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Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties

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In the classic Frank Capra film from which this article borrows its name,[1] "John Doe" began as a fictional character created by a reporter, played by Barbara Stanwyck, but eventually became the pseudonym of an actual person, a character played by Gary Cooper, who spoke for the common man and woman. This article traces a similar evolution of John Doe in civil litigation. Like the character in the movie, John Doe began his legal career as a purely fictional character. However, he too later became a pseudonym for actual persons who otherwise would not be heard.

In fact, John Doe parties have become an essential part of federal civil practice. Although they rarely appeared in federal court thirty years ago, "John Doe" and his pseudonymous relations, such as "Jane and Richard Roe" and the "unknown police officer," today regularly help plaintiffs bring civil suits in federal court.[2] These fictitiously

1. MEET JOHN DOE (Warner Brothers 1941).

2. The results of a Westlaw computer search of "John Doe" cases illustrate the significant increase in Doe cases over the last 30 years. After eliminating criminal cases and multiple decisions in a single civil case, the search revealed nearly 200 federal district court decisions in 1993 in which "John Doe" served as the formal title for either the plaintiff or the defendant. Search of Westlaw, DCT database (April 11, 1996) (search terms: TI ("John Doe") and DA (1993)). By contrast, only seven decisions (excluding three non-civil cases) by federal district courts in 1963 had "John Doe" in the title. Search of Westlaw, DCT database (April 11, 1996) (search terms: TI ("John Doe") and DA (1963)). This difference represents an increase of approximately 2700%. Over the same approximate period, the total number of civil cases commenced in the district courts increased by only 350%, from 63,630 in 1963 to 228,600 in 1993. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 211 (1994) (for the year ending June 30, 1993); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 155 (1964) (for year ending June 30, 1963).

These numbers provide only a rough measure, however. First, the Westlaw database consists of decisions actually rendered in that particular year as opposed to complaints filed in that year. A

named parties are often crucial to a plaintiff's pursuit of privacy and civil rights litigation. Despite their growing importance and popularity, codified federal civil procedure all but ignores John Doe parties.[3] Without guidance from formal rules, federal courts have gone in opposite directions and set widely conflicting standards for Doe parties. These new standards distort the existing rules and cause the wrong results even in non-Doe cases. It is time to stop the confusion. Federal civil procedure must face the reality of modern Doe practice and formally recognize John Doe parties.

I. INTRODUCTION

The popularity of John Doe as a substitute litigant is not unique to modern federal civil practice. More than three centuries ago, litigants in English courts created a fictional John Doe to avoid the technicalities in common law writ pleading; since then, John Doe has evolved from a purely fictional character to a pseudonym for actual persons.[4] The modern John Doe helps civil litigants, primarily plaintiffs, in two ways. In some civil cases, John Doe protects the plaintiff's anonymity by acting as the plaintiff's pseudonym. More commonly, John Doe preserves the plaintiff's claim by standing in for an unknown defendant while the plaintiff tries to determine the defendant's actual name.

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particular John Doe case may have more than one opinion in a given year, while another has none. Second, not all plaintiffs choose to use "John Doe." Many plaintiffs use other fictitious designations, such as "Jane Roe" and "unknown police officer." Finally, Westlaw's district court database is far more inclusive for 1993 than for 1963. More than half of the 1993 decisions in the district court database are otherwise "unpublished" opinions; conversely, the 1963 district court database has relatively few unreported cases. Telephone Interview with Sue Schway, Westlaw representative (Aug. 11, 1995). However, even if one were to compensate by splitting the difference between the 1963 and 1993 decisions in half, the increase would remain one of well over 1000%.

3. *See* FED. R. CIV. P. 1-86. Unlike the Federal Rules of Civil Procedure, other federal procedural provisions expressly address fictitious name practice. The Federal Rules of Criminal Procedure provide for the issuance of a "John Doe warrant," a practice which recently came to national prominence following the April 19, 1995 bombing in Oklahoma City. *See* FED. R. CRIM. P. 4(c)(1) ("The warrant . . . shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty."). Similarly, the Internal Revenue Code allows the IRS to issue a "John Doe summons" under certain specified conditions in order to obtain information concerning an unidentified taxpayer. *See* I.R.C. § 7609(f) (1994). A pseudonym also is used to protect the identity of juveniles in federal juvenile delinquency proceedings. *See* 18 U.S.C. § 5038(e) (1994).

4. Webster's entry for "John Doe" aptly describes the pseudonym's evolution: "John Doe and Richard Roe were originally fictitious plaintiff and defendant in a form of ejection action [and John Doe now is] a name . . . used in law courts, legal papers, etc. to refer to any person whose name is unknown." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (college ed. 1966); *see also* authorities cited *infra* note 20.

The new John Doe is not a mere procedural formality. He provides the plaintiff in many cases with the only means to pursue important substantive rights. Some of the most momentous cases of the last quarter century might not have been brought without the ability to designate a party by a fictitious name. For example, Norma McCorvey used the pseudonym "Jane Roe" to challenge abortion laws in *Roe v. Wade*.[5] She had real privacy concerns. Even today, more than 20 years later, controversy—sometimes lethal—still surrounds the case.[6] As new privacy concerns arise, such as those associated with AIDS and the HIV virus, the need for pseudonymity grows.[7]

Although the pseudonymous plaintiff is perhaps the more well known use of John Doe, it is John Doe as the unknown defendant who more frequently helps plaintiffs. The most noted use of an unknown defendant is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[8] which established, for the first time, a victim's right to seek a civil remedy against federal officers for violation of civil liberties.[9] The unknown defendant designation was essential. Webster Bivens, like many other victims of civil rights violations, apparently could not identify the specific officers who had arrested and assaulted him.

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5. *See* 410 U.S. 113, 120 n.4 (1973). Norma McCorvey remained anonymous for more than a decade following the Supreme Court's decision. In 1984, she began to use her name in public support of abortion rights. *See* Steve Waldman & Ginny Carroll, *Roe v. Roe*, NEWSWEEK, Aug. 21, 1995, at 22, 22. In August 1995, her name again made headlines as she switched sides and advocated restrictions on abortion. *Id.* at 22-24.

6. In 1994, for example, anti-abortion extremists shot and killed abortion clinic workers in Pensacola, Fla., and Brookline, Mass. *See* Tamar Lewin, *A Cause Worth Killing For? Debate Splits Abortion Foes*, N.Y. TIMES, July 30, 1994, at 1, 26; Tamar Lewin, *Abortion Providers Attempt to Handle Growing Threat*, N.Y. TIMES, Dec. 31, 1994, at 8.

7. *See, e.g.*, Doe v. Mercy Health Corp. of Southeastern Pa., 150 F.R.D. 83 (E.D. Pa. 1993) (protecting plaintiff in HIV discrimination suit); Doe v. Prudential Ins. Co., 860 F. Supp. 243 (D. Md. 1993) (protecting plaintiff in suit for wrongful failure to reveal HIV-positive diagnosis); Doe v. Vanderbilt Univ., Inc., 824 F. Supp. 746 (M.D. Tenn. 1993) (protecting plaintiff's identity in AIDS-tainted blood product liability suit).

8. 403 U.S. 388 (1971). The title to the action is misleading, however. Despite the title—"Six Unknown *Named* Agents of the Federal Bureau of Narcotics"—plaintiff Bivens did not actually name the defendants in the caption of his complaint. He did not know their names. *See id.* at 390 n.2.

9. *Id.* at 395-97. *Bivens* established a private cause of action against federal officers for violations of the Fourth Amendment protection against unreasonable search and seizure. *Id.* Bivens could not bring a claim under Section 1983 of the civil rights statutes because that section only applies to unconstitutional acts by state, as opposed to federal, authorities. *See* 42 U.S.C. § 1983 (1994) ("Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

Only by filing suit against "unknown" defendants was Bivens able to identify, through court order, his alleged wrongdoers by their proper names.[10]

The new uses of John Doe parties took federal courts by surprise. Neither the Federal Rules of Civil Procedure nor the Judiciary Code give courts guidance on the proper procedure for the use of Doe parties.[11] If anything, codified federal procedure is inconsistent with John Doe practice, particularly the use of the Doe defendant. The Rules simply do not contemplate the case where a plaintiff does not know the true identity of the defendant. For example, the rules require the plaintiff to plead the "names of all of the parties."[12] The plaintiff cannot plead the defendant's name if he does not know it. Furthermore, the plaintiff also cannot set proper jurisdiction and venue in some Doe defendant cases. When the plaintiff seeks to rely upon the court's diversity jurisdiction, he must allege the state of citizenship of each party.[13] Similarly, to use one of the two primary bases of venue, the plaintiff must know where each defendant resides.[14] Thus, forum selection is difficult, if not impossible, where the plaintiff does not know the actual identity of the John Doe defendant.

Even if the plaintiff succeeds in filing a complaint against a John

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10. After Bivens filed suit against the unknown defendants, the district court ordered that the complaint be served on "those federal agents who it is indicated by the records of the United States Attorney participated in the [arrest of plaintiff Bivens]." 403 U.S. at 390 n.2.

11. *See* 28 U.S.C. §§ 1-481, 1330-68 (1994) (setting forth statutory provisions relating to the organization of federal courts, jurisdiction of the district courts, and civil litigation); FED. R. CIV. P. 1-86.

12. FED. R. CIV. P. 10(a) provides as follows:

> (a) Captions; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

13. "[W]hen jurisdiction is based on diversity of citizenship, the pleader must allege the existence of both diversity and the requisite amount in controversy . . . . If a party is a natural person, the complaint should allege that he is a citizen of a particular state." 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1208, at 100 (2d ed. 1990); *see also* 28 U.S.C. § 1332(a) (1994) (stating that the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between (1) citizens of different states . . . ."); 28 U.S.C. § 1441(a), (b) (1994) (providing for removal of actions from state court that meet the section 1332 criteria if no defendant is a citizen of the state in which the action is brought).

14. 28 U.S.C. § 1391(a)(1), (b)(1) (providing that in both diversity and federal question actions, for purposes of venue, a civil action may be brought in the district where any defendant resides, if all of the defendants reside in the same state).

Doe defendant, the plaintiff confronts yet another procedural obstacle when he tries to substitute the actual defendant for the John Doe. If the statute of limitations deadline has passed, which usually is the case, the plaintiff must invoke the doctrine of "relation back" to save the claim. Relation back is a fiction by which courts treat an amendment to a complaint as if it were part of the original timely complaint. Federal Rule 15(c), which governs relation back of federal pleadings, limits amendments changing defendants after the limitations period to cases where the plaintiff initially made a "mistake" in naming the defendant.[15] Therefore, under the literal language of the rule, the plaintiff cannot substitute the true defendant for the John Doe after the limitations period because the plaintiff's naming of the Doe in the first place was not a mistake.[16] Yet, most plaintiffs who use John Doe defendants must try to rely on the doctrine of relation back because the limitations period will expire before they can properly identify the Doe defendant.

Since the mid-1960s, federal litigants, with increasing frequency, have named John Doe parties in civil complaints[17] forcing federal courts to try to reconcile Doe practice with the inconsistent provisions of federal civil procedure. Their efforts have failed. Courts have set conflicting standards for Doe practice. For example, the Seventh Circuit forbids relation back of Doe substitutions under Rule 15(c), but the Third Circuit allows it.[18] Thus, civil rights plaintiffs in Philadelphia

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15. FED. R. CIV. P. 15(c) provides that:

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

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

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

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

16. FED. R. CIV. P. 15(c)(3)(B).

17. *See supra* note 2.

18. *Compare* Wood v. Worachek, 618 F.2d 1225 (7th Cir. 1980) (holding that lack of knowledge reflected in Doe allegations is not a mistake within the meaning of Rule 15(c));

may file suit in federal court against unknown police officers, use civil discovery to identify them, and then formally name the officers as defendants after the limitations period has expired, while civil rights plaintiffs in Chicago may not. This is not a trivial procedural difference. Federal litigants in Chicago lose claims that litigants in other courts may pursue. Moreover, the ill effects of this distinction are not limited to Doe cases. By redefining Rule 15(c) to fit Doe practice, courts on both extremes have distorted the rule and diluted its effectiveness in all cases, even non-Doe suits.[19]

This article offers a solution to the relation back conflict and the other problems facing Doe practice in federal court: incorporate John Doe parties into the procedural rules. Candid recognition of the reality of Doe practice will eliminate the current state of confusion and preserve the integrity of existing rules. In advocating this reform, the article first puts John Doe practice in context. Part II traces the origin of John Doe and explains how two independent developments in federal practice in the mid-1960s, relaxation of federal relation back standards and recognition of federal privacy rights, coincided to cause an explosion of Doe practice in federal court. Next, part III details how federal courts have tried—without success—to reconcile the new Doe parties with a procedural scheme not equipped to handle Doe practice. Finally, part IV of this article proposes specific rule and code changes that will cure these problems and give federal courts the guidance they need on Doe party practice.

II. THE MODERN JOHN DOE: HIS EMERGENCE AND DUAL FUNCTIONS IN FEDERAL COURT

The precise date that John Doe first appeared in civil litigation is not known, but he was firmly entrenched in the English common law by the 17th century.[20] Then, as today, he helped parties bring actions that they might not otherwise pursue. When common law litigants did not fit neatly into one of the prescribed writs of action, they sidestepped

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Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) (allowing relation back of Doe substitution so long as other elements of Rule 15(c) are met); *see also* discussion *infra* part III.C.1.

19. *See generally* discussion *infra* part III.C.

20. *See* 7 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 10-15 (2d ed. 1937); Mitchell Dawson, *The Lives and Adventures of John Doe and Richard Roe*, CHI. BAR RECORD, *reprinted in* Frank W. Grinnel, *John Doe and Richard Roe—Their Portraits, Their History, Their Services in the Advancement of Justice Through the Rulemaking Power of the Courts*, MASS. L.Q., Aug. 1935, at 26, 27.

the problem by creating an entirely fictional character, typically named John Doe,[21] to bring or defend suits on their behalf.[22] This tradition continued in the United States until the mid-19th century, when reformers began to simplify pleading. In 1848, David Field revamped the New York Code of Civil Procedure,[23] and his "Field Code" became the model for "code pleading" reform throughout the country.[24] The Field Code abolished all existing forms of pleading,[25] but John Doe did not

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21. Common law pleaders used other names as well, but they most frequently chose "John Doe." *See* Dawson, *supra* note 20, at 28. One legal historian notes that Doe was a "relatively rare surname in old England" and speculates that the fictional "John Doe" was an outgrowth of the verb "do," which the Elizabethan English variably spelled as "doo," "do," or "doe." David Mellinkoff, *Who is John Doe?*, 12 UCLA L. REV. 79, 84-85 (1964). The oath "I do" also may have been a source because John was spelled often with an "I" rather than "J," and "John Doe" therefore was abbreviated as "I. Doe." *See id.* at 86. The pleaders also may have delighted in employing John Doe as a pun on the use of the verb "do" as a term for copulate, or on the name of a Dutch coin called a "doit," which had no value. *Id.*

22. Landowners, for example, frequently used John Doe in ejectment actions brought to quiet title. 7 HOLDSWORTH, *supra* note 20, at 10-15. Under the writ system, only tenants could use ejectment actions. *See id.* at 10-12. A landowner who wanted to quiet title had to use the "real" form of action that was slower than an ejectment action and did not allow a jury trial. *See* Larry L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE 381-82 (1991). Landowners got around this bar by creating a mythical tenant, John Doe, to bring the ejectment action on their behalf. *See* Craft v. Lathrop, 6 F. Cas. 702, 704-05 (C.C.E.D. Pa. 1851) (discussing John Doe ejectment action procedure). John Doe also served as security for civil defendants. *See* Dawson, *supra* note 20, at 28, 33-34 (John Doe and Richard Roe "did not rest content with the reputation gained from their sham battles in ejectment actions but adventured into other fields of the law offering themselves as pledges or bail in all manner of actions" and they foreshadowed "a most important era in English history and English law" that marked "the boundary line of barbarism and modern civilization.").

23. Act of April 12, 1848, ch. 379, §§ 1-391, 1848 N.Y. Laws 497. The Field Code was amended in 1849 and then again in 1851, the latter of which returned some parts of the code back to the 1848 form. 1851 N.Y. CODE OF PRACTICE 10 (Voorhies ed.); *see* Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 242-44 (1942).

24. Within 25 years of the original enactment of the Field Code, 24 states and territories had adopted it as their code of procedure. *See* Comment, *Unknown Parties: The John Doe Defendant*, 1970 LAW & SOC. ORD. 256, 258 n.14 [hereinafter *The John Doe Defendant*] (citing these jurisdictions by date of enactment).

25. "All the forms of pleading heretofore existing are abolished. . . ." Act of April 12, 1848, ch. 379, § 118, 1848 N.Y. Laws 497, 521. The abolition of the ancient practice of Doe ejectment prompted one poet to prematurely proclaim the death of John Doe and Richard Roe:

Well I know them; naught I owe them;
Off, in ejectment (blow them!)
Roe I have cursed and Doe have damned;
Law that made doth o'er throw them,
And now to die they are condemned.

Dawson, *supra* note 20, at 29 (quoting an anonymous poet from *Punch*). Not all states joined in the code pleading reform, so the mythical John Doe survived for many years in some states in his common law "pre-code" form. *See, e.g.*, Malone v. Bowdoin, 369 U.S. 643, 643 n.1 (1962) (eject-

die under code pleading. The Field Code created another use for him. If the plaintiff did not know the complete and correct name of an actual defendant[26] he could designate that defendant by a fictitious name,

ment action begun in federal court in which the original pleading used the common law John Doe form of pleading still in use in Georgia in the 1960s).

26. The previous common law practice did not permit the plaintiff to designate an actual person by anything other than his true and complete name. *See* Elmendorf v. DeLancey, 1 Hopk. Ch. 555, 556 (N.Y. Ch. 1825) ("When it is uncertain who are complainants, or who are the persons called to answer, the suit is fundamentally defective; and if the parties are not clearly designated, it is the fault of him who instituted the suit."); *The John Doe Defendant*, *supra* note 24, at 256-57 ("If the plaintiff stated incorrectly any part of the defendant's legal name, the action was subject to a plea in abatement, and a default judgment would be void.") (citation omitted).

such as John Doe.[27] The Field Code thus transformed John Doe from a pure legal fiction into a pseudonym for actual persons.[28]

Early John Doe practice developed principally in the state courts, not federal courts. Before the 1938 Federal Rules of Civil Procedure, "conformity" statutes required each federal court hearing cases at law

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27. "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly." Act of April 12, 1848, ch. 379, § 150, 1848 N.Y. Laws 497, 526; *The John Doe Defendant*, *supra* note 24, at 258. Today, the majority of states have unknown defendant provision's that are similar or identical to this Field Code provision. Some states incorporate Doe pleading in their statutory codes. *See* CAL. CIV. PROC. CODE § 474 (West 1979); GA. CODE ANN. § 9-11-10(a)(1993); ME. REV. STAT. ANN. tit. 14, § 651; MASS. GEN. LAWS ANN. ch. 223 § 19 (West 1990); MONT. CODE ANN. § 25-5-103 (1995); NEB. REV. STAT. § 25-321 (1984); N.H. REV. STAT. ANN. § 509:7 (1983); N.Y. CIV. PRAC. L. & R. § 1024 (McKimey 1976); N.C. GEN. STAT. § 1-166 (1983); R.I. GEN. LAWS § 9-5-20 (1985); WIS. STAT. ANN. § 807.12 (West 1977). Others put Doe pleading in their Rules of Civil Procedure. *See* ALA. R. CIV. P. 9(h); ARIZ. R. CIV. P. 10(f); HAW. R. CIV. P. 17(d); IDAHO R. CIV. P. 10(a)(4); IND. R. TRIAL P. 17(F); MINN. R. CIV. P. 9.08; MISS. R. CIV. P. 9(h); NEV. R. CIV. P. 10(a); N.D. R. CIV. P. 9(h); OHIO R. CIV. P. 15(D); OR. R. CIV. P. 20(h); P.R.R. CIV. P. 15.4; S.C. R. CIV. P. 10(a)(1); S.D. R. CIV. P. 15-6-9(h); UTAH R. CIV. P. 9(a)(2); WASH. SUPER. CT. R. CIV. P. 10(a)(2); WYO. R. CIV. P. 17(d). Some states have no statutory or rule authority at all but instead endorse Doe defendant pleading by judicial decree. *See, e.g.*, Farmer v. Alaska, 788 P.2d 43 (Alaska 1990); Maddux v. Gardner, 192 S.W.2d 14 (Mo. Ct. App. 1945); DeVargas v. State, 640 P.2d 1327 (N.M. Ct. App. 1981), *cert. granted*, 642 P.2d 166 (N.M. 1982); Goolsby v. Papanikolau, 637 A.2d 707 (Pa. Commw. Ct. 1994), *appeal denied*, 651 A.2d 493 (Pa. 1995). Only a very few states expressly reject Doe pleading. *See* Kerr v. Doe, 1994 WL 146649, at 1 (Conn. Super. Ct. Apr. 11, 1994) (noting that Connecticut practice does not permit actions against John Doe defendants); Hutchison v. Fish Eng. Corp., 153 A.2d 594, 595 (Del. Ch. 1959) ("[D]efendants have attacked the inclusion of the Doe defendants and under our practice I do not think it is permissible."), *appeal dismissed*, 162 A.2d 722 (Del. Super. Ct. 1960); Commercial Union Ins. Co. v. Bringol, 262 So. 2d 532, 536 (La. Ct. App. 1972) (holding that the pleading rules contemplate "real persons" and therefore do not permit fictitious party pleading). A few states do not allow general Doe defendant pleading but allow unknown heirs or claimants as parties in actions in rem. *See* ILL. COMP. STAT. ANN. ch. 735, § 5/2-413 (Michie 1993) (providing for service by publication of "unknown owners, or unknown heirs or legatees" upon affidavit that the names are unknown); *see also* MICH. R. CIV. P. 2.201(D). Finally, the remaining states have no express declaration either way, but Doe parties occasionally appear in their courts with little or no published commentary by the court. *See* Kansas *ex rel.* Ferguson v. Kansas Super Motels, Inc., 398 P.2d 331 (Kan. 1965) (action to enjoin named and unnamed defendants); M.R. v. Cox, 881 P.2d 108 (Okla. Ct. App. 1994) (both anonymous plaintiff and Doe employee defendants), *cert. denied*, 115 S. Ct. 1365 (1995); Lebovitz v. Bearden, 1993 WL 471479, at 4 n.1 (Tenn. App. Nov. 16, 1993) (noting presence of unknown employee defendant whose identity "was to be supplied when ascertained" but who was never identified); Rollo v. State, 421 A.2d 1298 (Vt. 1980) (negligence action against unknown state employee); Padon v. Sears, Roebuck & Co., 411 S.E.2d 245 (W. Va. 1991) (defamation claim against unknown Sears employee).

28. However, the Field Code John Doe provision applied only to defendants unknown to the plaintiff, not to known parties who wanted to remain anonymous. *See supra* note 27. With rare exceptions, the pseudonymous plaintiff is a modern phenomenon that grew out of federal privacy right litigation in the mid-1960s. *See infra* notes 77-88 and accompanying text.

to use the local procedures of the state where the federal court sat.[29] Therefore, to the extent that state courts used John Doe parties, whether the mythical John Doe of common law or the unknown defendant of code pleading, the federal courts did also.[30] On the equity side, none of the formal federal Equity Rules addressed Doe parties,[31] but federal equity courts tended to follow the equitable prohibition against making an unknown person a defendant to an action.[32] In 1938,

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29. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (providing that in actions at law, federal courts must use the procedure of the state in which the federal court sits).

30. Even under the conformity statutes, federal courts did not immediately follow the state code pleading reforms of the mid-19th century. Federal law originally required "static conformity" whereby federal courts followed state procedure as of a date certain, often causing the federal court to use outdated procedure. *See generally* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 61, at 399-400 (4th ed. 1991). For example, when New York state courts began to follow the Field Code in 1848, a federal court in New York was bound to follow the old New York common law procedure. *Id.* at 400-01. In 1872, Congress finally provided for dynamic conformity by which federal courts could follow modern state procedure as it evolved. *Id.* at 401; Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (mandating that federal procedure in cases at law conform to the practice, pleadings, and forms and modes of proceeding existing in the courts of the state within which the circuit or district court is located). Only then were most federal courts sitting at law able to use the code pleading form of the unknown Doe defendant in actions at law. Because of this "static conformity," John Doe ejectment actions greatly outnumber the Doe defendant cases in early federal case reporters. *See, e.g.*, Doe *ex rel.* Dickens v. Mahan, 62 U.S. (21 How.) 276 (1858) (common law ejectment action begun in federal court in the name of the mythical tenant "John Doe") (same); Doe *ex rel.* McCall v. Carpenter, 59 U.S. (18 How.) 297 (1855) (same); Doe *ex rel.* Clark v. Braden, 56 U.S. (16 How.) 327 (1853) (same); Drake v. Found Treasure Mining Co., 53 F. 474 (C.C.D. Nev. 1892) (noting that John Doe and Richard Roe were listed as defendants but that plaintiff made "no personal claims against them").

31. Three different sets of codified Federal Equity Rules governed federal equity practice until 1938. The first, the 1822 set, had 33 rules. Fed. Equity R.P. 1-33, 20 U.S. (7 Wheat) v-xiii (1822). The 1842 set had 92 rules. Fed. Equity R.P. 1-92, 42 U.S. (1 How.) xli-lxx (1842). The final Federal Equity Rules, adopted in 1912, had 81 rules. Fed. Equity R.P. 1-81, 226 U.S. 629 (1912). None of the rules expressly addressed John Doe parties, one way or the other. Rule 20 of the 1842 rules, however, required every bill of complaint to include "the names, places of abode, and citizenship, of all parties, plaintiffs and defendants." Fed. Equity R.P. 20, 42 U.S. (1 How.) xlvii (1842). Rule 25 of the 1912 set replaced Rule 20 and provided that every bill of complaint must contain "the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party." Fed. Equity R.P. 25, 226 U.S. 629, 655 (1912). No court seems to have relied upon the "when known" clause to justify or reject fictitious name pleading. The clause qualified "*full* name" and likely referred to the case where plaintiff did not know the entire name of the defendant. *See, e.g.*, Wilson v. Robinson, 17 F.2d 1023 (9th Cir. 1927) ("Jane Doe" Robinson and "John Doe" Robinson).

32. Kentucky Silver Mining Co. v. Day, 14 F. Cas. 351 (C.C.D. Nev. 1873) (No. 7719), is one of the few federal cases to directly address the propriety of Doe pleading under the Federal Equity Rules. There, the court rejected a bill of complaint that named 147 John Doe defendants:

> [N]o book of acknowledged authority . . . [permits] designating [unknown defendants] in the bill by a fictitious name. I speak, of course, of the chancery practice unchanged by statute. But the books do show us how to proceed when proper parties are unknown. The difficulty is not overcome by making the unknown ones parties under a false name, but

the new Federal Rules of Civil Procedure did little to clarify the status of Doe practice; like the Equity Rules before them, the new Rules were silent on the subject of Doe parties.[33] Without rule authority, courts were initially hostile to the practice,[34] but John Doe nevertheless continued to appear, sometimes unchallenged, in at least some federal civil cases.[35]

In the mid-1960s, two separate developments in federal courts took John Doe forever off the sidelines of civil litigation. Creative litigants began to use John Doe in federal civil cases in two new ways. First, plaintiffs used the John Doe defendant as a means to avoid a limitations deadline. This use of John Doe depended on an expanded form of the relation back doctrine that was not available until 1966 when rulemakers revised Federal Rule of Civil Procedure 15(c). Coincidentally, at almost the same time, federal plaintiffs began to use John Doe to hide their own identity. This new use was part of the burgeoning federal right-to-privacy litigation that began in 1965 when the Supreme Court first recognized the privacy right under the U.S. Constitution.

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by dispensing with them altogether, if the suit can proceed without them, or by praying a discovery for the purpose of bringing them before the court.

Id. at 352; *see also* United States v. Doe, 44 F.2d 850 (E.D.N.Y. 1930) (dismissing bill for injunction against named owner of building and John Doe occupant on grounds that Doe was an indispensable party who could not be identified and served without prior bill in discovery); Inman v. New York Interurban Water Co., 131 F. 997 (C.C.S.D.N.Y. 1904) (praying for discovery of John Doe defendant). Despite the general prohibition, some equitable bills of complaint in federal court named John Doe as a defendant. *See* Tacoma Ry. & Power Co. v. Pacific Traction Co., 155 F. 259, 260 (1907) (bill of complaint named John Doe and Richard Roe and court noted only that it never "acquired jurisdiction over the mythical John Doe and Richard Roe"); *see also* Surpass Leather Co. v. Winters, 23 F. Supp. 776 (W.D.N.Y. 1938) (dismissing bill for injunction against NLRB and John Doe police officers on grounds that district court lacked power to restrain the NLRB and its officials without comment on propriety of Doe pleading); Shainwald v. Davids, 69 F. 701, 703-04 (N.D. Cal. 1895) (finding no personal jurisdiction over the new defendant, substituted for a John Doe defendant, but not questioning the propriety of the initial Doe designation).

33. *See* 308 U.S. 653 (1939).

34. *See, e.g.*, Molnar v. National Broadcasting Co., 231 F.2d 684, 687 (9th Cir. 1956).

35. Parties continued to name Doe parties, almost exclusively as defendants, at a slowly increasing rate. A Westlaw computer search of all federal decisions, excluding bankruptcy cases and criminal cases, from 1945 to 1966 shows 74 district court, 36 appellate court and 5 Supreme Court decisions in which "John Doe" appears in the title. Search of Westlaw, Allfeds database (April 11, 1996) (search terms: TI ("John Doe") & DATE AFT (1/1/45) & BEF (12/31/66)). A search of the old federal case database reveals that only one decision with John Doe in the title was rendered between the years 1938 and 1945. Search of Westlaw, Allfeds-old database (April 11, 1996) (search term: TI ("John Doe")).

A. John Doe Defendant as a Form of Statute of Limitations Relief

Use of the John Doe defendant to avoid a statute of limitations bar is a relatively modern phenomenon. Under most previous forms of Doe defendant practice, in both state and federal courts, plaintiffs had to timely serve the John Doe defendant just like any other defendant.[36] Plaintiffs, however, could not serve a defendant whom they could not identify. In 1966, federal rulemakers relaxed the requirement of timely formal service when they expanded the federal relation back doctrine by amending Rule 15(c).[37] Under the new rule, the plaintiff, in certain specified circumstances, can add a defendant after the limitations period, even if he had not yet formally served that defendant. This change opened the door for the new form of John Doe defendant practice in federal court.

1. Doe Defendants Under Traditional Statute of Limitations Doctrine

Although John Doe defendants help some plaintiffs who do not have time constraints, the Doe defendant is far more useful when coupled with some form of relief from statutes of limitation. Civil rights cases against unknown law enforcement officers, the most frequent use of the Doe defendant in federal courts,[38] best illustrates this reality. Doe pleading enables the plaintiff to start a lawsuit even though he

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36. *See infra* notes 45-52.

37. *See supra* notes 53-57.

38. Of the nearly 200 district court decisions rendered in 1993 which listed a John Doe defendant in the title, approximately one-third involved civil rights suits. Search of Westlaw, DCT database (April 11, 1996) (search terms: TI ("John Doe") and DA (1993)). Many more civil rights plaintiffs do not use "John Doe" but instead follow the *Bivens* example and name "unknown police officers" as their defendants. The evolution of civil rights actions may account, at least in part, for the growing popularity of John Doe defendant suits. *See* SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 2.02, at 35 (1979) (noting early restrictive interpretations of Section 1983 that limited the ability to bring Section 1983 suits from the time of the provision's enactment to the year 1961). Civil rights litigation expanded in 1978 when the Supreme Court overruled its prior reading of Section 1983 and held that municipalities were "persons" within the meaning of the statute and therefore subject to at least some claims under Section 1983. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663 (1978). The ability to name the city likely made Doe defendant practice more desirable to civil rights plaintiffs. Before *Monell*, when a plaintiff did not know the names of the police officers, he had to file a Section 1983 claim solely against Doe defendants and not against their municipal employer. Plaintiffs bringing such "phantom" actions would undoubtedly have found judicial hostility. After *Monell*, the plaintiff, in at least some cases, could name both the city and the unknown police officer as defendants and gain faster discovery of the officer's identity because the entity with such knowledge—the city—was a named party to the suit. *But see infra* note 40.

does not know the full and correct name of the officer or which specific officer violated his rights. Otherwise, the plaintiff would be in a "Catch 22" situation. He cannot get the court's help in identifying the officer until he files suit, but he cannot file suit without naming at least one defendant.[39] Plaintiff cannot just pick any officer at random to sue as defendant.[40] Federal Rule 11, as well as standards of professional responsibility, mandate that the plaintiff have some basis for naming a

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39. Filing suit is a prerequisite to the ability to conduct discovery. The Federal Rules of Civil Procedure allow pre-filing discovery only in extraordinary circumstances to preserve evidence but not to conduct general discovery to support a complaint. *See* FED. R. CIV. P. 27(a) (requiring verified petition for leave to take pre-filing discovery); Nevada v. O'Leary, 151 F.R.D. 655, 657-58 (D. Nev. 1993) (explaining that Rule 27 "was intended to apply to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced," but was not designed "for discovering grounds for bringing an action"), *aff'd*, 63 F.3d 932 (9th Cir. 1995). Some states provide special discovery devices when a plaintiff does not know the identity of all of the defendants. For example, Illinois' Respondents in Discovery statute permits plaintiffs in civil actions to designate as "respondents in discovery" individuals or other entities in their pleadings whom the plaintiff believes to have information essential to determining those who should be named as additional defendants in the action. *See* ILL. COMP. STAT. ANN. ch. 735, para. 512-402 (Michie 1993). *But see* Bogseth v. Emanuel, 655 N.E.2d 888, 892 (Ill. 1995) (holding that "since the common law prohibits filing lawsuits against fictitious defendants, and since [the Respondents in Discovery statute] does not provide clear, affirmative indication that . . . [John Doe] suits are permissible, we cannot conclude that [the statute] permits suits to be brought against fictitious persons or entities").

40. Suing the governmental employer of the officer is not always an option either. Although the Supreme Court in *Monell* allowed claims against a city or other local government, *see supra* note 38, a Section 1983 claim against the city cannot be based vicariously on the wrongs of the officers. *Monell*, 436 U.S. at 691 (holding that a municipality cannot be held liable under Section 1983 on a respondeat superior theory). Instead, civil rights plaintiffs must allege and prove that the municipality itself violated the plaintiff's civil rights by establishing some form of policy or practice that caused the violation. *See id.* at 694.

A plaintiff in a *Bivens* action also is constrained in whom he can sue. In the *Bivens* case itself, the plaintiff could not have brought any claim against the United States or its official agencies due to their sovereign immunity. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."). In 1975, Congress amended the Federal Torts Claim Act ("FTCA") to waive sovereign immunity for suits arising from certain state law torts by federal law enforcement officers. 28 U.S.C. § 2680(h) (1994) (allowing suits that arise out of "acts or omissions of investigative or law enforcement officers of the United States Government" and claim "assault, battery, false, imprisonment, false arrest, abuse of process, or malicious prosecution"). Even with this expansion, however, *Bivens* claims against the individual officer and FTCA claims against the United States government are not always coexistent. *See* Carlson v. Green, 446 U.S. 14, 20, 22-23 (1980) (recognizing availability of suit against the federal government but noting that FTCA claims, unlike *Bivens* actions, do not permit punitive damages or jury trials and are dependent on available state tort law claims).

particular person as a defendant.[41] John Doe pleading provides the ethical alternative to this dilemma.[42] With Doe pleading, the plaintiff gets to begin his lawsuit and start discovery while candidly acknowledging that he does not yet know the correct identity of the defendant.

As a practical matter, however, the statute of limitations in most cases restricts the plaintiff's ability to discover the identity of the unknown officer.[43] In *Bivens*, the trial court issued an order directing the United States Attorney to immediately identify and serve the unnamed federal agents.[44] Most plaintiffs do not get this much help from the court. They have to conduct their own discovery to identify the defendants, and discovery takes time. The running of the statute of limitations does not await the plaintiff's identification of the proper defendant.[45]

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41. The *ABA Model Rules of Professional Conduct* mandate that a "lawyer shall not bring . . . a proceeding . . . unless there is a basis for doing so that is not frivolous." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). Federal Rule 11 similarly requires that the plaintiff both conduct a reasonable pre-filing inquiry and certify that his complaint allegations "have evidentiary support." FED. R. CIV. P. 11(b)(3). In Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986), the court sanctioned the plaintiff under the 1983 version of Rule 11 for filing suit against Upjohn without having any evidentiary basis that Upjohn had made the drug that was the subject of the plaintiff's product liability suit. *See also* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973) (finding violation of pre-1983 version of Rule 11 where plaintiffs selected defendants from the Philadelphia phone book). Rulemakers relaxed Rule 11 somewhat in 1993, but the plaintiff still cannot simply guess about the proper defendant. *See* FED. R. CIV. P. 11 advisory committee's notes (1993 Amendment). In some extraordinary cases, such as DES claims, a few courts do not require plaintiffs to prove the identity the particular wrongdoer, but these courts only do so by modifying the substantive law of causation. *See, e.g.*, Abel v. Eli Lilly & Co., 343 N.W.2d 164, 170 (Mich.) (allowing plaintiff to use alternative liability theory to avoid "the threshold requirement of any products liability action [to identify the] manufacturer"), *cert. denied*, 469 U.S. 833 (1984).

42. *Cf.* Wells v. HBO & Co., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) (sympathizing with plaintiffs having to "steer a course between naming individuals in [a lawsuit] prematurely and risking sanctions, and naming them too late and having an action foreclosed by the statute of limitations").

43. Civil rights suits do not have their own statute of limitations, so federal courts must borrow the state limitations period for personal injury claims. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261 (1985) (holding that federal courts must characterize Section 1983 claims as personal injury actions for purposes of borrowing a state statute of limitation). These limitations periods tend to be short. *See* Burgos Martinez v. Rivera Ortiz, 715 F. Supp. 419, 420 (D.P.R. 1989) (applying Puerto Rico's one-year limitation period to Section 1983 claim).

44. *Bivens*, 403 U.S. at 390 n.2.

45. "There is a plethora of case law holding that the statute of limitations is not tolled pending discovery of the identity of the alleged tortfeasor where all the other elements of the cause of action exist." Thomas v. Process Equip. Corp., 397 N.W.2d 224, 228 (Mich. Ct. App. 1986) (quoting Reiterman v. Westinghouse, Inc., 308 N.W.2d 612, 614 (Mich. Ct. App. 1981) (finding that once plaintiff knew that her decedent's death was caused by faulty machinery, "it was incumbent upon her to discover, within [the limitation period], the various manufacturers of the possible faulty mechanisms.")).

The discovery rule postpones accrual of the cause of action only for the late discovery of the plaintiff's injury, not the identity of the tortfeasor.[46] Likewise, equitable tolling does not help a plaintiff who simply does not know the identity of the alleged wrongdoer. Such tolling requires some form of affirmative duty of, or active misdeed by, the defendant. A defendant, even a law enforcement officer, generally has no obligation to assist the plaintiff in learning his identity.[47]

Nor did traditional relation back doctrine help plaintiffs who had to name the defendant officer as John Doe. Relation back is a fiction that saves an otherwise late amendment to a pleading.[48] The means by

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46. As the Illinois Appellate Court stated:

> [The discovery rule] represents the judiciary's attempt to alleviate the harsh results from the literal application of statutes of limitations where plaintiffs are ignorant of their injuries, such as in medical malpractice cases. The rule postpones the starting of the period of limitations until the injured party knows of or should have known of his injury. However, our courts have refused to extend the discovery rule to apply to cases where the undetermined fact is not the existence of the injury, but rather the identity of the tortfeasor.

Jackson v. Village of Rosemont, 536 N.E.2d 720, 722 (Ill. App. Ct. 1988) (citations omitted), *appeal denied*, 537 N.E.2d 810 (Ill. 1989); *see also* Jordan v. Tapper, 143 F.R.D. 575, 585-86 n.14 (D.N.J.) ("[T]he discovery rule is intended to toll the limitations period where plaintiff lacks knowledge of a cause of action, not the identity of potential defendants."), *appeal denied*, 143 F.R.D. 567 (D.N.J. 1992).

47. *See* Messelt v. Security Storage Co., 14 F.R.D. 507, 513 (D. Del. 1953) ("Waiving consideration of moral or ethical standards, I know of no legal principle compelling the [defendant] to insist on being joined as a party before the statute of limitations had barred its legal liability."). In Davis v. Frapolly, 742 F. Supp. 971 (N.D. Ill. 1990), a Section 1983 suit, the court explained what the defendant police officer can and cannot do to keep his identity secret:

> Those who may benefit from a statute of limitation can have no part in preventing a potential claimant from learning their identity. Of course, unless under an affirmative duty, they need not come forward voluntarily, unmasked. They may hide in the darkness caused by the potential plaintiff's lack of knowledge of their identity. But they cannot, through acts or omissions, in any way perpetuate the darkness.

Id. at 975. In *Davis*, the plaintiff tried to write down the officers' badge numbers at the time of the arrest, but one of the officers took away his pen and paper. *Id.* The court held that this "questionable conduct" justified equitable tolling even though attribution of the acts of one police officer to another was a "novel" application of the doctrine. *Id.* at 974 -75. Similarly, the court in Fludd v. United States Secret Serv., 102 F.R.D. 803 (D.D.C. 1984) tolled the limitations period in a *Bivens* action because the Secret Service refused to supply the names of its agents even after Fludd filed both a request and a lawsuit under the Freedom of Information Act: "[w]hile to be sure, the government's deletion of the agents' names in response to plaintiff's FOIA request was not fraudulent, it does constitute the kind of deliberate concealment of material facts which a court of equity would be justified in regarding as tolling the statute of limitations." *Id.* at 806.

48. Relation back in federal courts is governed by Rule 15(c) of the Federal Rules of Civil Procedure. See *supra* note 15 for the entire text of the current Rule 15(c). Unlike the discovery rule for accrual or the equitable tolling doctrine, relation back neither postpones the start of limitations period nor tolls it, but instead tests whether the plaintiff has otherwise met the limitations deadline. *See* Kansas Reins. Co. v. Congressional Mortgage Corp. of Tex., 20 F.3d 1362, 1367 (5th Cir. 1994) (holding that the " 'relation back' doctrine 'does not extend the limitations period,

which the plaintiff substitutes the defendant's real name for John Doe is an amendment. If that amendment meets the criteria for relation back, the court will consider it part of the original timely pleading, even if the amendment itself came after the limitations period.[49] Under traditional relation back doctrine, the plaintiff could not make an amendment changing the defendant after the limitations period had expired if he had not served that defendant before the limitations period expired.[50] The plaintiff, therefore, could not substitute the real name of

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but merely recognizes that, the purposes of the statute [of limitations] are accomplished by the filing of the initial pleading.' ") (citations omitted). Nevertheless, commentators and courts often confuse the concepts and, when considering relation back, rely on factors such as a defendant's deception that are relevant to other doctrines such as equitable tolling. *See, e.g.*, Hafferman v. Westinghouse Elec. Corp., 653 F. Supp. 423, 429 (D.D.C. 1986) ("[P]laintiffs' amendment of the complaint is deemed to relate back since it appears Westinghouse misled plaintiffs.").

49. Relation back is a "defense" to a defense; it saves a plaintiff's claim against a defense based on a statute of limitation. The issue may arise on the plaintiff's original motion to amend or in response to the defendant's motion to dismiss the new claim on limitations grounds. Technically, whether an amendment relates back and avoids a statute of limitations defense is a separate question from whether the amendment itself is proper. Federal Rule 15(a) governs amendments to federal pleadings generally, and in many circumstances, such as when defendant already has answered, requires the plaintiff to seek leave of court in order to amend his complaint. FED. R. CIV. P. 15(a). The following considerations influence whether the court will grant leave to amend:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded .... In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the amendment sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). Under this analysis, relation back is relevant to whether the amendment would be futile, but that is just one factor in the Rule 15(a) analysis. Moreover, where the amendment adds a new defendant, relation back may not even be at issue on the motion to amend because the new defendant is not present to oppose the motion on limitations grounds.

50. *See* Mellon v. Arkansas Land & Lumber Co., 275 U.S. 460, 463 (1928) (holding that where substitution of the defendant was "not the correction of an error in the name of the defendant, but the bringing in of a different defendant, [it] was in effect the commencement of a new and independent proceeding against him."); Annotation, *Amendment of Process or Pleading by Changing or Correcting Mistake in Name of Party*, 124 A.L.R. 86, 87 (1940) (summarizing early state law permitting amendments to cure misnomer of party after the limitations period and concluding that if the right party is before the court but under a wrong name, the plaintiff will be permitted to amend and cure the misnomer). Originally, relation back was a case law doctrine and was not codified, but in 1938, federal rulemakers put relation back into Rule 15(c). *See* FED. R. CIV. P. 15(c), 308 U.S. 683 (1939) (allowing relation back when the new claim arose out of the same "conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading"). The 1938 rule effected a subtle change in relation back standards, by shifting the focus to the "operative facts" asserted in the original complaint, but otherwise, the new rule codified the conventional common law relation back doctrine. *See* Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507,

the defendant for John Doe unless he had already timely served that defendant.[51] In most cases, the plaintiff did not know enough about a

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1513 (1987) (noting that prior to the promulgation of Rule 15(c), federal and state courts tended to look to whether the amendment stated a "new cause of action," which was subject to "a great deal of definitional litigation involving the concept of 'cause of action.' "). Under the new rule, as under the preceding judicial doctrine, any amendment that "added" a defendant whom plaintiff had not already timely served created a new cause of action and did not relate back. *See* Oliefabrik v. A.O. Smith Corp., 22 F.R.D. 33, 36 (E.D. Wis. 1958) ("[A]mendment with relation back is generally allowed in order to correct a misnomer of defendant where the proper defendant is already in court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run."); Messelt v. Security Storage Co., 14 F.R.D. 507, 512 (D. Del. 1953) ("It has often been held that an 'amendment' bringing in new parties, as contrasted with one correcting a misnomer of a party already before the court, does not relate back in time to the filing of the original complaint but is akin to the institution of a new action against the new parties."); Note, *Federal Rule 15(c) and the Doctrine of Substantive Conformity*, 59 COLUM. L. REV. 648, 655 n.48 (1959) ("Where a rule 15 amendment seeks to change the name of the defendant after the statute of limitation has run, the courts generally have stated that the amendment will relate back if it merely corrects the name of a party already before the court, but will not relate back if it would add a new party.").

51. Prior to the late 1960s, very few federal cases addressed relation back of a Doe substitution. *See* Phillip v. Sam Finley, Inc., 270 F. Supp. 292, 294 (W.D. Va. 1967) (applying pre-1966 Rule 15(c) relation back standards and holding that plaintiff could not toll the running of the statute of limitations by filing a complaint against "some fictional character"); Fematt v. Nedlloyd Line, 191 F. Supp. 907, 910 (S.D. Cal. 1961) (denying Doe substitution in action removed from California state court because "the use of fictitious parties in the federal courts is not recognized" and because plaintiff had not met the pleading requirements of the California Doe defendant statute); National Nut Co. of Cal. v. Kelling Nut Co., 61 F. Supp. 76, 79 (N.D. Ill. 1945) ("If the plaintiff can subsequently join any additional defendants by name, the fact that there are certain fictitious defendants named herein will not assist the plaintiff nor will it serve as any basis for not serving with process any additional defendants herein."). One of the most expansive discussions of the issue was in Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959). There, the plaintiff charged that certain named and unnamed (John Doe, Jane Doe and Richard Roe) defendants conspired to incarcerate him in a mental hospital and deprive him of his civil rights. *Id.* at 286-87. When the plaintiff eventually named two of the unknown defendants, the court held that the amended claims were barred by the statute of limitations:

> The general rule is that amendment of a complaint dates back to the filing of the original complaint. Where the same defendant named in an amended complaint was named in the original complaint, no problem is ordinarily presented. But where new defendants are brought in after the running of the statute of limitations, the situation is entirely different. Where a defendant has been sued in a wrong capacity in an original complaint, an amended complaint filed beyond the statute of limitations has been held good, as against the plea of the statute.
>
> But where new defendants are brought into the action, without previous notice or service of process, a different situation exists. This is like the institution of a new action against the new parties.

Id. at 304 (citations omitted). This holding was consistent with the practice under the Field Code, whereby the plaintiff had to serve every defendant, including Doe defendants, within the limitations period. *Cf.* Green v. County of Fulton, 511 N.Y.S.2d 150, 152 (N.Y. App. Div. 1987) (holding that plaintiff's adherence to "the procedure for naming unknown parties as set forth in CPLR

John Doe defendant to timely serve him, so plaintiffs had little incentive to name John Doe defendants.[52]

2. *Doe Defendant Substitutions Under the 1966 Expanded Relation Back Rule*

By the early 1960s, critics began to attack the strict relation back standards. Their concern came from cases where plaintiffs had mistakenly named the wrong defendant, especially the wrong governmental defendant.[53] Strict adherence to prior formal service as the criteria for adding "new" defendants caused inequitable results in some cases of mistake. The plaintiff could lose his claim against a potential defendant even though that defendant, through means other than formal service, knew all along that the plaintiff meant to sue him but had made a mistake in naming him as defendant.[54]

In 1966, federal rulemakers amended Rule 15(c) and alleviated the harshness of the old rule.[55] The changed Rule 15(c) allows an

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§ 1024 [New York's successor statute to the original Field Code unknown defendant provision] . . . does not serve to toll the Statute of Limitations" and that claims were time-barred where plaintiff failed to timely and formally serve the deputies that plaintiff later sought to substitute for Doe defendants). *See generally* Stephen D. Easton, Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 STAN. L. REV. 297, 301 (1983) ("The plaintiff must serve the 'fictitiously named defendant,' thereby identifying him and notifying him that he is a party to the suit. In this situation, subsequent amendment of the complaint, substituting the defendant's name for 'John Doe,' does not really add a defendant. Rather, it states the name of a defendant who had been a party to the suit from the beginning.").

52. Doe defendant pleading gave plaintiffs a narrow form of relief from statutes of limitation under traditional relation back doctrine. It gave such relief to plaintiffs who could identify, but not name, the defendant. If the plaintiff could sufficiently identify John Doe so that he could serve John Doe with process, even though he did not know the defendant's proper name, the plaintiff got relation back once he determined the defendant's true name.

53. Professor Clark Byse wrote a leading article critical of traditional relation back standards as applied to plaintiffs who made mistakes in naming governmental defendants. *See* Clark Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40, 40 (1963). Professor Byse cited cases where plaintiffs seeking judicial review of denials of social security benefits had not correctly named the incumbent Secretary of Health Education & Welfare as defendant. *Id.* Even though the correct defendant had adequate notice of the suits, the courts denied relation back of plaintiffs' amendments naming the Secretary because the plaintiffs had not timely named and served him in particular. *Id.* at 41. Thus, in these cases, the plaintiffs lost their claims altogether.

54. In some cases, courts fashioned their own relief to this dilemma. They created an often confusing doctrine of "identity of interest," whereby a party that was sufficiently related to the named defendant, such as a related corporate entity, could be added to the suit even without prior service. *See* Lewis, *supra* note 50, at 1514.

55. In reforming Rule 15(c), rulemakers expressly credited the concerns raised by Professor Byse. Fed. R. Civ. P. 15(c) advisory committee's note (1966 Amendment, 39 F.R.D. 83); *see also* Byse, *supra* note 53, at 45-52. Professor Byse proposed a special relation back rule for actions

amendment changing defendants if the claims asserted against the new defendant arose out of the same transaction as the original claim, and if "within the period provided by law for commencing an action against him,"[56] the new defendant:

> (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and
>
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[57]

These two clauses relaxed the timely service requirements for defendants added by amendment.[58] In the cases that meet the criteria of the

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against the United States, its agencies, or officers in which service on one was effective notice as to the correct governmental entity. *Id.* at 55-56. He also suggested more liberal relation back for private parties. *Id.* at 56 n.42. The drafters adopted both of his suggestions. *See* FED. R. CIV. P. 15(c) advisory committee's note (1966 Amendment, 39 F.R.D. 82, 83) (citing Professor Byse and noting that "Rule 15(c) has been amplified to provide a general solution" to his other concerns); *see also* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 311 (1989) ("The 1966 addition served the specific purpose of terminating the Justice Department's practice of invoking time limitations against plaintiffs who commenced timely actions against the wrong officer or agency [and served] the general purpose of liberalizing the availability of relation back for plaintiffs who timely commenced suits against the wrong defendants and whose mistakes were known to the intended defendants.").

56. FED. R. CIV. P. 15(c), 39 F.R.D. 82, 82 (1966). The meaning of this new timing provision caused much confusion, and in 1991, rulemakers redefined the notice period. *See infra* notes 169-71 and accompanying text.

57. FED. R. CIV. P. 15(c), 39 F.R.D. 82, 82 (1966). Rule 15(c), as amended in 1966, read in full:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the parties against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing an action against him, the party to be brought in amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

In 1991, rulemakers repackaged Rule 15(c) and moved the notice and mistake clauses to new subsections (A) and (B) of Rule 15(c)(3). *See infra* note 167. To review the current text of Rule 15(c), see *supra* note 15.

58. Rulemakers did not eliminate the requirement of formal service altogether. At some point, the plaintiff has to formally name the defendant in an amended complaint and serve the defendant with that amended complaint, unless the defendant waives service. Otherwise, the plain-

notice and mistake clauses, the plaintiff can add a new defendant after the limitations period even if the plaintiff had not previously served that defendant.[59]

The new rule did not abrogate statutes of limitation. To the contrary, rulemakers carefully crafted the notice and mistake clauses of new Rule 15(c) to protect the two primary substantive aims of statutes of limitation—notice and repose.[60] Limitations statutes require timely

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tiff cannot get a binding personal judgment against that defendant. *See generally* RESTATEMENT (SECOND) ON JUDGMENTS § 34 (1980) (stating that only a "party" is bound by judgments and only a person "who is named" and "subjected to the jurisdiction of the court is a party to the action").

59. In some very select cases, whether new Rule 15(c) relaxes the requirement of timely formal service presents a difficult question of conflict between state and federal law. *See generally* discussion *infra* notes 212-14, 225. Like any form of relation back, the plaintiff under the 1966 version of Rule 15(c) must first file a timely complaint to which the amendment can relate back. *See supra* note 57. In many states, filing the complaint alone stops the limitations period from running. *See, e.g.*, ILL. COMP. STAT. ch. 735, § 5/2-201 (1993); ARK. R. CIV. P. 3; ALASKA R. CIV. P. 3; ARIZ. R. CIV. P. 3; IND. R. TRIAL P. 3; IOWA R. CIV. P. 48; MO. R. CIV. P. 53.01; MASS. R. CIV. P. 3. However, some states still follow the original Field Code model and provide that an action is not commenced until the plaintiff both files the complaint and serves it on the defendant. *E.g.*, Minn. R. Civ. P. 3.01; *see also supra* note 51. Although the federal rules take the former approach and define commencement as filing only, *see* FED. R. CIV. P. 3, the Supreme Court has directed that a federal court must apply the state rule when determining whether the claim is timely under that state's statute of limitations. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 748-51 (1980) (finding that Federal Rule 3 did not govern tolling of limitations period and applying Oklahoma service commencement rule to bar claim that plaintiff filed but did not serve within the limitations period). Whether that deference to the state service-commencement rule also extends to application of relation back is an open question. *See* Florence v. Krasucki, 533 F. Supp. 1047, 1051 (W.D.N.Y. 1982) (acknowledging lack of other cases examining impact of *Walker* on Federal Rule 15(c) and holding that federal notice and mistake standards should apply in lieu of service-triggered New York statute). *See also infra* note 229.

60. FED. R. CIV. P. 15(c) advisory committee's note (1966 Amendments, 39 F.R.D. 82, 83) ("[t]he policy of the statute limiting the time for suit . . . [is] not offended by allowing relation back in the situations" allowed by new Rule 15(c)). The court in Yorden v. Flaste, 374 F. Supp. 516 (D. Del. 1974), explained the relationship between Rule 15(c) and statute of limitations policies:

> Rule 15 had been carefully drafted to defer to the policies underlying such statutes [of limitations]. Those statutes compel the exercise of a right of action within a reasonable time so that: (1) a defendant will have a fair opportunity to prepare an adequate defense; (2) the defendant will be protected from the insecurity generated by the fear of litigation pending in perpetuity; (3) the judicial system will be free from stale claims; and (4) the marketplace will be free from the uncertainty of long pending and unsettled claims. Theoretically, once the person has adequate notice that someone is attempting to set up a claim against him, the policy interests behind the statute of limitations are served and strict application of the statutory provisions is unwarranted.

Id. at 520; *see also* Travelers Indem. Co. v. United States, 382 F.2d 103, 106 (10th Cir. 1967) (noting that the purpose of the 1966 amendment to Rule 15(c) was to protect the added party's rights "by enumeration of the conditions that must be satisfied before relation back of the amendment will be allowed").

notice of a lawsuit in order to ensure that a defendant can protect against lost or stale evidence and not suffer prejudice at trial due to the plaintiff's delay.[61] For the same reasons, the notice prong of Rule 15(c) also requires that the new defendant have adequate and timely notice of the suit. But that notice need not be formal service. Instead, under the notice clause of Rule 15(c), the court inquires as to whether the informal notice protected the defendant from being "prejudiced in maintaining a defense on the merits"[62]—precisely the goal of statutes of limitation.

The mistake clause of Rule 15(c) safeguards the second aim of statutes of limitation—repose—by ensuring not only that the new defendant know of the lawsuit but also that he appreciates that he is an intended defendant in that action.[63] Even if defendant has notice of the suit and has carefully preserved all potential evidence, statutes of limitation provide the added benefit of certainty.[64] Unless he knows that

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61.

> Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients rather that principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

62. FED. R. CIV. P. 15(c)(3)(A). The sufficiency of notice under Rule 15(c) has developed its own body of law. For example, most courts hold that the notice requirement of Rule 15(c) necessitates knowledge of the actual filing of the lawsuit, rather than notice merely of the underlying incident giving rise to the suit. *See, e.g.*, Craig v. United States, 413 F.2d 854, 858 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969). An area of intense debate is whether the defendant can be sufficiently protected even if he personally did not receive the notice. The Second Circuit imputes notice from an original defendant to the new defendant if they shared counsel or have other similarity of interests. *See, e.g.*, Gleason v. McBride, 869 F.2d 688, 693 (2d Cir. 1989) (holding that court may impute notice through attorney if attorney understood that the new defendant would be added); Hodge v. Ruperto, 739 F. Supp. 873, 881 (S.D.N.Y. 1990) (imputing notice through city attorney). The Seventh Circuit does not impute notice even where the new defendant and original defendant share the same attorney. *See, e.g.*, Jones v. Wysinger, 815 F. Supp. 1127, 1129-30 (N.D. Ill. 1993) (denying relation back on notice grounds even though the new defendant in Section 1983 claim shared counsel with original defendants who were fellow police officers). The question of whether imputation of notice is consistent with the aims of Rule 15(c) is beyond the scope of this article.

63. 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4509, at 150 (1982) ("The condition that an added defendant must not only have known about the suit within the limitations period but also have had reason to know that he escaped suit only because of a mistake minimizes the possibility that application of the Rule will disturb any secure sense of repose. . . .").

64. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind . . . ."); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 730-31 (1974)

the plaintiff intended to sue him in particular, he may assume that he will not be sued in the future. This standard is met when a potential defendant has notice of a suit in which plaintiff has made an obvious mistake in identity, such as calling the defendant by a similar but wrong name.[65] The test is whether a reasonable person would understand that plaintiff made such a mistake in identifying him as defendant.[66] Absent such an obvious mistake, a potential defendant does not have to speculate why he was not named in a particular suit. He is entitled to repose.

Although the notice and mistake standards of Rule 15(c) protect a defendant's rights under the applicable statute of limitations, they also give the plaintiff much-needed flexibility. This flexibility was the key to the new federal Doe defendant practice. The 1973 civil rights case of *Ames v. Vavreck*[67] demonstrates the impact of expanded relation back in John Doe cases. Ames and several other plaintiffs claimed that they were unlawfully arrested for political speech, and filed a Section 1983 complaint against the City of Minneapolis, the prosecutor, and several John Doe officers whom the plaintiffs described as the Minneapolis police officers who participated in their arrest. The plaintiffs then deposed a number of police officers, some of whom admitted that they were the arresting officers. Before the two-year limitations period ran, the plaintiffs moved to substitute the officers for the John Does in the complaint,

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("Statutes of limitation have several purposes, but one of them, which cannot be dismissed as procedural, is to permit potential defendants to breath easy after the passage of the designated period."). Repose achieves societal benefits beyond the defendant's personal peace of mind. It fosters commerce by giving potential defendants the certainty they need to enter into new transactions unfettered by lingering questions based on past events. The repose element also may work to the benefit of the plaintiff. Certainty helps a defendant settle claims. He can fully assess his liability as of a specific date and not hold back for fear that the settlement will spur future suits based on the same event. Likewise, the certainty enables a defendant to more easily obtain insurance coverage, thus protecting prospective plaintiffs in claims based on future events. *See* Lewis, *supra* note 50, at 1511-12 (policies supporting statutes of limitations include "alleviating a potential defendant's economic or psychological insecurity, often styled a 'policy of repose' " and "avoiding the disruptive effect of aged, unsettled claims may have on commercial intercourse").

65. *See, e.g.*, Davis v. Krauss, 93 F.R.D. 580, 582 (E.D.N.Y. 1982) (holding that where Section 1983 complaint named "Joseph Souton" and "McGuiness" as defendants, it "hardly required much imagination" to suppose that plaintiff was intending to sue Josef Boutin and Karl Mogenis, who were police officers in the same precinct in which the complaint alleged that Souton and McGuiness were officers).

66. *See* 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1498, at 137-39 (2d ed. 1990) ("[In analyzing the mistake clause], the courts probably will apply something akin to a reasonableness test to determine whether the party 'should have known' he was the one intended to be sued.").

67. 356 F. Supp. 931 (D. Minn. 1973).

but the court did not grant the motion until one month after the limitations period expired.[68] The new police officer defendants argued that the statute of limitations barred any claim against them.

Without expanded relation back, the plaintiffs would have lost their claims against the officers. The action against the officers did not commence until the plaintiffs filed the amended complaint, which first required leave of court.[69] That the plaintiffs filed their motion to amend before the limitations period did not save their complaint.[70] Under traditional relation back, the informal notice provided by the motion was insufficient. Indeed, that is the point of the new relation back rule—informal notice short of formal service will sometimes satisfy the aims of statutes of limitation. Nor could accrual and equitable tolling doctrines help the plaintiffs in *Ames*. Even though they alleged a general conspiracy and concealment by the original named defendants, the court found no basis to toll the statute of limitations against the new defendants.[71]

Only the doctrine of relation back, as expanded by the 1966 rule change, saved the claims against the individual officers.[72] The court allowed the claims because the officers had sufficient knowledge that plaintiffs intended to bring them in as defendants:

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68. *Id.* at 936, 941-42.

69. Rule 15(a) requires leave of court to amend a complaint after a responsive pleading is served. FED. R. CIV. P. 15(a); *see also supra* note 49. Although the record in *Ames* is not explicit, it appears that at least some of the defendants had answered by the time the plaintiffs moved to amend. Plaintiffs, for example, took a number of depositions prior to moving for leave to make the Doe substitutions. *See* 356 F. Supp. at 936.

70. *Cf.* Sitarz v. Bucher, 652 F. Supp. 95, 97 (D.N.M. 1986) (holding that newly added defendants were not parties until after plaintiffs were granted leave to amend and filed the amended complaint); Swartz v. Gold Dust Casino, 91 F.R.D. 543, 547 (D. Nev. 1981) (discussing relation back effect of Doe substitution proposed in a motion to amend filed before, but not granted until after, the running of the limitations period).

71. The *Ames* court explained:

> Plaintiffs' argument that fraudulent concealment by defendants has tolled the running of the statute of limitations has no merit. That doctrine cannot be applied against the defendants added by the first amended complaint because there are no allegations that those defendants engaged in any conduct to conceal plaintiff's claim against them. Plaintiffs would have the court apply fraudulent concealment principles to them based on alleged activities of the original defendants. Even though a conspiracy is alleged to have existed, that allegation alone will not allow the inference of fraudulent concealment to be drawn into this case.

356 F. Supp. at 941; *see also* Roberts v. Dillon, 15 F.3d 113 (8th Cir. 1994) (noting alternative of Doe pleading where plaintiff does not know identity of wrongdoer but defendant's actions do not rise to level of affirmative concealment).

72. 356 F. Supp. at 942.

> [T]he original complaint contained a clearly expressed intent to add individual officers as defendants as soon as they could be identified . . . . [I]t is inconceivable that the additional defendants have been prejudiced in their defense or that they had no reason to believe that suit might be brought against them.[73]

This informal notice was insufficient under traditional concepts of relation back. The 1966 version of Rule 15(c), however, allowed the court to look beyond technical filing and service requirements and evaluate the informal notice received by the officers.[74]

The *Ames* court glossed over whether the original Doe allegations qualified as a mistake under the literal language of Rule 15(c).[75] Subsequent courts have done no better. The issue continues to plague federal and state courts. As this article details below, the problem is not merely a question of semantics. It impacts the substantive policies of statutes of limitations in both Doe and non-Doe cases. But such issues do not deter plaintiffs. Civil rights and other plaintiffs regularly name John Doe defendants in the hope that they too can identify the true defendants and add them to the suit after the limitations period. All these plaintiffs needed was a chance to save their claims, and the expansion of Rule 15(c) gave them that chance.[76] Thus, modern Doe defendant practice in federal court was born.

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73. *Id.* at 942. The court appeared to rely at least in part on notice given to an assistant city attorney who represented both the City, an original defendant, and the "unnamed" police officers in their depositions. The attorney, for example, got a copy of the motion to make the Doe substitution prior to the expiration of the limitation period. *Id.* Whether imputed notice by itself is proper under Rule 15(c) is subject to debate, *see supra* note 62, but even without imputed notice, the officers in *Ames* apparently would have had actual and personal notice of the suit during their depositions.

74. When the court finally reached the merits, it found that the officers' behavior was so egregious that it warranted punitive damages against them. *See* Lykken v. Vavreck, 366 F. Supp. 585, 596 (D. Minn. 1973) (noting that the policemen's actions were "inexcusable").

75. The court twice acknowledged the mistake requirement of Rule 15(c) but never reconciled its language with the Doe allegations. 356 F. Supp. at 942. The court, however, echoed the intent of the mistake clause when it found that the complaint "clearly expressed intent to add individual police officers as defendants." *Id.*

76. In the non-Doe mistake cases, which were at the heart of the 1966 rule revision, the change in Rule 15(c) may cause different results (i.e., more late amendments allowed to cure mistakes), but it would not have a great impact on how the plaintiff chooses to draft his complaint in the first place. In non-Doe cases, the plaintiff's amendment of the complaint and his ultimate resort to Rule 15(c) is unintended. He assumes when he files his complaint that he has correctly identified the defendants. He only later realizes his mistake. Therefore, unlike in a Doe case, where the plaintiff knows he must amend his complaint, the 1966 relaxation of the relation back rule would have little impact on how the plaintiff initially frames his non-Doe complaint.

B. John Doe as Pseudonym to Shield a Party's Identity

Since the 1960s, federal litigants have used John Doe for another purpose—to hide their own identity.[77] Here, the plaintiff is not concerned with a pending limitations cut off. Instead the plaintiff's own privacy interests are paramount. Some defendants may seek pseudonymous protection,[78] but usually the plaintiff himself wants to keep his own identity secret.[79] The plaintiff may want to remain anonymous for any number of reasons; he may fear public stigma, personal safety, and economic retribution, or the issues may simply be too intimate to disclose publicly. Unlike the Doe defendant, whose widespread use grew out of a change in procedural rules, the modern Doe plaintiff became popular due to change in substantive law—the recognition of privacy rights under the federal constitution.[80]

The pseudonymous plaintiff made national headlines in the 1960s as part of the new and controversial federal privacy right litigation.[81]

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77. For a thoughtful discussion of the use of a pseudonym to protect a party's identity, see Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

78. In rare cases, a defendant will seek and obtain permission to seal the record and proceed under a pseudonym. *See, e.g.*, Doe v. A. Corporation, 709 F.2d 1043, 1044 n.1 (5th Cir. 1983) (granting anonymity to defendant corporation in benefits suit by former in-house lawyer). In some types of proceedings, such as professional disciplinary actions, it is not uncommon for the "defendant" to appear under a pseudonym. *See, e.g.*, Doe v. Federal Grievance Comm., 847 F.2d 57 (2d Cir. 1988). *But see* Coe v. United States Dist. Court for the Dist. of Colo., 676 F.2d 411 (10th Cir. 1982) (denying pseudonymous protection for doctor seeking to enjoin state medical board action against him for alleged professional and sexual misconduct due to strong public interest in full disclosure of medical disciplinary proceedings). *See generally* Adam Milani, Doe v. Roe: *An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659 (1995) (arguing for use of John Doe pseudonym for defendants in John Doe plaintiff cases).

79. In many pseudonymous cases, the plaintiff keeps his identity secret from only the outside world, not the court and defendant, who know his identity. In some cases, especially where the plaintiff is concerned about reprisals from the defendant himself, only the court may know the plaintiff's identity. As a middle ground, the plaintiff may withhold his name but offer limited identifying characteristics to the defendant. *See* Steinman, *supra* note 77, at 42.

80. Eugene Fidell described the growing popularity of Doe plaintiffs:

> With the evolution of a right of privacy, the increasing intrusion of the state on matters traditionally thought to be private and the growing willingness of litigants to assert rights and ventilate disputes relating to matters that can only be described as intimately private, the worthy Mr. Doe and his equally monosyllabically surnamed—and equally litigious—friends have become familiar plaintiffs in the nation's courthouses.

Eugene R. Fidell, *The Strange Case of John Doe: Getting Anonymity in Federal Court*, NAT. L.J., Mar. 5, 1984, at 20; *see also* Steinman, *supra* note 77, at 2 ("[B]efore parties could use pseudonyms to shield their rights to privacy, those rights had to be legally recognized.").

81. Although the modern popularity of Doe plaintiffs is tied to federal privacy rights litigation, state courts have used pseudonyms in isolated cases for years. For example, adoption pro-

The Supreme Court first recognized the right to privacy in the 1965 case of *Griswold v. Connecticut*,[82] in which the Court overturned legislation prohibiting use of contraceptives by married persons. Griswold did not use a fictitious name, but the plaintiffs in a predecessor case, challenging the same birth control law, used the pseudonyms "Paul," "Pauline," and "Jane Poe."[83] When this earlier "Poe" case got to the United States Supreme Court, the Court simply acknowledged the use of pseudonyms without condemning the practice.[84] Then, in one of the most publicized cases ever, the 1973 abortion decision in *Roe v.*

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ceedings traditionally have used pseudonyms to shield a minor child's identity. *See, e.g.*, Doe v. Doe, 30 N.Y.S.2d 141 (N.Y. Fam. Ct. 1941) (child support proceeding in which parents are designated as "Doe" and children are called only "Walter" and "Bettina"); *In re* Adoption of Doe, 56 S.E.2d 8 (N.C. 1949); *In re* Adoption of Baby Girl Doe, 277 P.2d 321 (Wash. 1954). Such privilege of anonymity was not set forth in the general pleading codes but was instead stated, if at all, in specific substantive provisions. *See, e.g.*, MISS. CODE ANN. § 93-17-25 (1994) (providing for confidentiality of adoption proceedings). More often, courts just handled the issue on a case-by-case basis. Indeed, Doe plaintiffs today appear almost as regularly in state court as they do in federal court, largely as a matter of judicial discretion. *See, e.g.*, Doe v. Red & Black Publishing Co., 437 S.E.2d 474 (Ga. 1993); *In re* Doe, 843 P.2d 735 (Kan. Ct. App. 1992); Doe v. Medical Ctr. of La., 612 So. 2d 1050 (La. Ct. App. 1993); Doe v. Office of Professional Medical Conduct, 611 N.E.2d 294 (N.Y. 1993); Doe v. American Nat'l Red Cross, 500 N.W.2d 264 (Wis. 1993).

82. 381 U.S. 479 (1965) (holding that Connecticut statute forbidding use of contraceptives unconstitutionally intruded upon marital right of privacy).

83. Poe v. Ullman, 367 U.S. 497 (1961). The plaintiffs attacked the same Connecticut birth control law at issue in *Griswold*, but the Supreme Court denied their challenge on the ground that the plaintiffs had not shown that the statute would be enforced against them. *Id.* at 501.

84. The Court noted: "Plaintiffs . . . sue under fictitious names. The Supreme Court of Errors of Connecticut approved this procedure in the special circumstances of the cases." 367 U.S. at 498 n.1. In particular, the Connecticut high court stated the following on the novel use of pseudonyms:

> [The Connecticut pleading statute] provides in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. [A Connecticut Practice Book] states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file, which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names used are fictitious, and secure the court's consent, as was done in this case. The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

Buxton v. Ullman, 156 A.2d at 508, 514-15 (Conn. 1959).

Wade,[85] the plaintiff again used a pseudonym. As before, the Court noted Jane Roe's use of a pseudonym but did not criticize it.[86] Litigants took these cases[87] as implicit endorsement of the practice and began to designate themselves by pseudonyms with unprecedented frequency.[88]

Whether the plaintiff may shield his identity behind the John Doe moniker is not simply a question of whether the plaintiff desires anonymity. The plaintiff's interest in privacy often conflicts with, and is outweighed by, the needs of both the public and the defendant. When the plaintiff's name is hidden, the public cannot as closely scrutinize the workings of its courts. Full disclosure of court proceedings, even in civil cases, is a basic tenet of the Anglo-American legal system. It is so deeply rooted that the First Amendment may guarantee public access to civil proceedings.[89] In addition, basic fairness to the defendant ar-

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85. 410 U.S. 113 (1973). Likewise, the plaintiffs in a companion case to *Roe v. Wade*, which challenged a Georgia abortion statute, also used the pseudonyms "John Doe" and "Mary Doe." Doe v. Bolton, 410 U.S. 179 (1973).

86. In *Roe v. Wade*, the Court noted that the plaintiff's name was a pseudonym and held that despite the pseudonym, she presented a justiciable controversy. 410 U.S. at 120 n.4, 121 n.5. The Court made the same notation in Doe v. Bolton, 410 U.S. at 184 n.6 & 187.

87. The Supreme Court continues to entertain pseudonymous suits with little or no comment on the propriety of the Doe designation. For example, in John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989), a FOIA action, the Court noted that although all of the names in the caption were pseudonyms, the Court would use the real names of each of the agencies involved because the Solicitor General's office had no objection to the disclosure of their names. *Id.* at 148 n.1. As to the plaintiff private corporation, however, the Court said it would "adhere . . . to the use of [the] . . . pseudonym." *Id.; see also* Whalen v. Roe, 429 U.S. 589 (1977) (pseudonymous plaintiffs challenged constitutionality of New York state central computer system that stored names of persons taking certain types of prescription drugs). *See generally* Milani, *supra* note 78, at 1678-79 n.80 (listing pseudonymous party cases decided by the Supreme Court).

88. "While federal decisions concerning Doe plaintiffs or known Doe defendants are rare prior to 1969, such cases are common now." Steinman, *supra* note 77, at 1 n.2.

89. The Supreme Court has not directly addressed the question of public access to civil suits, but it repeatedly has affirmed the public right of access to criminal trials. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (finding First Amendment right of the press and public to attend criminal trials). In the criminal context, the Court bases the right to public trial on both the defendant's individual Sixth Amendment rights and the general First Amendment protections of the press and public. See U.S. CONST. amend. VI (guaranteeing the accused the right to a speedy and public trial); U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the people to peaceably assemble, and to petition the Government for a redress of grievances."). Although the Sixth Amendment applies exclusively to criminal trials, the First Amendment has no such limit. *See* Steinman, *supra* note 77, at 3-18 (surveying First Amendment right to access cases and concluding that their rationale applies to criminal and civil trials); *cf.* United States v. Bateman, 805 F. Supp. 1058, 1061 (D.N.H. 1992) (distinguishing the "civil context, where the importance of confrontation is not as great" from the "criminal context, where the more carefully guarded rights of the defendant are involved").

gues against the plaintiff's unfettered use of pseudonyms. In most cases, the defendant will be hampered in preparing his defense, at least to some degree, when he does not know the plaintiff's identity.[90]

These competing concerns are best reconciled by using a balancing test.[91] The Fourth Circuit recently directed that its trial courts weigh the following factors to determine if a plaintiff may proceed as John Doe:

> • whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
> • whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically to innocent non-parties;
> • the ages of the persons whose privacy interests are sought to be protected;
> • whether the action is against a governmental or private party; and
> • relatedly, the risk of unfairness to the opposing party from allowing an action against to proceed anonymously.[92]

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90. Professor Steinman further explained these concerns:

> In some situations, information about a plaintiff other than identity or identifying traits would suffice to enable a defendant to defend effectively. When the issues raised by a case are purely legal, for example, defendants do not need information about a plaintiff beyond that which determines whether plaintiff has standing and whether a case or controversy exists. In cases in which the claims are dependent on factual issues peculiar to plaintiff's case, however, the defendant's need to know his adversary's name may be such that refusal to surrender that information would deny the defendant procedural due process.

Steinman, *supra* note 77, at 42 (footnotes omitted); *see also* Scott L. Winkelman, *Closing Open Court to "Doe" Plaintiffs*, LEGAL TIMES, Aug. 21, 1995, at 26, 26 (arguing that a grant of anonymity for plaintiff is unfair to defendant because it is "tantamount to a judicial endorsement of the plaintiff's claims on the merits" and "invites erroneous charges of wrongdoing"). Determining res judicata is also a problem. The defendant and court must be able to determine if the claim already has been brought by this plaintiff. *See* Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973) (noting "inherent problems" in fictitious name procedure, including the possible inability to fix res judicata effect).

91. Most legal commentators advocate a balancing test. *See* Steinman, *supra* note 77, at 35-43; William S. Kleinman, Note, *Who is Suing You?: John Doe Plaintiffs in the Federal Courts*, 61 TEX. L. REV. 547, 561 (1982); Wendy M. Rosenberger, Note, *Anonymity in Civil Litigation: The "Doe" Plaintiff*, 57 NOTRE DAME L. REV. 580, 592 (1982); *cf.* Mark A. Mesler, Comment, Doe v. Frank: *Determining the Circumstances Under Which a Plaintiff May Proceed Under a Fictitious Name*, 23 MEM. ST. U. L. REV. 881 (1993) (noting that as of the summer of 1993, the "First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits cases have failed to even address this issue" of proper balancing).

92. James v. Jacobson, 6. F.3d 233, 238 (4th Cir. 1993). The "James" plaintiffs were victims of the now infamous scheme of a Virginia fertility doctor who used his own sperm to artificially inseminate his patients. The plaintiffs sought anonymity primarily to protect their two children who were the biological children of the defendant. The district court allowed the plaintiffs to file a complaint and proceed through discovery under the fictitious names "John and Mary James" but would not let them testify anonymously at trial. *Id.* at 236. The Fourth Circuit reversed, holding that the trial court abused its discretion in applying a strict rule that "party-anonymity at trial is simply not permissible." *Id.* at 239. In forming its list of the proper factors, the Fourth

Although the cases that require such balancing do not lend themselves to categorization, courts typically allow pseudonymity in cases that raise a substantive right-to-privacy issue and often involve intimate issues.[93] AIDS and HIV patients now commonly seek and receive anonymity.[94] In some cases, a pseudonym is essential to preserve the very right that the plaintiff is trying to enforce—his own privacy.[95] Finally, plaintiffs recently have tried, with mixed results, to extend pseudonym-

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Circuit relied upon Doe pleading cases, even though *James* concerned anonymity at trial. *Id.* at 238-39.

93. The Fifth Circuit in Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) tried to summarize the common characteristics of the pseudonymous cases:

> "[W]here the issues involved are matters of a sensitive and highly personal nature," such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families, the normal practice of disclosing the parties' identities yields "to a policy of protecting privacy in a very private matter." . . . [T]he cases affording plaintiffs anonymity all share several characteristics. . . . The plaintiffs in those actions, at the least, . . . admit that they either had violated state laws or government regulations or wished to engage in prohibited conduct. . . . Furthermore, all of the plaintiffs previously allowed in other cases to proceed anonymously were challenging the constitutional, statutory or regulatory validity of government activity.

Id. at 712-13 (citations omitted) (quoting Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974)); *see also* Doe v. Blue Cross & Blue Shield, 794 F. Supp. 72, 74 (D.R.I. 1992) (cases allowing pseudonymity usually involve "abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children") (citing Doe v. Rostker, 89 F.R.D. 158, 161 (N.D. Cal. 1981)). *But see* Steinman, *supra* note 77, at 75 ("The Fifth Circuit [in *SMU*] overstated the shared characteristics of the cases allowing pseudonymity. They did not all involve disclosure of personal information of the utmost intimacy, and many did not involve an admission that plaintiff had engaged, or wished to engage, in prohibited conduct. The fact that similarly situated plaintiffs in other cases were less fearful and therefore dared to sue under their own names, has not been determinative. Almost all of the cases allowing pseudonymity, however, have involved challenges to a governmental body or activity.").

94. *See* cases cited *supra* note 7.

95. For example, in Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973), the court allowed prescription drug users to use fictitious names to challenge a New York statute that required computerized records of their names: "[I]f plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to avoid." *Id.* at 541 n.7. In Doe v. Frank, 951 F.2d 320 (11th Cir. 1992), the Eleventh Circuit distinguished *Ingraham* and noted that the type of relief sought by plaintiff may impact whether he will be afforded pseudonymous protection:

> The plaintiff in *Ingraham* was allowed to proceed under a fictitious name not because he would have had to disclose information of the utmost intimacy—his use of controlled substances; but rather, because he was challenging a state statute that regulated disclosure of such information. The plaintiff in *Ingraham*, therefore, was granted his request for anonymity because the injury litigated against—disclosure of plaintiff's name—would be incurred as a result of the disclosure of the plaintiff's identity in the complaint.

Id. at 324 n.6 (finding that social stigma attached to alcoholism did not justify pseudonymity in employment discrimination case).

ity beyond traditional privacy issues to suits in which the plaintiff merely raises unpopular claims, such as challenges to school prayer,[96] or in which he fears economic harm or reprisals.[97]

These expanding uses of the Doe doctrine underscore the propriety of the underlying procedure.[98] Yet the practice still suffers setbacks. The Court of Appeals for the District of Columbia, for instance, recently sharply criticized the use of Doe pseudonyms, calling it an "extraordinary break with precedent."[99] Although the suitable cases for pseudonymity must remain fluid and open to challenge, the propriety of the practice itself need not.

III. FAILURE OF CURRENT FEDERAL PROCEDURE TO ADEQUATELY ADDRESS JOHN DOE PARTIES

The John Doe defendant and plaintiff have become an essential

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96. *See, e.g.*, Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (permitting Doe protection for parents and minors challenging school prayer).

97. For the most part, courts have denied plaintiffs pseudonymity in economic harm cases. *See* Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) (denying anonymity to female law students charging sex discrimination in law firm hiring). *But see* Steinman, *supra* note 77, at 73-77 (questioning holding in *SMU* and arguing that economic and professional concerns are proper factors in deciding pseudonymity).

98. The authority to allow the plaintiff to proceed as John Doe appears to be one of the inherent powers of the court. *See* James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) ("The decision whether to permit parties to proceed anonymously at trial is one of many involving management of the trial process that for obvious reasons are committed in the first instance to trial court discretion."). To the extent that courts cite any specific rule, they rely on Rule 26(c) of the *Federal Rules of Civil Procedure*, which grants the court broad power to issue protective orders in discovery. FED. R. CIV. P. 26(c). *See, e.g.*, Doe v. Stegall, 653 F.2d 180, 184-86 (5th Cir. 1981) (holding that the district court had power to issue protective order under Rule 26(c) to shield the identity of plaintiffs challenging school prayer).

99. United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995) (per curiam). In this celebrated antitrust case, the district court let three computer industry companies file amici briefs under John Doe pseudonyms due to their claimed fear of retaliation from Microsoft. *Id.* at 1453. In reversing the lower court's refusal to enter a consent decree, the Court of Appeals ordered that the case be assigned on remand to another district judge. *Id.* at 1465. The appellate judges were "deeply troubled" by many aspects of the proceedings below, including the John Doe amici filings:

> We are similarly distressed by the district judge's decision to allow the Doe Companies to proceed anonymously. We are not aware of any case in which a plaintiff was allowed to sue a defendant and still remain anonymous to that defendant. Such proceedings would, as Microsoft argues, seriously implicate due process.

Id. at 1463. Although the court later acknowledged the "rare" cases allowing Doe proceedings, *id.* at 1464, its hostile reaction highlights that Doe practice is not yet a fully accepted part of civil litigation; *see also* Winkelman, *supra* note 90, at 26 (defending the *Microsoft* rejection of Doe practice).

part of civil practice in federal court,[100] but codified federal procedure has not caught up to this practice. In 1988, Congress officially recognized Doe defendants in the removal statute—a first in codified procedure. This is a step in the right direction, but it does not go far enough. Courts have failed to reach a workable solution to three significant procedural issues confounding Doe practice in federal court: first, the proper pleading of a Doe party in a federal complaint; second, the impact of an unknown Doe defendant on the forum selection criteria for diversity jurisdiction and venue; and third, application of the mistake clause of the federal relation back rule to Doe defendant substitutions.

A. Pleading: Inconsistent Rules and Lack of Standards for Pleading John Doe Parties

Despite widespread use of Doe pleading, the Federal Rules of Civil Procedure undermine it. Unlike most state court systems, the Federal Rules do not expressly provide for any form of fictitious name parties, and some procedural provisions are arguably inconsistent with Doe pleading. Rule 10(a), for instance, requires plaintiff to plead "the names of all the parties."[101] In *Roe v. New York*,[102] the court relied on Rule 10(a) to dismiss a pseudonymous complaint filed by four teenage boys who sought to challenge the adequacy of their care in a state juvenile school and who designated themselves in their complaint only by the pseudonyms "Roe," "Moe," "Soe," and "Joe." The court held that the complaint was ineffective to commence the action because it did not comply with the mandate that every complaint contain the name of "at least one plaintiff."[103] The lawsuit was a nullity, and the plaintiffs would have to begin the process again.[104]

The *Roe v. New York* court was wrong.[105] Although at first glance

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100. "Does and their . . . relations appear prominently in the [federal] reporters." Scheetz v. Morning Call, Inc., 130 F.R.D. 34, 36 (E.D. Pa. 1990), *aff'd*, 946 F.2d 202 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1171 (1992).

101. FED. R. CIV. P. 10(a). To read the full text of Rule 10(a), see *supra* note 12.

102. 49 F.R.D. 279 (S.D.N.Y. 1970).

103. *Id.* at 281.

104. The court even rejected the plaintiffs' offer to reveal the names under some form of protective order, because in the court's view no action was pending. *Id.* at 282; *see also* Doe v. United States Dep't of Justice, 93 F.R.D. 483 (D. Colo. 1982) (holding that Doe plaintiff complaint did not commence the action under Rule 10(a)).

105. In addition to an overly broad reading of what Rule 10(a) actually requires, the court unduly penalized a pleading error. Even if Rule 10(a) prohibited Doe pleading, it would not render the filing of a Doe complaint a nullity. A defective complaint commences the action but at the risk of later dismissal. Moreover, the court may order corrective action short of dismissal. *See*

Rule 10(a) seems to bar Doe pleading, in reality it does not. Rule 10(a) simply seeks to distinguish the more formal caption in the complaint from all others, which for economy need not list every party. Rule 10(a) does not necessarily dictate the substance of the name designation. For instance, the comparable provision of the Field Code, which elsewhere permitted fictitious names, also required that the parties be "named" in the complaint.[106] Nevertheless, even though most courts today reject *Roe v. New York* as elevating form over substance,[107] the language of Rule 10(a) still invites procedural disputes.[108]

The Federal Rules of Civil Procedure elsewhere cast doubt on the propriety of Doe pleading. The only mention of a John Doe party in the entire rules compilation is in an Advisory Committee note to Rule 17(a). Rule 17(a) requires that a suit be prosecuted in the name of "the real party in interest," but in case of error, the rule gives reasona-

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FED. R. CIV. P. 12(e) (allowing the court to strike a vague or ambiguous complaint only if a more definite statement is not filed within 10 days after the court granted the motion).

106. Act of April 12, 1848, ch. 379, § 120(*l*), 1848 N.Y. LAWS 521 ("The complaint shall contain: . . . [T]he names of the parties to the action, plaintiff and defendant."). Likewise, many states today have rules identical to Rule 10(a), even though they permit unknown defendant pleading elsewhere in their rules of procedure. *Compare* ALA. R. CIV. P. 10(a) ("In the complaint the title of the action shall include the names of all the parties, but in the other pleadings its is sufficient to state the name of the first party on each side. . . .") *with* ALA. R. CIV. P. 9(h) "When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name. . . .").

107. One court rejected the argument that Rule 10 barred Doe pleading as "highly mechanical" and "elevat[ing] form over substance." Roe v. Borup, 500 F. Supp. 127, 129 (E.D. Wis. 1980). Another noted its "reservations that failure to comply with Rule 10, which is addressed to matters of form, will sustain a motion to dismiss. . . ." Doe v. Boyle, 60 F.R.D. 507, 508 (E.D. Va. 1973) (dismissing complaint on other grounds), *aff'd*, 494 F.2d 1279 (4th Cir. 1974). Yet another explained how the view of *Roe v. New York* is now antiquated:

> The decision in *Roe v. State of New York*, upon which defendants heavily rely, was rendered in 1970, a time in which instances of parties suing pseudonymously were rare. Since that time, however, increasing numbers of parties have sought for a variety of reasons to sue anonymously in order to keep their identities confidential, and in fact, "a practice has developed permitting individuals to sue under fictitious names" under certain circumstances.

Doe v. Hallock, 119 F.R.D. 640, 642 (S.D. Miss. 1987) (citing Steinman, *supra* note 77).

108. As recently as 1992, the Eleventh Circuit, in ruling on the propriety of plaintiff's pseudonymity, cited both the "clear mandate" and "explicit requirement of disclosure" in Rule 10(a) in holding that the parties were required to be named. Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992); *see also* Doe v. University of Rhode Island, Civ. A. 93-0560B, 1993 WL 667341, at 2-3 (D.R.I. Dec. 28, 1993) (noting that Rule 10(a) "does not always prevent a [plaintiff] from suing under a fictitious name"); Agresta v. Philadelphia, 694 F. Supp. 117, 119 & n.1 (E.D. Pa. 1988) (dismissing "unknown police officers" because the plaintiff did not list them at all in the caption as required by Rule 10(a), but also noting that the unknown officers would be dismissed because of their fictitious designation even if plaintiff had listed them in the caption). *Cf.* Scheetz v. Morning Call, Inc., 130 F.R.D. 35, 37 n.5 (E.D. Pa. 1990) (rejecting *Agresta*).

ble time for the real party in interest to substitute as plaintiff.[109] To help explain this rule, the Advisory Committee distinguishes an exceptional use of a fictitious plaintiff:

> [Rule 17(a)] should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period.[110]

Not surprisingly, some courts have cited this note when questioning the propriety of Doe pleading.[111]

Neither the note nor Rule 17(a) has any bearing on actual Doe practice. First, Rule 17(a) only requires that the party who has a real interest in the claim prosecute it.[112] It does not address what name that person must use. A John Doe plaintiff clearly is a party in interest in the suit; he merely wants to shield his identity.[113] Moreover, the John Doe that the Advisory Committee condemns is merely a creation of the lawyer's wishful thinking.[114] The lawyer does not have an actual client. Such a filing would be frivolous and is already proscribed by Federal Rule 11.[115] Nevertheless, the negative mention of a Doe party in the note to Rule 17(a), especially in the absence of a positive reference

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109. FED. R. CIV. P. 17(a).

110. FED. R. CIV. P. 17(a) advisory committee's note.

111. *See* Breslin v. City of Philadelphia, 92 F.R.D. 764 (E.D. Pa. 1981) (citing Rule 17(a) and the advisory committee's note among several bases for dismissing suit in which only Doe defendants remained); *cf. Scheetz*, 130 F.R.D. at 37 n.5 (rejecting *Breslin*).

112. FED. R. CIV. P. 17(a). The rule has been criticized for stating only the obvious. *See, e.g.*, 6A WRIGHT ET AL., *supra* note 66, § 1541, at 321-22 ("Some commentators have called for abolition of the real party in interest requirement [in part] because exactly the same results would be achieved under the applicable substantive law.").

113. If a court is concerned about a potential sham suit, such as that illustrated in the Advisory Committee's note to Rule 17(a), *see supra* note 108 and accompanying text, it can ask the Doe plaintiff to prove that he has an actual interest in the suit by filing such verification under seal.

114. Even the most liberal Doe practices do not allow a lawyer to create a Doe client in the hope that he will find a real client to fill John Doe's shoes. California, for example, permits a plaintiff to name Doe parties in the hope that some person might turn up who fits that description, but it does not let the lawyer create a plaintiff in the hope that he might turn up an actual client. *See infra* notes 117-18.

115. *See* FED. R. CIV. P. 11(b); *see also supra* note 41.

elsewhere in the rules, casts lingering doubt as to the propriety of Doe pleading under the Federal Rules.

The Federal Rules fail not only because their literal language is inconsistent with modern Doe practice, but because they fail to provide affirmative guidance on how to properly plead John Doe parties.[116] As for the Doe defendants, many plaintiffs simply add to their list of named defendants some general reference to Doe defendants, such as "John Does 1 through 100." They do not make any attempt to describe these John Doe defendants. This type of generic Doe pleading is common under California state practice, but its benefits are unique to California's limitations scheme. First, California has an unusually long period—three years—in which a plaintiff may serve the defendants, including a Doe defendant.[117] More significantly, California procedure, unlike most Doe pleading rules, allows the plaintiff to substitute an actual person for a generic John Doe, even though at the time he filed his complaint the plaintiff did not think that any person other than the named defendants was liable.[118] Few states have such a liberal limitations practice, so generic Doe pleading is useless in the vast majority of cases filed in federal court.[119] It is also burdensome. Scores of extra

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116. A very few courts do attempt to set some guidelines for Doe pleading. *See, e.g.*, Estate of Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) ("an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery").

117. CAL. CIV. CODE § 583.210(a) (West Supp. 1996). Unlike under the Field Code, where the plaintiff had to identify the John Doe defendant sufficiently to serve him before the limitations period expired, see *supra* notes 50-52 and accompanying text, plaintiffs in California have three years beyond the limitations period to find, identify and serve the Doe defendants. *See* § 583.210(a). *See generally* James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 59, 84-85 (1971).

118. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 30 Cal. Rptr. 650 (Cal. Ct. App. 1963) (holding that California "allows the original designation of a defendant by a fictitious name in a situation where plaintiff knew the true name of the defendant and knew all of the facts giving rise to a cause of action against him, but was unaware at the time of filing that he had such a cause of action") (interpreting CAL. CIV. CODE § 474 (West 1979)). Hence, most plaintiffs in California routinely add scores of John Doe defendants to each complaint, just in case they later discover some person who might also be liable on the original claim. *See* Hogan, *supra* note 117, at 70 ("[I]t behooves every plaintiff's counsel to frame any complaint filed in California's courts system [with Doe defendants]. . . .").

119. The Field Code's unknown defendant procedure, still used by most states, *see supra* note 27, did not permit generic John Doe pleading. It was not an "expedient to cover the name of a person not sued, not intended to be sued, and whom the plaintiff only purposes [sic] to make a defendant if he discovers at some later period that he ought to do so." Town of Hancock v. First Nat'l Bank, 93 N.Y. 82, 85 (N.Y. 1883) (disallowing use of fictitious name procedure for persons whom plaintiff knew at time of filing complaint). Likewise, only a very few states other than California have extended periods in which the plaintiff may identify and serve the Doe defendant.

potential John Doe parties create needless uncertainty and complicate case management.[120] Yet, plaintiffs continue to plead generic Doe defendants because they have no guidance from the federal pleading rules.

Federal guidelines for handling Doe plaintiffs are equally lacking. This problem has not gone unnoticed. Ten years ago, Professor Steinman urged better guidelines on what plaintiffs must do in order to proceed anonymously.[121] Her call has gone unanswered. With rare exceptions,[122] each plaintiff must guess about the proper procedures for filing a Doe complaint.[123] One court may accept the complaint without question, while another may insist that the plaintiff first file a formal mo-

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See, e.g., OHIO R. CIV. P. 3(A) ("A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant . . ., or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D) [the Ohio unknown defendant amendment provision]."); Sooy v. Petrolane Steel Gas, Inc., 708 P.2d 1014, 1017-18 (Mont. 1985) (holding that John Doe is a party to the action from its filing so long as he is served within three years); Souza v. Erie Strayer Co., 557 A.2d 1226, 1227 (R.I. 1989) (interpreting Doe summons provision in Rhode Island statute as tolling the statute of limitations so long as the actual defendant is served within a reasonable time).

120. *See infra* notes 232-34 and accompany text.

121. Professor Steinman noted the "lack of guidance" both in the Federal Rules of Civil Procedure and on the local district court level. Steinman, *supra* note 77, at 35 (1985). In June 1984, she wrote one court in each federal judicial district and each court of appeals asking whether the courts had any procedures for litigants seeking to proceed pseudonymously. *Id.* at 85-86 n.376. None of those responding had any specific local rules. *Id.* She therefore advocated that "clear procedures should be established governing pseudonymity requests." *Id. See also* Milani, *supra* note 78, at 1698-1706 (proposing procedures for use of the pseudonymous defendant in certain stigmatizing tort cases).

122. The federal district court for the District of Columbia has an established procedure for Doe complaints, although it is not formally embodied in written local rules. *See* Fidell, *supra* note 80, at 20. According to the clerk's office, it will accept a case filed in the name of a Doe plaintiff only if it is accompanied by a motion for leave to proceed as a Doe. *Id.* That motion must have a supporting memorandum of points and authorities and a proposed form of protective order. *Id.* Before accepting the complaint, the clerk will try to get the matter before a motions judge who will summarily rule on the motion and set the conditions for filing. *Id.*

123. Some courts have proposed procedures for future Doe complaints. The court in *Roe v. New York*, for example, suggested the means that Doe plaintiffs should use in that court to avoid dismissal in the future: (1) they should name at least one plaintiff by his true name, (2) they should somehow identify themselves under oath, or (3) they should seek the court's prior permission to proceed pseudonymously. 49 F.R.D. 279, 281 (S.D.N.Y. 1970) (citing Doe v. Kurtis, 306 F. Supp. 509 (S.D.N.Y. 1969) (Doe plaintiff's true name and address set forth in letters attached to complaint)); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (complaint verified by the signature of plaintiff under her true name), *appeal dismissed*, 396 U.S. 488 (1970); Buxton v. Ullman, 156 A.2d 508 (Conn. 1959) (directing that plaintiff get court's permission before filing Doe complaint)), *prob. juris. noted sub. nom.*, Poe v. Ullman, 362 U.S. 987 (1960), *appeal dismissed*, 367 U.S. 497 (1961).

tion before filing the complaint.[124] These variations on the fundamental issue of how to file a complaint may cause a plaintiff to lose his claim altogether.[125] Federal rulemakers long ago dictated that pleading be simple and clear in order to facilitate speedy resolution of an action on its merits.[126] Doe cases fall far short of this ideal.

B. Diversity Jurisdiction and Venue: Unknown Domicile of the John Doe Defendant

When the plaintiff wants to name a John Doe defendant, he faces not only pleading uncertainty but also doubts about his choice of forum. Two key elements of the forum selection process assume that the plaintiff knows the state in which each defendant is a citizen. If he wants to bring only state law claims in federal court,[127] the plaintiff must affirmatively plead complete diversity.[128] Even if the plaintiff has a federal claim, he must still select a federal district court having proper venue over the suit,[129] and one of the bases for setting venue is the defendant's place of residence.[130] In 1987, Congress tried to cure this dilemma in removal cases,[131] but it did not go far enough. Forum

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124. Compare the procedures outlined *supra* notes 122 & 123.

125. Although Rule 5(e) states that the "clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices," FED. R. CIV. P. 5(e), some clerks still may not accept unusual papers, such as a Doe plaintiff complaint. *See generally* Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir.) (affirming summary judgment on statute of limitations grounds where clerk refused to accept timely complaint because plaintiff had designated himself as "John Doe"), *cert. denied*, 444 U.S. 856 (1979); *see also* National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989) ("Absent permission by the district court to proceed anonymously, and under such other conditions as the court may impose (such as requiring disclosure of their true identity under seal), the federal court lacks jurisdiction over the unnamed parties as a case has not been commenced with respect to them.").

126. 5 WRIGHT & MILLER, *supra* note 13, § 1182, at 12 (stating that the federal "pleading rules illustrate two of the basic philosophies of the federal rules— simplicity of procedure and facilitation of the speedy determination of litigation on the merits"); *see also* FED. R. CIV. P. 1 (mandating that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

127. Although federal civil rights suits are the most common use of Doe defendants, plaintiffs often need to use unknown defendant pleading in diversity suits involving state law claims. *See, e.g.*, Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) (state law personal injury claims); Bryan v. Associated Containers Transp., 837 F. Supp. 633 (D.N.J. 1993) (state law personal injury claim).

128. *See* 28 U.S.C. § 1332(a) (1993); FED. R. CIV. P. 8(a).

129. *See generally* 28 U.S.C. § 1391 (1993 & Supp. 1995).

130. 28 U.S.C. §§ 1391(a)(1), 1391(b)(1).

131. *See* Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669 (codified at 28 U.S.C. § 1441(a) (1993)).

selection, like pleading, remains an uncertain proposition in many Doe defendant cases.

1. Confused Diversity Jurisdiction Standards in Doe Defendant Cases

Under long-established rules, the party seeking to invoke the court's jurisdiction, usually the plaintiff, must plead and establish that the court has subject matter jurisdiction. If he bases jurisdiction on diversity of citizenship of the parties, he must allege each party's citizenship.[132] This requirement poses no problem for the John Doe plaintiff. A plaintiff who wishes to proceed under a pseudonym can allege and prove his own citizenship, if necessary under seal or other protection which will preserve his anonymity. When the plaintiff names an unknown Doe defendant, however, he cannot meet these pleading requirements. At the pleading stage, the plaintiff does not know the defendant's identity—that is why he is naming a Doe defendant—and, therefore, cannot in good faith allege this unknown defendant's state of citizenship.

Federal courts have long struggled with this problem. On one extreme, some courts have tried to solve it by banning Doe defendants. Most noteworthy is the Ninth Circuit's effort, which began with the 1956 case of *Molnar v. National Broadcasting Co.*[133] There, a California plaintiff sued NBC and 10 generic John Doe defendants for injuries she suffered when she fell in NBC's building. She attempted to base federal jurisdiction on diversity of citizenship and affirmatively alleged that the Doe defendants were citizens of Delaware. The court found these allegations illusory[134] and held that the Doe defendants destroyed diversity.[135] In the same term, the Ninth Circuit also called Doe de-

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132. FED. R. CIV. P. 8(a); 28 U.S.C. § 1332. Rule 8(a) requires that a complaint set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends." *See also supra* note 13.

133. 231 F.2d 684 (9th Cir. 1956).

134. The court reasoned that:

> If the identity of defendants were known so that the pleader could state they were citizens of Delaware, she could also state their names and allege what part each had in the [accident]. But if the allegation that they are citizens of Delaware be, as on the face of the complaint it is, unfounded guesswork, the jurisdiction of the court is not established.

Id. at 686-87.

135. *Id.* at 687-88. The court reasoned that:

> [N]o one of the Rules of Civil Procedure under which federal courts operate gives warrant for the use of such a device. While the Federal Rules of Civil Procedure are not universally inclusive of all possible colorings of practice, no justification can be found therein for a

fendants "dangerous" and rejected their use in all suits originally filed in federal court, even federal question cases.[136] Despite these efforts to achieve a bright-line rule, the Ninth Circuit ban on Doe defendants was never completely successful,[137] and the court has formally retreated from it.[138] Nevertheless, the remnants of the ban continue to confuse practice in that court today.[139]

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violation of jurisdictional principles. . . . The national trial courts are of special jurisdiction. At the outset of every proceeding . . . jurisdiction should be established by allegation of essential facts.

Id. at 687.

136. The court, on non-diversity grounds, held that a plaintiff could not sue federal immigration agents by the fictitious designations of "John Doe and Richard Roe":

> These John Doe complaints are dangerous at any time. It is inviting disaster to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is still of record. Appropriate action has been taken by the trial court on its own motion in some such cases. Although the fact that the Rules of Civil Procedure contain no express prohibition upon the subject, there is no authority of which we are aware for the joining of fictitious defendants in an action under a federal statute. These defendants [John Doe and Richard Roe] should have been eliminated . . . .

Sigurdson v. Del Guerico, 241 F.2d 480, 482 (9th Cir. 1956) (citations omitted); *see also* Tolefree v. Ritz, 382 F.2d 566 (9th Cir. 1967) (holding that the trial court properly dismissed fictitious defendant in federal civil rights action); Hall v. Pacific Maritime Ass'n, 281 F. Supp. 54, 61 (N.D. Cal. 1968) (striking claim for relief from federal labor claim because Doe defendants "are not allowed" in federal practice).

137. *See, e.g.*, Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962) (noting without comment the presence of Doe defendants in civil rights suit).

138. By 1980, the Ninth Circuit formally had recognized the propriety of Doe pleading in at least some federal question cases. *See, e.g.*, Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980) (holding that although "[a]s a general rule, the use of 'John Doe' to identify a defendant is not favored," plaintiff in a federal civil rights action may be permitted to name John Doe defendants where their true identity is not known prior to filing of the complaint); *see also* Wilson v. Gerst, No. 89-16166, 1991 WL 126436, at 1 (9th Cir. 1991) ("Unknown defendants may be named in certain circumstances, such as when the identity of the alleged defendants is not known prior to the filing of the complaint and may be identified through discovery.").

139. Today, some courts in the Ninth Circuit allow Doe defendants in original diversity cases, while others, relying on the ban, reject them. *See* D. ARIZ. LOC. R. 1.9(d) (citing *Molnar* and directing that "the Clerk shall refuse to accept for filing any civil action or proceeding originally commenced in this Court any complaint wherein any party is designated and sought to be joined under a fictitious name"); C.D. CAL. LOC. CIV. R. 3.7.2.1 (directing the clerk to refuse any complaint, in actions based on diversity, that designates a party by a fictitious name); Swartz v. Gold Dust Casino, Inc., 91 F.R.D. 543 (D. Nev. 1981) (allowing Doe defendant in diversity suit where the identity of the alleged defendant is not known at the time of the filing of the complaint). Still others continue to rely on old authority such as *Sigurdson*, *supra* note 136, to ban Doe parties in federal question cases as well. *See, e.g.*, Riley v. Brazeau, 612 F. Supp. 674, 679 (D. Or. 1985) (citing *Sigurdson* and granting motion in federal securities action to dismiss Doe defendants because the "Ninth Circuit does not permit the inclusion of John Doe defendants"); Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985) (citing *Sigurdson* and striking Doe defendant in federal discrimination suit because "plaintiff has conceded that the Ninth Circuit frowns upon the naming of fictitious persons as defendants").

Most federal courts have shied away from an absolute ban on Doe defendants in diversity cases.[140] They follow a case-by-case method and use a variety of tests to determine whether to allow Doe defendants. Some courts try to determine whether John Doe represents an actual person or is a merely "nominal" party.[141] Other courts allow the plaintiff to attempt to prove that the Doe defendants and the named plaintiff are of diverse citizenship.[142] Still others appear to ignore any Doe defendants for diversity purposes unless and until the plaintiff determines their true identity and tries to add them to the suit.[143]

Prior to 1987, Doe cases removed to federal court from state court had all the questions of original diversity cases as well as the added problem of whether the plaintiff named a phantom Doe defendant solely to stay in state court.[144] Due to this fear of forum manipulation, courts refrained from banning removal of all Doe defendant actions. In place of such a bar, they created a variety of tests to determine when a Doe action could be removed and whether the Doe could remain after removal.[145] These tests confused removal practices. The removal debate

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140. However, some district judges individually impose complete bans on Doe defendants in their courts in diversity cases. Judge Shadur of the Northern District of Illinois, for example, actively reviews cases for subject matter jurisdiction and sua sponte dismisses Doe defendant cases based on diversity. *See, e.g.*, Salzstein v. Bekins Van Lines, Inc., 747 F. Supp. 1281 (N.D. Ill. 1990); McAdoo v. Wagoner, 669 F. Supp. 884 (N.D. Ill. 1987).

141. *See, e.g.*, Block v. First Blood Assocs., 691 F. Supp. 685, 697 (S.D.N.Y. 1988) ("Until [plaintiff] has identified the Doe defendants or stated an actionable claim against these fictitious parties, at least as to class or category or participation in acts alleged in the complaint, the Doe defendants must be regarded as nominal and not competent to defeat diversity jurisdiction.").

142. John Hancock Mut. Life Ins. Co. v. Central Nat'l Bank, 555 F. Supp. 1026, 1027 (N.D. Ill. 1983) (acknowledging that plaintiff in some cases can plead "in good conscience" the diverse citizenship of John Doe but holding that plaintiff could not do so for unknown claimants). It is interesting to note that the author of this opinion is Judge Shadur, who now actively pursues and dismisses Doe defendants. *See supra* note 140.

143. Ward v. Conner, 495 F. Supp. 434, 440-41 (E.D. Va. 1980) (postponing "final decision on the diversity question until the time for serving defendants with process has elapsed and the citizenship of any served 'John Doe' defendants can be ascertained"), *rev'd on other grounds*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Hannah v. Majors, 35 F.R.D. 179, 180 (W.D. Mo. 1964) (denying challenge to diversity jurisdiction because "no amendment has been permitted to make anyone really existing a defendant in the place of a Doe defendant"); *see also* Rodriguez v. City of Passaic, 730 F. Supp. 1314, 1319 n.7 (D.N.J.) (holding that Doe allegation in civil rights suit is "mere surplusage and will be disregarded by the court"), *aff'd*, 914 F.2d 244 (3d Cir. 1990); Dunn v. Paducah Int'l Raceway, 599 F. Supp. 612, 613 n.1 (W.D. Ky. 1984) ("John Does do not destroy diversity where plaintiff alleges diversity in good faith").

144. *See, e.g.*, Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939) ("It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.").

145. Even the Ninth Circuit, which purported to ban Doe parties in all diversity actions, had at least five exceptions for removed actions. Courts in the Ninth Circuit generally did not

came to a crescendo in 1987, when the Ninth Circuit, sitting en banc in *Bryant v. Ford Motor Co.*[146] and frustrated by the many different rules and exceptions, imposed an outright ban on removal of any state action with a Doe defendant.[147]

The Supreme Court granted certiorari in *Bryant*,[148] but Congress acted in the meantime to overturn it.[149] In 1988, Congress amended the removal statute to expressly allow removal of actions with Doe defendants.[150] The removal statute now states: "[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[151] This is the only section of the federal procedural scheme to directly address Doe parties. The change in the removal provision was a narrow measure, apparently prompted by the ban in *Bryant*.[152] Neither Congress nor the Judicial Conference, which

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remand removed diversity actions when: (1) named defendants proved that the Doe defendants are wholly fictitious; (2) the complaint contained no charging allegations against the Doe defendants; (3) plaintiffs unequivocally abandoned their claims against the Doe defendants; (4) the complaint did not identify the Doe defendants with sufficient specificity; and (5) the Doe defendants were not indispensable parties. *See, e.g.*, Bryant v. Ford Motor Co., 844 F.2d 602, 605 (9th Cir. 1987) (surveying exceptions and case law), *cert. granted*, 488 U.S. 816 (1988), *cert. vacated*, 488 U.S. 986, *vacated*, 886 F.2d 1526 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990).

146. *Id.*

147. *Id.* at 605-06 ("[T]he 30-day limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court.").

148. 488 U.S. 816, *cert. vacated*, 488 U.S. 986 (1988).

149. Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 1016(a), 102 Stat. 4654, 4669 (1988) (codified at 28 U.S.C. § 1441 (1994)). The Ninth Circuit later vacated its decision in *Bryant* to reflect the new removal statute. 886 F.2d 1526 (9th Cir. 1989).

150. *See* § 1016(a), 102 Stat. at 4669.

151. *Id.* In the same legislation, Congress also added another new provision to the removal statute that clarified the court's power to remand the case to state court if the plaintiff sought to substitute an actual defendant for John Doe who destroys the court's diversity jurisdiction: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." § 1016(e), 102 Stat. at 4670 (codified at 28 U.S.C. § 1447(e) (1994)).

152. *See generally* Susan E. Foe, Note, *Doe Pleading to Be Disregarded in Diversity Jurisdiction: Congress Responds to* Bryant v. Ford Motor Co., 19 GOLDEN GATE U. L. REV. 127 (1989). However, the *Bryant* decision had been argued, but not formally decided, when the Judicial Conference proposed changing the removal statute to accommodate Doe defendants. *Bryant* was argued en banc on July 16, 1987 and decided on November 6, 1987, following a 1986 decision by a panel of the Ninth circuit. The first formal record of the statutory John Doe removal proposal is in a report from a September 21-22, 1987 meeting, in which the Judicial Conference considered a general bill that was to become the Court Reform and Access to Justice Act. Before this meeting, the Doe removal provision was not in the proposed reform bill. *See Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 67 (1987 statement of Elmo B. Hunter, Chairman of Comm. on Court Administration of the

proposed the Doe defendant changes, formally addressed the impact of Doe defendants on the court's original jurisdiction over diversity actions.[153]

This partial solution has confounded courts. In *Macheras v. Center Art Galleries-Hawaii, Inc.*,[154] the court complained of a "troubling lack of guidance as to how the Doe defendant issue is to be handled in a section 1332 [original diversity] action,"[155] and then analyzed the effect of a bifurcated rule for removed and original diversity actions. If the presence of a Doe defeated diversity in an original section 1332 action, then a plaintiff who wanted to use Doe parties would have to resort to state court, thereby giving the defendant, who now could remove a Doe action, the exclusive choice of forum.[156] The court declined to give defendants this advantage or to impose forfeiture of Doe pleading "rights" as a condition on the plaintiff's filing in federal court.[157] The plaintiff in such cases already is taking a risk:

> A plaintiff who names Doe defendants, files suit in federal court at his peril. If a

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Judicial Conference of the United States). The reform bill, containing the Doe defendant removal provision, was enacted on November 19, 1988. § 1016, 102 Stat. at 4669-70.

153. The only official commentary on the new John Doe provision was the following:

> This amendment addresses a problem that arises in an number of states that permit suits against "Doe" defendants. The primary purpose of naming fictitious defendants is to suspend the running of the statute of limitations. The general rule has been that a joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or dropped, perhaps as late as the start of trial, or when it becomes clear that any claims against the Doe defendants are fictitious or merely nominal. At best, the result may be disruptive removal after a case has progressed through several stages in the State court. At worse, the result may be great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove. These problems can be avoided by the disregard of fictitious defendants for purposes of removal. Experience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity. If the plaintiff seeks to substitute a diversity-destroying defendant after removal, the court can act as appropriate under proposed § 1447(d) [enacted as § 1447(e), *see supra* note to deny joinder, or to permit joinder and remand to the State court.

H.R. REP. NO. 100-889, 100th Cong., 2d Sess. at 71 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6031-32.

154. 776 F. Supp. 1436 (D. Haw. 1991).

155. *Id.* at 1439.

156. *Id.* at 1439-40.

157. *Id.* at 1440.

> key party turns out to be nondiverse, the action will be dismissed for lack of jurisdiction. If the statute of limitations has expired at this point, plaintiff may not be able to refile the case in state court. Plaintiff therefore bears the risk of making a mistake about the citizenship of a Doe party. This is a sufficient concession to be exacted from the plaintiff who chooses the federal forum. There is no need for the federal court to fashion additional artificial limitations.[158]

The court in *Salzstein v. Bekins Van Lines, Inc.*[159] reached the opposite conclusion. Because the new statute addressed only removal, the court refused to extend it to an original diversity action. The court explained:

> Congress' 1988 response to *Bryant* . . . was limited to legislating in the context of removal, to prevent a plaintiff from barring a defendant's access to federal courts by the simple device of naming "Doe" as another defendant. But, the negative inference of such limited legislation is that it works no change (and implies none) where the question is where the plaintiff forfeits such access by the entirely self-controlled decision as to how the complaint should be drawn.[160]

Thus, the question of a Doe defendant's impact on diversity jurisdiction may be even more confused today than in 1987, when the Ninth Circuit set out to clarify the procedure for removal of Doe actions, or in 1988, when Congress tried the same.

2. *Uncertain Venue in Doe Defendant Actions*

Doe defendants also complicate venue, but not to the same degree as diversity jurisdiction. For most actions, whether based on diversity or federal question jurisdiction, venue is proper in the "district in which any defendant resides, if all defendants reside in the same state."[161] As with diversity jurisdiction, the uncertainty arises only where plaintiff seeks to name a John Doe defendant, not when he designates himself as

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158. *Id.* There would be no statute of limitations risk in a state that tolls a limitations period during the pendency of the action in another court. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5103(b) (Supp. 1995) (providing that actions originally filed in federal court but dismissed for lack of jurisdiction may be "transferred" to Pennsylvania commonwealth court and treated as though originally filed in that court); *see also* Easton, *supra* note 51, at 322 n.102 ("There is disagreement about whether the filing of a suit in a court that never had jurisdiction tolls the statute of limitations. But when plaintiff properly files his original complaint in federal court, and the court loses jurisdiction due to later joinder of non-diverse parties, the plaintiff's argument that the statute of limitations should toll is much stronger.") (citations omitted).

159. 747 F. Supp. 1281 (N.D. Ill. 1990).

160. *Id.* at 1283 n.4.

161. 28 U.S.C. §§ 1391(a)(1), (b)(1) (1994). Section 1391(a) governs actions based on the court's diversity jurisdiction. Section 1391(b) governs actions based on federal questions. Section (1) of each is identical.

a Doe plaintiff. It is defendant's place of residence, not plaintiff's, that serves as a basis for venue under the general venue provisions.[162] Unlike the diversity determination, however, the defendant's place of residence is not essential to venue selection. The venue statute provides other choices in addition to the defendant's residence, such as the district in which a substantial part of the events occurred.[163] Nevertheless, the inability to determine a Doe defendant's place of residence limits the plaintiff's available venue options and creates procedural uncertainty.

Where the plaintiff sues a single Doe defendant, his lack of knowledge of John Doe's residence necessarily eliminates that as a venue option. The plaintiff will have to sue where the events occurred. Where the plaintiff sues named defendants in addition to John Doe, however, the impact on venue is not as certain. Under the venue statute, place of residence is a proper venue only if "all defendants reside" in the same state.[164] Here, the question mirrors the problem in diversity cases, whether the Doe defendant may be disregarded so that the case can proceed in an otherwise proper forum, a district in a state where all of the named defendants live. No court has, as of the date this article was written, addressed this question.[165] But as the popularity of Doe de-

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162. For years, plaintiff's residence was a proper place for venue in diversity actions, but Congress eliminated it as a venue option when it revised the general venue statute in 1990. *See* Act of Dec. 1, 1990, Pub. L. 101-650, § 311, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5114 (codified at 28 U.S.C. § 1391 (1994)). Under selected special venue provisions, plaintiff's place of residence remains a proper venue. *See, e.g.*, 28 U.S.C. § 1391(e) (venue for actions against federal officers).

163. 28 U.S.C. §§ 1391(a)(2), (b)(2) (providing that diversity and non-diversity based civil actions may be brought only in a judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred," or in which "a substantial part of property that is the subject of the action is situated"). The statute also provides a catch-all provision if venue is not proper elsewhere by allowing the plaintiff in a diversity action to bring the action in a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, see § 1391(a)(3), or, in the case at a non-diversity based action, in the district in which any defendant may be found, see § 1391(b)(3). Finally, in an action against a federal officer or employee in his official capacity, the statute allows venue in a district where a defendant resides, where a substantial part of the events giving rise to the claims occurred, and where the plaintiff resides. § 1391(e). Such special provisions will not help plaintiffs in *Bivens* actions because such suits are against officers in their individual capacity and are governed by the general venue provision of § 1391(b) rather than § 1391(e). *See* Cameron v. Thornburgh, 983 F.2d 253, 256 (D.C. Cir. 1993) (stating that § 1391(e) applies only to suits against government officers in their official capacities and not to *Bivens* actions).

164. *See* §§ 1391(a)(1), (b)(1).

165. Very few cases have considered any issue relating to Doe defendants and venue. *See* Fidtler v. Doe, 1994 WL 12116, 1 n.2 (E.D. Pa. Jan. 13, 1994) (holding that in a Section 1983 action, that "[b]ecause the residence of the unnamed police officer is not known, 28 U.S.C.

fendants continues to grow, the uncertainty inevitably will cause procedural disputes and delays.

C. Relation Back: Incongruity of the "Mistake" Standard and Doe Substitutions

Ironically, the very rule that caused the explosion in federal Doe defendant practice—the 1966 relation back standard—creates the most difficulties for Doe defendants today. The primary reason that a plaintiff pleads a Doe defendant is to try to avoid a statute of limitations bar.[166] Limitations relief depends on relation back, and an amendment relates back under Rule 15(c) only where the plaintiff made a mistake in identifying the defendant. A Doe allegation simply is not a mistake. When federal rulemakers adopted the mistake standard in 1966, they did not consider its impact on Doe substitutions. Inattention is no longer possible. Since 1966, federal courts throughout the country have had to struggle with the mistake clause in Doe cases. They have failed to reach a workable solution. Not only is relation back muddled in federal Doe cases, but the confusion has spilled over and contaminated both non-Doe cases in federal court and Doe cases in state court.

1. Conflicting Applications of the Rule 15(c)(3) Mistake Standard to Doe Substitutions

In order to relate back, an amendment that changes a party after the limitations period must meet either the federal standards for relation back in Rule 15(c)(3), or in a limited number of cases, the relation back tests of state law, pursuant to Rule 15(c)(1).[167] This state law

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§ 1391(b)(1) does not apply"); Berger v. King World Prods., Inc., 732 F. Supp. 766 (E.D. Mich. 1990) (holding venue proper in district where all defendants reside even though one defendant was designated as Jane Doe because all parties agreed to her actual identity and citizenship).

166. *See, e.g.*, Craig v. United States, 413 F.2d 854, 856 (9th Cir.) ("The only purpose the naming of fictitious defendants could possibly serve is to make it possible to substitute named defendants after the statute of limitations has run."), *cert. denied*, 396 U.S. 987 (1969); McAllister v. Henderson, 698 F. Supp. 865, 869 (N.D. Ala. 1988) (same).

167. In 1991, rulemakers repackaged Rule 15(c): they added a new subsection 15(c)(1) which addressed relation back under state law, discussed *infra* notes 211-29; moved the "same transaction" standard (the original 1938 rule) into its own subsection, 15(c)(2); and put the 1966 changing party provisions—the notice and mistake clauses—in Rule 15(c)(3). To read the entire text of the current Rule 15(c), see *supra* note 15. In addition to this reorganization, rulemakers made two revisions to the change of party provision of Rule 15(c)(3). One expanded the notice period. *See* discussion *infra* notes 169-71. The other clarified that the notice and mistake clauses apply to both substitution of a new party and the correction of the name of an existing party. *See* FED. R. CIV. P. 15(c)(3); FED. R. CIV. P. 15 advisory committee's note (1991 Amendment) (revis-

option is new, part of the 1991 amendment to Rule 15(c), and is discussed in the next section. As will be seen, most amendments adding new defendants, including Doe substitutions, are judged by the same standards, whether under state or federal law. Those standards, now embodied in Rule 15(c)(3), are: first, that the claim against the new defendant arise out of the same transaction as a claim in the original complaint; second, that the new defendant have timely notice of the original lawsuit; and third, that the new defendant timely realize that "but for a mistake concerning the identity of the proper party, the action would have been brought against the [new defendant]."[168]

True Doe amendments should always arise out of the same facts as the original pleading and thus meet the first test of Rule 15(c)(3). Ordinarily, the amended pleading is a verbatim restatement of the original complaint except for the name of the defendant. The substitution merely replaces "John Doe" with the defendant's actual name. Thus, the same transaction test presents no problems for Doe substitutions.

The second requirement of timely notice requires a factual determination in each case. If the new defendant did not have timely notice of the lawsuit, the plaintiff cannot add him, regardless of whether the plaintiff originally described him as a Doe defendant or merely misstated his name. Until 1991, courts required the new defendant to learn

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ing introductory clause to refer to an amendment that "changes the party or the naming of the party," in place of the former provision that referred only to amendment "changing the party"). This clarification addressed a point of confusion that followed the 1966 rule. Although the 1966 revision of Rule 15(c) was aimed at both forms of amendments, some courts lost sight of this aim and took opposing views on the effect of the 1966 rule. A few continued to adhere to the traditional view of relation back and restricted post-limitations amendments "to situations in which the plaintiff has actually sued and served the correct party, the party he intends to sue, but merely mistakenly used the wrong name of the defendant." People of the Living God v. Star Towing Co., 289 F. Supp. 635, 641 (E.D. La. 1968); *see also In re* Kent Holland Die Casting & Plating, Inc., 928 F.2d 1448 (6th Cir. 1991) (affirming the *Marlowe* rule that new parties cannot be added after the limitations period); Marlowe v. Fisher Body, 489 F.2d 1057, 1064 (6th Cir. 1973) (holding that 1966 amendment applies only to "correction of misnomers" and does not change the rule that "an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations"). Some courts took the other extreme and held that where the amendment merely seeks to correct a misnomer, the amendment may be made without reference to the notice and mistake requirements. *See, e.g.*, Wentz v. Alberto Culver Co., 294 F. Supp. 1327, 1328 (D. Mont. 1969) (finding a "difference between correcting a misnomer and changing a party" and holding "that a misnomer may be corrected under the amendment power expressed in the first sentence [same transaction clause] of Rule 15(c)"). *Contra* Ingram v. Kumar, 585 F.2d 566, 570 (2d Cir. 1978) (citing *Wentz* and other such "misnomer" cases and finding that the "history of the 1966 amendment to the Rule indicates to the contrary, as does the weight of authority"), *cert. denied*, 440 U.S. 940 (1979).

168. FED. R. CIV. P. 15(c)(3)(B).

of the lawsuit before the limitation period expired.[169] This short notice period often prompted courts to deny relation back of any amendments adding a defendant, Doe substitution or otherwise. In 1991, rulemakers expanded the notice period[170] to include the extra time for service after the limitations period—120 days after filing of the original complaint.[171] Under this rule, a diligent plaintiff can satisfy the notice ele-

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169. The actual wording of the 1966 version of Rule 15(c) required the defendant to have the requisite notice and knowledge "within the period provided by law for commencing the action against him." 39 F.R.D. 82 (1966). For 20 years, courts and observers debated whether this phrase meant solely the limitations period or whether it also included the additional time after filing the complaint for service of process under Rule 4. *See* FED. R. CIV. P. 4(m) (allowing at least 120 days for service). Some courts held that Rule 15(c) included the extra time for service. *E.g.*, Ringrose v. Engelberg Huller Co., 692 F.2d 403, 410 (6th Cir. 1982); Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); Ingram v. Kumar, 585 F.2d 566, 571 (2d Cir.), *cert. denied*, 440 U.S. 940 (1979). Other circuits held that the new defendant must have the specified notice within the limitations period. *E.g.*, Watson v. Unipress, Inc., 733 F.2d 1386, 1390 (10th Cir. 1984); Trace X Chemical Inc. v. Gulf Oil Chemical Co., 724 F.2d 68, 70-71 (8th Cir. 1983). In 1986, the Supreme Court temporarily settled this debate and held that the time period under Rule 15(c) did not include the extra period for service. Schiavone v. Fortune, 477 U.S. 21, 31 (1986) (the "linchpin is notice, and notice within the limitations period"). Commentators criticized *Schiavone* as imposing a meaningless double standard. When the plaintiff correctly named the defendant, he did not have to give that defendant any form of notice within the limitations period (he had the extra time allotted for formal service under Rule 4), but if the plaintiff made any mistake in naming the defendant, he had to ensure that that defendant had notice within the limitations period. *See* Joseph P. Bauer, Schiavone: *An Un*-Fortune-*ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Robert D. Brussack, *Outrageous* Fortune*: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671 (1988); Lawrence Epter, *An Un*-Fortune-*ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation Back Doctrine*, 17 FLA. ST. U. L. REV. 713 (1990). *But see* Nathan M. Gundy III, Note, Schiavone v. Fortune: *A Clarification of the Relation Back Doctrine*, 36 CATH. U. L. REV. 499, 503, 529 (1987) (recognizing "flaws" in the Court's decision but approving it as a "much needed clarification").

170. In most cases the 1991 change lengthens the notice period, but it also shortens the notice period in a narrow set of cases—where plaintiff files suit several months before the limitations period expires and defendant receives the requisite notice after the 120-day period but before the limitations period expires. Any amendment made after the limitations period will not relate back under new Rule 15(c) because defendant did not have notice within 120 days; whereas it would have related back under the old rule because the defendant had notice within the limitations period. *See* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 210 (2d ed. 1995).

171. Rulemakers agreed that the strict timing requirement of *Schiavone*, *supra* note 169 was "inconsistent with the liberal pleading practices" of the Federal Rules and changed Rule 15(c) to define the notice period as the time provided under Rule 4 for service, which currently is set forth in Rule 4(m). FED. R. CIV. P. 15(c) advisory committee's note (1991 Amendment). Rule 4(m) directs that the plaintiff serve all defendants within 120 days but allows some flexibility:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause

ment of Rule 15(c)(3) if, within 120 days of filing the complaint, he moves to amend the complaint and serves the new defendant with the motion to amend.[172] This lengthened notice period will dramatically reduce the number of cases in which the court will be able to rely on untimely notice grounds in order to deny relation back of Doe substitutions. They can no longer avoid the thorny problem of reconciling the mistake clause with Doe pleading.[173]

The federal courts that have reached the question of mistake in the Doe context generally fall into one of three camps.[174] The first group takes a simple and literal reading of the mistake language and holds that a plaintiff's lack of knowledge of the correct defendant is not a mistake concerning his identity.[175] These courts, led by the Seventh Circuit, effectively bar any Doe substitutions after the limitations period. On the other extreme are a number of courts in the Third Circuit and elsewhere that allow Doe substitutions by broadly interpreting the mistake prong.[176] They redefine the standard to include any instance in which the plaintiff omitted the proper defendant from the original complaint. The third, and best, approach ignores the actual mistake language and instead looks to whether the complaint Doe allegations were

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for the failure, the court shall extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m). In amending Rule 15(c) to incorporate the Rule 4(m) period, rulemakers clarified that the Rule 15(c) notice period "allows not only the 120 days specified in [Rule 4(m)], but also any additional time resulting from any extension ordered by the court pursuant to that rule." Rule 15(c) advisory committee's note (1991 Amendment); *see also* Ford v. Hill, 874 F. Supp. 149 (E.D. Ky. 1995) (denying relation back of Doe substitution on other grounds, but finding timely notice where plaintiff served defendant with the amended complaint more than 120 days after filing of the original complaint but within the time extended by the court under Rule 4(m)).

172. The motion itself serves as notice of the lawsuit and unequivocally puts the new defendant on notice that he is an intended defendant. *See, e.g.*, Cruz v. Wilmington, 814 F. Supp. 405 (D. Del. 1993) (holding that substitution of named police officers for Does within 120 days automatically meets the Rule 15(c)(3) requirements).

173. Prior to 1991, courts avoided addressing the mistake clause in Doe cases by finding untimely notice. *See* Saffron v. Wilson, 481 F. Supp. 228, 256 (D.D.C. 1979) (noting and avoiding a "host of problems" as to meaning of mistake in the Doe context); *see also* Welch v. Louisiana Power & Light Co., 466 F.2d 1344 (5th Cir. 1972) (remanding Doe case on notice grounds); Craig v. United States, 413 F.2d 854 (9th Cir.) (denying relation back of Doe substitution on notice grounds), *cert. denied*, 396 U.S. 987 (1969); Stephens v. Balkamp, Inc., 70 F.R.D. 49 (E.D. Tenn. 1975) (same).

174. *See generally* Douglas v. County of Tompkins, No. 90-CV-841, 1995 WL 105993, at 7-8 (N.D.N.Y. Mar. 2, 1995) (surveying "split" in the courts on "whether unknown identity constitutes a mistake of identity under Rule 15(c)(3)(B)"); Bloessner v. Office Depot, Inc., 158 F.R.D. 168, 170-71 (D. Kan. 1994) (same).

175. *See* discussion *infra* part III.C.1.a.

176. *See* discussion *infra* part III.C.1.b.

sufficient to put the new defendant on notice that he was the original intended defendant.[177] The danger of these three approaches is not just that they conflict with each other, but also that all three, in varying degrees, undermine the purpose of the mistake clause.

a. Strict Reading of "Mistake" to Forbid Doe Substitutions

The Seventh Circuit was the first court of appeals to directly consider and reject reconciliation of the mistake language with the Doe scenario. In *Wood v. Worachek*,[178] plaintiff brought a Section 1983 action against the Milwaukee chief of police and certain named police commissioners and officers. He also included as defendants the arresting officers whose names he did not know and could designate only as John Doe and Richard Roe. After the limitations period, he sought to add four specific officers for John Doe and Richard Roe. The Seventh Circuit denied relation back, even though the officer at issue[179] had received timely notice of the suit.[180] The court denied relation back because the plaintiff had not made a mistake within the meaning of Rule 15(c):

> Rule 15(c)(2) [now 15(c)(3)(B)] permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party. Thus, in the absence of a mistake in the identification of the proper party, it is irrelevant for the purposes of Rule 15(c)(2) whether or not the purported substitute party knew or should have known that the action would have been brought against him. The record in this case clearly indicates that the plaintiff did not mistake the identity of the proper party defendant, and he is therefore precluded from availing himself of the benefits provided by Rule 15(c)(2).[181]

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177. *See* discussion *infra* part III.C.1.c.

178. 618 F.2d 1225 (7th Cir. 1980).

179. The district court held that the claims against all four new officers were barred by the statute of limitations. *Id.* at 1228. On appeal, the Seventh Circuit addressed the dismissal of only one officer. *Id.* at n.1. The plaintiff urged the court to consider the dismissal of all four officers, but the court held that the plaintiff had not properly preserved for appeal the issue as to the other three officers and refused to consider them. *Id.*

180. The court questioned whether the notice—the plaintiff had deposed the officer before the limitations period ran—was sufficient to ensure that the defendant "not be prejudiced in maintaining a defense on the merits," but based its denial of relation back on the mistake requirement. *Id.* at 1230.

181. *Id.* (citing Sassi v. Breier, 584 F.2d 234 (7th Cir. 1978)). Like *Wood*, *Sassi* was a Section 1983 claim against named and unknown Milwaukee police officers. The *Sassi* court denied relation back of the plaintiff's attempted substitution of actual officers on notice grounds because there was nothing in the record to rebut the new defendant officers' affidavits that they had no

Although the Seventh Circuit purports to follow the literal letter of the rule, its reading of the mistake clause does not comport with the goal of Rule 15(c).

In *Wood*, the court held that whether the new party knew he was the intended defendant in the suit is "irrelevant." Yet that is precisely the aim of the mistake clause. The rule requires a mistake because that is a means by which to assure that the defendant know that the plaintiff intended to bring the action against him. Doe allegations provide an alternative, if not better, method to put the defendant on notice that "the action would have been brought against him" as required by Rule 15(c)(3)(B). A well-pleaded Doe allegation eliminates any speculation by describing the particular defendant whom the plaintiff intends to sue and explaining why the plaintiff did not sue the defendant by name—he did not know defendant's name. The *Wood* rule ignores this value of Doe allegations.

The Seventh Circuit's limited reading of the mistake clause can cause unduly harsh results even in non-Doe cases. The impact of such a limited reading is illustrated by *Wilson v. United States*.[182] Wilson was injured while testing boats for the Navy and brought suit against his employer, General Electric, under the Jones Act. He made a mistake in drafting his complaint. The United States Navy, not General Electric, owned the equipment, and General Electric won summary judgment on this ground. Wilson moved to substitute the United States as defendant, and by the time he filed the amended complaint, the limitations period had expired. The First Circuit denied relation back, relying in part on the Seventh Circuit's decision in *Wood*, because Wilson's lack of knowledge of the proper defendant was not a mistake within the meaning of Rule 15(c)(3)(B).[183]

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knowledge of the suit and did not know that they were intended defendants. *Sassi*, 584 F.2d at 235. Since *Wood*, the Seventh Circuit has reaffirmed its strict reading of the mistake clause in Doe cases. *See* Worthington v. Wilson, 8 F.3d 1253, 1256-57 (7th Cir. 1993) (applying the *Wood* rule to deny Doe substitution).

182. 23 F.3d 559 (1st Cir. 1994).

183. *Id.* at 563. The First Circuit has not yet addressed whether relation back of a Doe amendment is consistent with Rule 15(c). Prior to *Wilson*, at least one district court in the First Circuit allowed relation back of a Doe substitution in a Section 1983 action involving defendant police officers, notwithstanding the preexisting authority in the Seventh Circuit. *See* Ocasio Ortiz v. Betancourt Lebron, 146 F.R.D. 34 (D.P.R. 1992). Similarly, the Fourth Circuit has endorsed the Seventh Circuit view of mistake in a non-Doe case, but it has not yet applied it to Doe substitutions. *See* Western Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1207 (4th Cir. 1989). District courts in the Fourth Circuit have extended the Seventh Circuit view to Doe cases and denied relation back of Doe substitutions. *See* Bruce v. Smith, 581 F. Supp. 902, 907 (W.D. Va.

Wilson obviously did not confuse General Electric with the United States government, but he may have mistook which entity owned the boats. In other words, Wilson may have made a "mistake concerning the identity of the proper party"—the boat owner. If his complaint alleged that General Electric owned the boats, and if the United States had the requisite notice of the complaint, then it very well could have understood that it was the intended defendant because it owned the boats. The First Circuit, however, foreclosed any such analysis by adopting the *Wood* rule.[184]

b. Broad Re-definition of "Mistake" to Allow Doe Substitutions

Doe cases have wreaked havoc on the mistake clause in the other extreme as well. Beginning with a 1972 John Doe case in Nevada federal court, *Williams v. Avis Transport of Canada, Ltd.*,[185] a number of courts have used an overly broad reading of the mistake language. In *Avis*, Williams had an accident while driving a Chrysler station-wagon, leased from Avis, and equipped with Goodyear tires. He brought a products liability action in Nevada state court against Avis and "Does I through X," claiming that Avis leased the car with defective tires. Avis removed the action to federal court and then brought in Chrysler and Goodyear by impleader. Williams next tried to add claims against Chrysler and Goodyear, which responded that the statute of limitations

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1984) (relying on *Wood*). In the Sixth Circuit, the court of appeals has yet to rule on the issue, and district courts are split on application of the Seventh Circuit's *Wood* rule to Doe substitutions. *Compare* Ford v. Hill, 874 F. Supp. 149, 153-54 (E.D. Ky. 1995) (relying on Worthington v. Wilson, 8 F.3d 1253 (7th Cir. 1993), to deny relation back of Doe substitution in absence of a "mistake") *with* O'Brien v. City of Grand Rapids, 783 F. Supp. 1034, 1038-39 (W.D. Mich. 1992) (noting *Wood* and intercircuit conflict in Doe cases but granting relation back of Doe amendment). The only circuit to directly address the *Wood* rule in a Doe case is the Second Circuit, which followed *Wood*. *See* Barrow v. Wethersfield Police Dep't, 66 F.3d 466 (2d Cir. 1995) (citing *Wood* and denying relation back of a Doe substitution because "the new names were added not to correct a mistake but to correct a lack of knowledge").

184. 23 F.3d at 563. Even if the court had reached the issue, however, it would have denied the new claim on the grounds that the United States did not have timely notice of the filing of the complaint and that the plaintiff delayed in filing the amended complaint for five months after the court granted leave to amend. *Id.* at 61-62. Nevertheless, the First Circuit's endorsement of *Wood* in *Wilson* creates bad precedent. The court in Ford v. Hill, 874 F. Supp. 149 (E.D. Ky. 1995), for example, relied upon *Wilson* to deny a Doe substitution even though the plaintiff timely served the defendant with the amended complaint that unequivocally told him that he was the intended John Doe defendant. *Id.* at 153-54.

185. 57 F.R.D 53 (D. Nev. 1972).

barred Williams' claims against them. Williams sought relation back under Rule 15(c).[186]

The court split its decision. It allowed relation back only as to Goodyear and based the difference on notice.[187] Avis had notified Goodyear, but not Chrysler, of the suit within the limitation period. The court therefore found that the amendment as to Chrysler failed under the notice prong of Rule 15(c).[188] Goodyear, on the other hand, had timely notice of the suit, so the court next considered the mistake clause. The court did not analyze whether the naming of the Doe defendant was a "mistake"; instead, it simply redefined the mistake language: "[a] mistake within the meaning of the rule exists whenever a party who may be liable for the actionable conduct alleged in the Complaint was omitted as a party defendant."[189]

The *Avis* test—whether the plaintiff omitted a defendant—is far too broad. Every amendment that seeks to add a defendant would meet this test, rendering the mistake clause superfluous. The plaintiff could add any defendant, so long as the defendant had notice of any lawsuit concerning activity in which "he may be liable."[190] The "may be liable" qualification in the *Avis* test does not protect the defendant's interest in repose. Statutes of limitation give repose to alleviate fear of liability. The whole point of repose is to relieve a potential defendant of the uncertainty concerning activity for which he fears the plaintiff may seek to hold him liable. If he has no such fear, there is no need for repose.

Courts have relied upon the *Avis* test in non-Doe cases to justify relation back even where the new defendant was entitled to repose. In *Taliferro v. Costello*,[191] for example, the court used the *Avis* test to

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186. Williams also argued that the court should apply the Nevada state rule of relation back, which he argued liberally allowed Doe substitutions without regard to the limitations in Rule 15(c). *Id.* at 55-56. The court rejected this contention:

> No federal statute or rule specifically countenances the naming of fictitious parties in a lawsuit, and the policy expressed in the Ninth Circuit decisions is so strongly opposed to the practice that this Court is constrained to reject the contention that the substitution of a real party for a "Doe" defendant under circumstances which do not satisfy the requirements of F.R.C.P. 15(c) relates back to the commencement of the action for purposes of the statue of limitations. It is a procedural matter, not one of substantive law.

Id. at 56.

187. *Id.* at 55.

188. *Id.*

189. *Id.*

190. *Id.*

191. 467 F. Supp. 33 (E.D. Pa. 1979).

form a new mistake standard—the "joinder test"—that offers no protection of the defendant's repose. There, Tom Taliferro and his wife brought a Section 1983 action against Frank Costello, the deputy sheriff of the city of Philadelphia. After the limitations period, they sought to add the city of Philadelphia to the suit. The court allowed the addition of the city, relying on Doe cases as "strong support" for a broad reading of Rule 15(c):[192] "Where an amendment seeks to add a new defendant, [the mistake clause] of Rule 15(c) seems designed to insure that prior to the expiration of the limitation period, the new defendant knew (or should have known) that his joinder was a distinct possibility."[193]

The *Taliferro* joinder test, like the *Avis* test, renders the mistake prong of Rule 15(c) meaningless. To be sure, in an obvious mistake situation, or where the complaint describes a Doe defendant, the intended defendant, once he knows of the suit, should understand that he was the intended defendant to that suit. Once he realizes that he was an intended defendant, he will then also understand that his joinder is a distinct possibility. The flaw of the joinder test is that it tries to reverse this logic. That a defendant appreciates that he might be joined in a suit does not mean that he also knows that the plaintiff actually thought he had named him as an original defendant.[194]

Even in the *Taliferro* case itself, the broad joinder test caused the wrong result. The Taliferros' error was not the type that should justify relation back. Admittedly, their plight was worthy of sympathy. They filed pro se and too narrowly interpreted their available legal claims.[195]

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192. Citing *Avis* and other cases that allowed Doe substitutions to relate back, including Varlack v. SWC Caribbean, 550 F.2d 171 (3d Cir. 1977), *see infra* notes 200-03, the court concluded that "[g]iven the frequently expressed hostility to John Doe complaints, these decisions provide strong support for a holding that Rule 15(c) applies when an amendment adds a new defendant." 467 F. Supp. at 35 n.3.

193. *Id.* at 36. Just four years before *Taliferro*, another court in the Third Circuit reached the opposite result as it considered and rejected the "expansive definition" of *Avis* as rendering the mistake requirement "redundant" of the notice prong. Francis v. Pan Am. Trinidad Oil Co., 392 F. Supp. 1252, 1259 n.13 (D. Del. 1975). Similarly, a few courts in the Third Circuit continue to reject *Avis* after *Taliferro*. *See* Great Northeastern Lumber & Millwork Corp. v. Pepsi Cola Metro. Bottling Co., 785 F. Supp. 514 (E.D. Pa. 1992) (rejecting *Avis* rule as going "too far").

194. Indeed, courts have misapplied the *Taliferro* joinder test, or some other variation on the *Avis* test, to allow addition of defendants who had affirmative reason to believe that the plaintiffs did not intend to sue them. *See, e.g.*, Davis v. Buffalo Psych. Ctr., 613 F. Supp. 462 (W.D.N.Y. 1985) (citing *Taliferro* in employment discrimination suit to allow late addition of defendant which plaintiff knew and previously named in related EEOC charge but did not name in original complaint), *vacated in part on other grounds*, 623 F. Supp. 19 (W.D.N.Y. 1985).

195. In their amended complaint, the Taliferros, through their new lawyer, wanted to rely

However, Rule 15(c) does not—and should not—allow amendments after the limitations period to cure every kind of mistake. The mistake should be of the type that reasonably puts the potential defendant on notice that the plaintiff intended to sue him in the first place. The Taliferros did not meet this standard—they did not intend to sue the city when they filed their complaint. As far as the city was concerned, the Taliferros could have made this choice for any number of reasons, including not only mistakes but also deliberate strategic decisions. Repose and Rule 15(c)(3)(B) are supposed to protect potential defendants from having to speculate in every case why plaintiffs did not sue them and whether they should expect to be joined.[196]

The *Avis* and *Taliferro* analyses are not well-suited for Doe cases. They do nothing to assure that the new defendant understands from the original Doe pleadings that he is an intended defendant. Doe allegations do not always effectively put a potential defendant on notice that he is an intended defendant. A simple listing of generic Doe defendants, without more, does not tell the defendant that he is the John Doe. Such notice, however, would be provided by particularized allegations that describe John Doe and his involvement in the events giving rise to the suit. In *Avis*, for example, if Williams described one of the Doe defendants as the unknown manufacturer of the tire, Goodyear may have known it was an intended defendant.[197] If on the other hand, Williams had listed John Doe defendants only generally,[198] then Good-

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both on an "official policy" basis for the city's liability under Section 1983, which the Supreme Court had just the year before recognized in Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), *see supra* notes 38 and 40, as well as claims that arguably existed against the city even before *Monell*—state claims under pendent jurisdiction and claims arising directly under the Fourteenth Amendment. 467 F. Supp. at 36.

196. By contrast, in Wilson v. United States, 23 F.3d 559 (1st Cir. 1994), the U.S. government, assuming it had notice of the complaint itself, likely would not have had to speculate why it, as owner of the boats in question, was not named as defendant. *See supra* notes 182-84. Plaintiff apparently wanted to sue the owner of the boat, but mistakenly identified General Electric as the owner. *See* 23 F.3d at 560. Mistaken identification of the owner of the particular boat in question should have been enough to give the true owner, the government, reason to believe that it was the intended defendant.

197. *See Avis*, 57 F.R.D. 53. Because the court did not consider the adequacy of the Doe allegations, the opinion does not disclose whether the identity of the tire manufacturer was actually unknown to Williams and whether the Doe designations in any way described Goodyear or its alleged role in the accident. Likewise, the opinion does not state whether Goodyear timely saw the actual complaint so that it could appreciate the Doe allegations, or just heard of the suit from Avis.

198. Nevada, the state in which Williams originally brought his action, does not permit generic Doe designations, at least as of 1991. In that year, the Nevada Supreme Court clarified that a plaintiff cannot just list Doe defendants as a precaution against the possibility of not having

year, although knowing that it was potentially liable, may not have known that it was an intended defendant and the amendment would contravene the repose element of the statute of limitations. The *Avis* court, however, never addressed these questions because its broad reading of the mistake clause rendered an in-depth analysis of the Doe allegations unnecessary.[199]

c. Evaluation of the Notice Effect of Doe Allegations

Very few courts evaluate the adequacy of the actual text of Doe allegations and the quality of the notice given to the defendants. No court of appeals has formally adopted an in-depth analysis of the Doe allegations as the proper means to address a Doe substitution under Rule 15(c). The Third Circuit, however, came close to that endorsement in *Varlack v. SWC Caribbean, Inc.*[200] There, Varlack lost part of his arm as a result of a fight with an employee at an Orange Julius restaurant. He sued SWC Caribbean, which owned the restaurant, and an " 'unknown employee' of Orange Julius Restaurant."[201] After the limitations period expired, Varlack tried to substitute the night manger of the restaurant, a man named Cannings, for the unknown employee. The Third Circuit held that the relation back criteria of Rule 15(c) governed the timeliness of Doe substitutions and found that Varlack's

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identified all wrongdoers. Nurenberger Hercules-Werke GMBH v. Virostek, 822 P.2d 1100, 1106 (Nev. 1991) (holding that plaintiff must include the Doe in the caption, plead the basis for identifying the Doe by a fictitious name, specify the Doe's connection with the acts in the complaint, and exercise due diligence in ascertaining the true identity of John Doe).

199. In Heinly v. Queen, 146 F.R.D. 102 (E.D. Pa. 1993), the court both cited the joinder test and looked at the notice effect of the Doe allegations and, in so doing, demonstrated the futility of the joinder test. Heinly was shot during an arrest and brought a Section 1983 action against named defendants and ten John Does, whom he described as members of the special assault team that arrested him. Heinly identified the officers in discovery and sought to add six officers by name after the limitations period had expired. The court relied on the *Taliferro* joinder test to justify relation back of the substitution, but also noted that the Doe allegations were sufficient to put the officers on notice that they were the intended defendants. *Id.* at 107-08. If the Doe allegations were sufficient notice, then the joinder test added nothing. The officers understood that their joinder was a possibility because they knew that they were the intended defendants. On the other hand, the joinder test would have permitted relation back even absent any Doe allegations. All persons involved in an arrest should realize that their joinder to a Section 1983 suit based on that arrest is a possibility, regardless of the naming of Doe defendants. *See* Sendobry v. Michael, 160 F.R.D. 471, 473 (M.D. Pa. 1995) (allowing Doe substitution, relying in part on *Heinly* for joinder test, and holding that naming of Doe defendant is "immaterial" because a "party who participated in conduct described in a complaint should reasonably expect to be named regardless of whether the caption refers to that party as 'John Doe' or as an 'unnamed defendant' ").

200. 550 F.2d 171 (3d Cir. 1977).

201. *Id.* at 174.

amendment met all three standards.[202] As to the mistake clause, the court stated:

> Cannings testified that he knew there was a suit against "an 'Unknown' Employee of Orange Julius Restaurant." He also admitted that the phrase "Unknown Employee" referred to him, even though it didn't use his name, and that if his name had been captioned he would have been one of the persons sued. We think this testimony was manifestly a sufficient basis on which the district court could conclude that the final condition for relation back under Rule 15(c) was satisfied.[203]

The Third Circuit did not evaluate the adequacy of the Doe allegations themselves because it did not need to—Cannings admitted that he understood that he was the intended unknown employee defendant.

In *Campbell v. Bergeron*,[204] the district court did evaluate the Doe allegations and held that they were adequate to put a reasonable person on notice that he was the intended defendant.[205] Campbell suffered a serious eye injury while in jail and brought a Section 1983 action against the sheriff, whom he identified by name, and John Doe, a deputy sheriff, whom Campbell could not name but described through his actions on the night of the arrest.[206] Soon after Campbell served the sheriff, the sheriff told the deputy, a man named Pattan, about the suit and the allegations contained in the complaint. During discovery, Campbell identified Pattan as the deputy and sought to add Pattan by his true name. Pattan claimed Campbell had moved to amend too late.[207] The court allowed the amendment to relate back:

> [T]here can be no doubt that this complaint described Deputy Pattan in everything except his correct name and that anyone having familiarity with the incident and with the complaint would know that the "John Doe" specified was actu-

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202. *Id.* at 174-75.

203. *Id.* at 175. The court in *Taliferro v. Costello* relied on this holding as support for its broad reading of the mistake clause to allow relation back at all Doe defendants. 467 F. Supp. 33 (E.D. Pa. 1979); *see supra* note 192. However, *Varlack* never attempted to reconcile the language of the mistake clause with the content of the Doe allegations.

204. 486 F. Supp. 1246 (M.D. La. 1980), *aff'd*, 654 F.2d 719 (5th Cir. 1981).

205. *Id.* at 1251.

206. The complaint alleged that Campbell had requested deputy John Doe to move him to another cell and that John Doe refused. *Id.* at 1250.

207. Louisiana has a "prescription" provision rather than a statute of limitations. *Id.* at 1251. It requires the action to be brought in one year but also interrupts prescription if a suit is timely filed against one joint obligor or tortfeasor. *Id.* Ordinarily, filing of the action against the sheriff would have tolled the prescription period against the deputy. However, the court found that the sheriff could not be liable under Section 1983 because he was not personally involved in the alleged conduct and that therefore there was no interruption of prescription as to the deputy. *Id.*

> ally Pattan. Thus, anyone who received a copy of the complaint knew or should have known that, but for a mistake concerning the identity of Pattan, the action would have been brought against him.[208]

This focus on the Doe allegations themselves is the best of the three approaches to relation back of Doe substitutions.[209] It captures the intent of the mistake clause without redefining it. Nevertheless, even this approach presents the potential for misapplication in non-Doe cases. Although it inflicts less damage on the mistake clause than the *Avis* and *Taliferro* joinder tests, it still ignores the mistake language, which may suggest that the mistake clause is unimportant.[210] In non-Doe cases, the mistake clause cannot be ignored. Where Doe allegations do not alert the intended defendant, the mistake in identity requirement protects repose. Thus, even the courts that follow the spirit of the rule threaten to weaken its protections. Rule 15(c)(3), as currently drafted, simply cannot adequately handle Doe substitutions.

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208. *Id.*

209. Other courts have applied this approach to both deny and grant relation back to Doe substitutions. For example, in Ames v. Vavreck, 356 F. Supp. 931 (D. Minn. 1973), *see supra* notes 670-75, the court allowed the substitution based on the plaintiffs' clear intent to add the individual officers as reflected in their Doe allegations. 356 F. Supp. at 942; *see also* Douglas v. County of Tompkins, 1995 WL 105993, at 10 (N.D.N.Y. Mar. 2, 1995) (denying relation back where "there were no descriptive details in the original complaint as to the Doe and Roe defendants from which [the new defendants] could even have arguably inferred that they were the unknown defendants therein"); Brown v. Sheridan, 150 F.R.D. 462, 464-65 (N.D.N.Y. 1993) (allowing relation back of amendment naming specific employees of Office of Mental Health where they fit the description of John Does in the original complaint); Ocasio Ortiz v. Betancourt Lebron, 146 F.R.D. 34, 41-42 (D.P.R. 1992) (allowing relation back based in part on "the specificity of the allegations contained in the original complaint" and noting that "the fact that plaintiffs included John Doe defendants in their original Complaint vitiates the argument that officers present during the search were unnamed for tactical reasons or for lack of evidence"); Sitarz v. Bucher, 652 F. Supp. 95 (D.N.M. 1986) (holding that Section 1983 complaint designation of ten John Does, whom plaintiff identified as officers from possibly several different law enforcement agencies, was too "broad" to put nine officers on notice that plaintiff originally intended to sue them); Saffron v. Wilson, 481 F. Supp. 228 (D.D.C. 1979) (finding single Doe designation describing a specific Secret Service supervisor insufficient to put eight Secret Service supervisors, representing entire chain of command, on notice that they were intended defendants).

210. In Ramirez v. Burr, 607 F. Supp. 170 (S.D. Tex. 1984), the court did away with the mistake requirement altogether. There, a local government employee challenged her discharge under a variety of theories and later sought to amend her complaint to add specific individuals for the "unnamed board members" she originally had designated as defendants. The court found that the new defendants had adequate notice under the first clause of Rule 15(c) and then restated the mistake clause by simply omitting the word "mistake": "Rule 15(c) also requires that the 'party to be brought in by amendment . . . knew or should have known . . . the action would be brought against him.' " *Id.* at 174 (alteration in original).

2. Limited Utility of the Rule 15(c)(1) State Law Option for Doe Substitutions

In 1991, the rulemakers added another relation back option to Federal Rule 15(c) that directed federal courts to grant relation back of an amendment when "relation back is permitted by the law that provides the statute of limitations applicable to the action."[211] This new rule, Rule 15(c)(1), addresses a choice of law issue that has long troubled federal courts and scholars—whether the relation back criteria of Federal Rule 15(c) should apply at all where state law provides another relation back standard.[212] The general view was that the federal rule should govern,[213] but some courts distinguished the case of a more

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211. FED. R. CIV. P. 15(c)(1); *see also id.* advisory committee's note (1991 Amendment).

212. Although the choice of law question is commonly called an *Erie* issue, after the landmark 1938 decision in Erie R.R. v. Tompkins, 304 U.S. 64, the Supreme Court has clarified that the *Erie* doctrine does not control the applicability of a Federal Rule of Civil Procedure:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471 (1965). Under the "constitutional restriction," Congress may make rules for federal courts but the rules must be arguably procedural, at least in diversity suits. *Id.* at 472 ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."). Congress delegated this rulemaking power to the federal judiciary in the Rules Enabling Act but clarified that that power was to make rules only that govern matters of "practice and procedure" and that do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1994). A rule is valid under the Enabling Act even if it impacts substantive concerns so long as that effect is merely "incidental" to its fulfillment of legitimate federal policies. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 5 & 8 (1987) (holding that "[r]ules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules").

213. When the state relation back rule is more restrictive than the federal rule, the clear weight of authority was that Rule 15(c) should govern. *See, e.g.*, Ingram v. Kumar, 585 F.2d 566, 570 n.5 (2d Cir.) (noting that "[s]trong federal policies underlie Rule 15(c)" and that application of the federal rule in lieu of a more restrictive state rule "will not significantly impair state interests or encourage forum shopping"), *cert. denied*, 440 U.S. 940 (1979); Welch v. Louisiana Power & Light Co., 466 F.2d 1344, 1345 (5th Cir. 1972) (holding that Rule 15(c) applies and remanding for determination of notice even though "[u]nder Louisiana law such an amendment would not relate back and would be barred by the statute of limitations"). Even when faced with a less restrictive state relation back rule, the majority of federal courts applied the federal rule, often with little discussion. *E.g.*, Brown v. E.W. Bliss Co., 818 F.2d 1405, 1408-09 (8th Cir. 1987) (holding that Federal Rule 15(c) " 'regulates matters which can reasonably be classified as procedural' so it 'satisf[ies] the constitutional standard for validity' " and applying the federal rule to deny relation back even though Missouri law would allow the amendment) (quoting Burlington N.

liberal state rule and argued that the balancing of policies favored application of the state rule to allow, rather than deny, the claim.[214] The Supreme Court fueled this debate in 1986, when in *Schiavone v. Fortune*,[215] a diversity suit, it applied Federal Rule 15(c) in lieu of a more liberal state rule, in order to deny an amended claim.[216] In 1991, rulemakers tried to end the confusion by adopting Rule 15(c)(1) and giving federal courts express authority to apply state law.[217] Despite its superficial appeal, this new state law option will not help federal courts avoid the "mistake" quandary in Doe cases.

In the few cases where state law clearly allows relation back of Doe substitutions,[218] the state law option of Rule 15(c)(1) makes the

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R.R. v. Woods, 480 U.S. 1, 8 (1987)).

214. *See* Covel v. Safetech, Inc., 90 F.R.D. 427, 431-32 (D. Mass. 1981) (noting the "especially significant" distinction between a restrictive state rule and the liberal Massachusetts relation back rule (requiring no notice) and concluding that "it cannot be fairly said either that the objectives of the more liberal relation-back provisions of Massachusetts law would be protected, or that a policy—whether state or federal—of facilitating decision on the merits would be served" by applying Federal Rule 15(c)). The federal policy of liberality argues for keeping claims, not denying them. The limits of Rule 15(c)(3) are designed to protect state statutes of limitations. Where the states themselves have decided that the limitations policies must give way to other concerns, such as liberality in pleading and preservation of claims, there is no limitations policy for Rule 15(c)(3) to protect. For these reasons, some courts applied the more liberal state rule. *See* Marshall v. Mulrenin, 508 F.2d 39, 45 (1st Cir. 1974) (applying liberal Massachusetts amendment rule in lieu of Federal Rule 15(c)). *But see* Comment, *Federal Rules of Civil Procedure—The* Erie *Doctrine—State Relation Back Provision Found Controlling Over Rule 15(c)*—Marshall v. Mulrenin, 50 N.Y.U. L. REV. 952 (1975) (arguing that First Circuit wrongly decided *Marshall*). *See generally* 19 WRIGHT ET AL., *supra* note 63, § 4509, at 152.

215. 477 U.S. 21 (1986).

216. *Id.* at 29. The Court interpreted and applied Federal Rule 15(c) without considering the more liberal New Jersey relation back rule. *See id.* at 29-32. The Third Circuit opinion in *Schiavone* expressly noted "the *Erie* question" but declined to address it because the plaintiff conceded in the district court that the New Jersey rule was "procedural only." Schiavone v. Fortune, 750 F.2d 15, 18-19 (3d Cir. 1984). After *Schiavone*, some courts that previously had applied a more liberal state rule in lieu of Rule 15(c) felt compelled to apply the federal rule. *See, e.g.*, Pessotti v. Eagle Mfg. Co., 774 F. Supp. 669, 679 (D. Mass. 1990) (following the "implicit dictum" of *Schiavone* and applying Federal Rule 15(c) in diversity action), *aff'd*, 946 F.2d 974, 980 n.6 (1st Cir. 1991) (declining to reach the *Schiavone* issue because relation back was not available under either federal or state rule).

217. FED. R. CIV. P. 15(c)(1) advisory committee's note (1991 Amendment) ("If *Schiavone* . . . implies the contrary, [Rule 15(c)(1)] is intended to make a material change in the rule."); *see also* Carrington, *supra* note 55, at 312 ("Partly in response to trenchant criticisms of both *Schiavone* and the present rule [1966 version of Rule 15(c)] . . . , rulemakers are presently [1989] trying to repair Rule 15(c). As this task proceeds, consideration has been given to a concern that, at the margins of its potential reach, Rule 15(c) arguably extends beyond the proper bounds of procedure as functionally defined.").

218. Only a few states have clarified the relation back effect of Doe substitutions in their rules or codes of procedure. Both Alabama and Mississippi have rules of civil procedure that

federal court's decision easier.[219] The federal court can simply apply the state rule and allow the substitution. In the vast majority of Doe cases, however, Rule 15(c)(1) either will have no effect on the federal court's decision or will complicate its analysis even more. As an initial matter, the "state" law[220] option of Rule 15(c)(1) is not available in all cases. It allows resort to other law only where that other law supplies the statute of limitations.[221] To be sure, state law provides the statute of limitations in most John Doe defendant cases, even when the action is based on a federal statute; federal civil rights actions, for example, borrow state statutes of limitation.[222] Still, some federal actions in

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specifically address and allow relation back of Doe substitutions, even without notice to the defendant. ALA. R. CIV. P. 15(c) ("An amendment pursuant to Rule 9(h), *Fictitious parties*, is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading."); MISS. R. CIV. PRO. 15(c) (same). For a thorough discussion of the Alabama relation back provisions as they apply to Doe substitutions, see Jerome A. Hoffman, *ARCP 15(c): Relation Back of Amendments Adding, Changing or Substituting Parties or Names of Parties*, 46 ALA. LAW. 84 (1985). A few other states achieve this same result by interpreting their otherwise silent Doe pleading rules as providing a relation back effect, independent of Rule 15(c). *E.g.*, Santiago v. Becton Dickinson & Co., 539 F. Supp. 1149, 1155 (D.P.R. 1982) (recognizing that Doe pleading rule, P. R. R. CIV. P. 15.5, provides for relation back independent of Rule 15(c) notice provisions); Sooy v. Petrolane Steel Gas, Inc., 708 P.2d 1014, 1018 (Mont. 1985) (holding amendment under Montana Doe pleading provision automatically relates back such that the Doe defendant is considered a party from the filing of the original complaint); Viviano v. CBS, Inc., 503 A.2d 296, 306 (N.J. 1986) (holding that the New Jersey Doe pleading provision operates independently to automatically relate back Doe substitution amendment). Finally, although Missouri has no rule or statute expressly authorizing Doe pleading, its courts hold that Doe substitutions relate back to the original complaint. Maddux v. Gardner, 192 S.W.2d 14, 18 (Mo. Ct. App. 1945) (holding that "[s]uit was begun when the petition was filed against John Doe" and allowing Doe substitution even though the true defendant was not timely served).

219. *See, e.g.*, Bryan v. Associated Container Transp., 837 F. Supp. 633, 642-43 (D.N.J 1993) (using Rule 15(c)(1) to justify application of the more liberal New Jersey Doe relation back rules and allowing relation back even where new defendant had no timely notice of the pending lawsuit).

220. The Rule 15(c)(1) option is not limited to state law. It also encompasses any federal law that provides a relation back standard distinct from that set forth in the other two paragraphs of Rule 15(c). *See, e.g.*, 28 U.S.C. § 2679(d)(5) (1994) (special relation back for federal tort claims in which the United States has been substituted as defendant).

221.

> If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. In some circumstances, the controlling limitations law may be federal law. Whatever may be the controlling body of limitations law, if that law provides a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.

FED. R. CIV. P. 15(c)(1) advisory committee's note (1991 Amendment) (citations omitted).

222. Both Section 1983 and *Bivens* actions borrow state statutes of limitation. *See* cases discussed *supra* note 43; *see also* FED. R. CIV. P. 15(c)(1) advisory committee's note (noting applicable statute of limitations will usually come from state law).

which Doe defendants are named use federal statutes of limitations and therefore require examination of the federal relation back standards.[223]

More significantly, Rule 15(c)(1) authorizes resort to state law only where "relation back is permitted"—not where it is prohibited—by the other law.[224] The federal court must compare the federal and state rules because the rulemakers intended the state law to apply only where "that law affords a more forgiving principle of relation back" than the federal standard.[225] In order to make this comparison, the federal court must grapple with the meaning of the federal mistake clause in Doe cases and the three differing approaches taken by federal

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223. *See, e.g.*, 35 U.S.C. § 286 (1994) (providing a federal six-year limitations period for patent infringement actions).

224. Rulemakers specifically directed the federal court to allow relation back of an amendment whenever the state relation back rule provides a "more forgiving" standard. FED. R. CIV. P. 15(c) advisory committee's note (1991 Amendment), *supra* note 221; *see also* Rae v. Klusak, 810 F. Supp. 983, 984 n.1 (N.D. Ill. 1993) (noting that Rule 15(c)(1) "was inserted to give an *additional* escape hatch if a state statute of limitations were [sic] *more* liberal than Rule 15(c)(3)" and holding that the federal standards apply in lieu of more restrictive state standards) (emphasis in original).

225. FED. R. CIV. P. 15(c)(1) advisory committee's note (1991 Amendment). Federal policies of liberal pleading and amendment justify a federal court's rejection of a state relation back rule if it is, in fact, more restrictive than the federal rule.

> Application of [Rule 15(c)] . . . would maintain the uniformity of practice in the federal courts and promote the goal of deciding cases on their merits rather than on the basis of inadvertent noncompliance with procedural and quasi-procedural technicalities. Furthermore, the availability of relief under Rule 15(c) is closely related to the federal policies in favor of simplified pleadings, liberal amendments, permissive joinder of parties and claims and broad discovery.

19 WRIGHT ET AL., *supra* note 63, § 4509, at 149-50; *see also* Loudenslager v. Teeple, 466 F.2d 249, 250 (3d Cir. 1972) (noting that use of a more restrictive state relation back rule would frustrate the Supreme Court's policy of facilitating decisions based on the merits). *See supra* note 213. Relation back of Doe cases, however, presents one choice of law factor that non-Doe cases do not: the likelihood of forum shopping. *See* Ingram v. Kumar, 585 F.2d 566, 570 n.5 (2d Cir. 1978) (noting lack of forum shopping in non-Doe case in holding that it would apply Federal Rule 15(c) in lieu of a more restrictive state rule), *cert. denied*, 440 U.S. 940 (1979). Unlike the typical non-Doe case of mistaken identity, the plaintiff in a Doe defendant case knows from the outset that he does not know the correct defendant and may not be able to timely serve that defendant. If the federal rule allows for relation back of Doe substitutions, the plaintiff may choose the federal forum where he has a chance of adding the true defendant after the limitations period. Such potential for forum shopping, however, should not invalidate a federal rule for relation back of Doe substitutions, assuming that it is appropriately narrow. Even though discouragement of forum shopping is one of the "twin aims of the *Erie* rule," the *Erie* analysis is not the appropriate test for a Federal Rule of Civil Procedure. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965). Instead, when a situation is covered by a federal rule, a court must apply the rule unless it violates the Enabling Act statute or the Constitution. *See supra* note 212. The same strong federal policies that support the application of Federal Rule 15(c) apply equally in Doe cases, and if the protections of the notice and mistake clauses are properly applied to Doe substitutions, any impact of the federal rule on state policies would be merely incidental to these federal goals.

courts. Of the three, all but the Seventh Circuit view would be less restrictive than a state rule clearly rejecting relation back of Doe substitutions.[226]

The comparison in most cases will require the federal court to struggle with the mistake clause on the state as well as federal level before it can rule on a Doe substitution. Even though the vast majority of states have Doe pleading provisions, few have any special provision for relation back of Doe substitutions. Instead, they have only their own copies of Federal Rule 15(c), including its mistake clause.[227]

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226. A few states have clearly rejected relation back of Doe Amendments. *See, e.g.*, Kerr v. Doe, No. 0117897, 1994 WL 146649 (Conn. Super. Ct. Apr. 11, 1994); Click v. Pardoll, 359 So. 2d 537 (Fla. Dist. Ct. App. 1978), *cert. denied*, 367 So. 2d 1122 (Fla. 1979); Hailey v. Interstate Mach. Co., 459 N.E.2d 346 (Ill. App. Ct. 1984); Thomas v. Process Equip. Corp., 397 N.W.2d 224 (Mich. Ct. App. 1986). Still others allow no form of Doe pleading at all. *See* cases cited *supra* note 27.

227. All states have followed to some degree the example of the Federal Rules of Civil Procedure, with some states adopting the federal rules almost verbatim. *See* WRIGHT, *supra* note 30, § 62, at 406 ("The excellence of the [Federal Rules of Civil Procedure] is such that in more than half the states the rules have been adapted for state use virtually unchanged, and there is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.").

Not all states have kept up to speed with the many changes in Federal Rule 15(c). Some still model relation back on the original version of Rule 15(c), which went into effect in 1938. *See, e.g.*, LA. CODE CIV. PROC. ANN. 1153 (West 1984) art. (2); FLA. R. CIV. P. 1.190(c); MASS. R. CIV. P. 15(c); MICH. R. CIV. P. 2.118(D); NEV. R. CIV. P. 15(c); N.C. R. CIV. P. 15(c); UTAH R. CIV. P. 15(c)(2). Most jurisdictions base their rule on the version of Federal Rule 15(c) that went into effect in 1966. *See, e.g.*, GA. CODE ANN. § 9-11-15(c) (1993); KAN. STAT. ANN. § 60-215(c) (1994); WIS. STAT. ANN. § 802.09(3) (West 1994); ALASKA R. CIV. P. 15(c); ARIZ. R. CIV. P. 15(c); COLO. R. CIV. P. 15(c); DEL. R. CIV. P. 15(c); IDAHO R. CIV. P. 15(c); IND. R. CIV. TRIAL P. 15(c); IOWA R. CIV. P. 89; KY. R. CIV. P. 15.03(2); MINN. R. CIV. P. 15.03(c); MONT. R. CIV. P. 15(c); N.J. CT. R. 4: 9-3; N.M. R. CIV. P. 1-015(c); N.D. R. CIV. P. 15(c); OHIO R. CIV. P. 15(C); ORE. R. CIV. P. 23(c); P.R. R. CIV. P. 13.3; S.C. R. CIV. P. 15(c); S.D. R. CIV. P. 15-6-15(c); TENN. R. CIV. P. 15.03; VT. R. CIV. P. 15(c); WASH. R. CIV. P. 15(c); W. VA. R. CIV. P. 15(c). Some enterprising states have updated their rules to match the 1991 change in the timing requirement of Federal Rule 15(c). *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 2015(c) (1995); ARK. R. CIV. P. 15(c); D.C. SUPER. CT. R. CIV. P. 15(c); ME. R. CIV. P. 15(c); MO. R. CIV. P. 55.33(c); WY. R. CIV. P. 15(c). Finally, a few states have independently modified their copies of Federal Rule 15(c). Tennessee, for example, has a rule that exactly mirrors the 1966 version of Federal Rule 15(c), except that in place of the mistake clause it states: "but for a misnomer or other similar mistake concerning the identity of the proper party." TENN. R. CIV. P. 15.03. Massachusetts kept the 1938 version of Federal Rule 15(c) and clarified that it allowed amendments changing parties without any additional criteria. MASS. R. CIV. P. 15(c) ("Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (*including an amendment changing a party*) relates back to the original pleading.") (emphasis added); *see also id.* reporters' notes (1973 Amendment) ("Massachusetts practice is more liberal than Federal Rule 15(c)."). Moreover, Alabama and Mississippi have rules explicitly permitting relation back of Doe defendants. See *supra* note 218.

Therefore, most states find themselves in the same predicament as the federal courts: they have a relation back rule that is inherently inconsistent with and silent as to Doe practice.[228] Accordingly, Rule 15(c)(1) does not solve the problem of relation back of Doe substitutions in federal court.[229] Often, Rule 15(c)(1) will only complicate the court's

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228. At least 20 jurisdictions expressly allow Doe pleading but provide for relation back of Doe substitutions only through the Rule 15(c) mistake standard: Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Minnesota, Nebraska, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Utah, Washington and Wyoming. *Compare supra* note 27 (describing state Doe pleading provisions) *with supra* note 227 (describing state versions of Rule 15(c)). Courts in some of these states have held that Doe substitutions relate back if they meet the criteria of Rule 15(c), but they have not tried to reconcile the "mistake" requirement with Doe pleading. *See, e.g.*, Farmer v. State, 788 P.2d 43 (Alaska 1990); Harvill v. Community Methodist Hosp. Ass'n, 786 S.W.2d 577 (Ark. 1990); Marriott v. Goldstein, 662 P.2d 496 (Colo. Ct. App. 1983), *overruled on other grounds by* Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985) (en banc); Harper v. Mayor of Savannah, 380 S.E.2d 78 (Ga. Ct. App. 1989); Chacon v. Sperry Corp., 723 P.2d 814 (Idaho 1986); Nolph v. Scott, 725 S.W.2d 860 (Ky. 1987); DeVargas v. State *ex rel.* N.M. Dep't of Corr., 640 P.2d 1327 (N.M. Ct. App. 1981), *cert. denied*, 642 P.2d 166 (N.M. 1982); Kiehn v. Nelsen's Tire Co., 724 P.2d 434 (Wash. Ct. App. 1986); Northern Util. Div. v. Town of Evansville, 822 P.2d 829 (Wyo. 1991). Only a few states have directly questioned whether Doe substitutions qualify as a mistake under their version of Rule 15(c). *See, e.g.*, Berns Const. Co. v. Miller, 491 N.E.2d 565, 573-74 (Ind. Ct. App. 1986) (suggesting that Doe substitutions must meet standards of Indiana Rule 15(c), which is identical to pre-1991 federal rule, but also implicitly endorsing Seventh Circuit's *Wood* rule, which provides that lack of knowledge is not a mistake), *aff'd*, 516 N.E.2d 1053 (Ind. 1987); Leaon v. Washington County, 397 N.W.2d 867, 871 n.1 (Minn. 1986) (observing that Doe substitutions could be governed by Minnesota Rule 15.03, which is identical to 1966 federal rule, but noting and expressly reserving the question of whether "a John Doe designation is the kind of change of parties contemplated by Rule 15.03").

229. Nor does Rule 15(c)(1) solve the relation back conflict problem in the few states that use a service-triggered limitations rule. *See supra* note 59. This difficult conflicts question is two-pronged. First, in the "service" states, absent formal service on the actual defendant, there is no timely complaint to which the amended claim can relate back. Rule 15(c)(3) and the state relation back rules modelled upon it have no application unless there is a timely complaint. Yet, the notice and mistake clauses of these rules by design do not require formal service. They set a relaxed standard for the quality of the notice to the defendant. This aspect of Rule 15(c)(3), unlike Federal Rule 3, is specifically tailored to address state statutes of limitation and service requirements and is in direct conflict with a state rule that requires formal service prior to the limitations period. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980) (applying state service rule to determine compliance with limitations law because "[t]here is no indication that [Federal Rule 3] was intended to toll a state statute of limitations"). On the other hand, the second aspect of Rule 15(c)(3)—timing of the defendant's notice—does not conflict with a state service commencement rule. The intent of this time limit was to equalize treatment of defendants, whether or not they were first correctly named in the suit, *see supra* notes 169 and 171, and it does not purport to set the length of limitation periods. *See* Lindley v. General Electric Co., 780 F.2d 797, 800 (9th Cir. 1986) ("[Rule 15(c)] was not designed to determine the *length* of the limitations period to be applied.") (quoting Rumberg v. Weber Aircraft Corp., 424 F. Supp. 294, 301 (C.D. Cal. 1976)).

Federal courts can reconcile the federal relation back rule and state service rules by using a

analysis by requiring it to decide the mistake issue twice—once under federal precedent and then again under state law.

IV. Proposed Federal Procedure for John Doe Parties

The problems confronting Doe pleaders under the current federal procedural scheme can be cured with relative ease by formally recognizing Doe parties. The current difficulty with Doe practice essentially is one of silence in the rules, not any affirmative barrier.[230] Through five changes to the Federal Rules of Civil Procedure and Judiciary Code, Doe parties can become a formal part of federal procedure. Only then will Doe practice achieve the clarity that the courts have struggled for in vain for thirty years.

A. Pleading of Doe Parties

The rules must first address proper pleading of Doe parties. For the Doe defendant, the federal rules should require plaintiff to plead and describe specific unknown persons rather than merely list generic Doe defendants in the complaint caption. A number of federal policies

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bifurcated analysis that reflects the dual functions of Federal Rule 15(c)(3). The court should look to the relation back rule for the quality of notice and then to the service rule for the timing of the notice. Indeed, this is the approach taken by states that have both forms of rules. Minnesota, for example, has a service-triggered commencement rule, *see* Minn. R. Civ. P. 3.01, and a relation back rule that exactly mirrors the 1966 version of Federal Rule 15(c). *See* Minn. R. Civ. P. 15(c). Its courts reconcile the two provisions by requiring the new defendant to have the relaxed notice and knowledge within the period for service, usually the limitations period. *Cf.* Carlson v. Hennepin County, 479 N.W.2d 50, 55 (Minn. 1992) (allowing addition of a defendant who was not formally served within the limitations period, so long as he had the Rule 15(c)(3) notice within that period).

230. To be sure, the Federal Rules of Civil Procedure are silent as to many procedural issues and need not address every nuance of practice. *See* Molnar v. National Broadcasting Co., 231 F.2d 684, 687 (9th Cir. 1956), *supra* note 135 (noting that "the Federal Rules of Civil Procedure are not universally inclusive of all possible colorings of practice" but holding that Doe defendants destroy diversity). However, the rules do address similar situations that occur in reported cases far less frequently than the increasingly popular Doe pleading. For example, Federal Rule 25 provides for substitution of parties in cases where the claim is not extinguished after the original party dies or becomes incompetent. Fed. R. Civ. P. 25(a)(1)(b). A Westlaw search of district court decisions showed only six decisions in 1993 citing Rule 25(a)(1). Search of Westlaw, DCT database (April 11, 1996) (search terms: Rule /2 25(a)(1) & DA(1993)). No 1993 opinion cited Rule 25(b), and a search with no date restriction at all revealed only two decisions that cited the rule. Search of Westlaw, DCT database (April 11, 1996) (search terms: Rule /2 25(b)) (eliminating decisions citing local rules, criminal rules, or agency rules with same number). By contrast, nearly 200 decisions in 1993 had "John Doe" in the title as a party, and many more presumably used other forms of pseudonymous names. *See supra* note 2.

support this restriction.[231] Foremost is the federal court's need to protect substantive policies of statutes of limitation. Although plaintiffs resort to Doe pleading because they need limitations relief, a federal court should not ignore the underlying aims of the state limitations statute. Basic principles of federalism mandate that a federal court uphold the substantive policy of states, including the aim of repose. When a plaintiff ultimately seeks to add the true defendant in the place of John Doe, the federal court in most cases must insist that the defendant have had timely notice that he is the intended defendant. Particularized, not generic, Doe allegations will help serve this aim.[232]

Particularized Doe defendant allegations also will facilitate case management. They will eliminate uncertainty about the basic structure of the case. Whenever plaintiff names any new defendant, he fundamentally alters the case. Everything must pause while the new defendant prepares his defenses and motions and gets up to speed on discov-

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231. These federal policies also would support application of a federal particularized pleading rule if challenged by a plaintiff who seeks to invoke the generic Doe pleading permitted under California state practice. *See supra* note 117. The Ninth Circuit has held that a federal court must apply the California Doe procedure in diversity suits, but its holding does not extend to pleading. *See* Lindley v. General Elec. Co., 780 F.2d 797 (9th Cir.), *cert. denied*, 476 U.S. 1186 (1986). The court instead addressed only Rule 15(c) and held that the California practice was essentially a form of tolling and not a relation back rule that would conflict with Federal Rule 15(c). *Id.* at 801. Unlike relation back, a federal particularized Doe pleading rule would conflict with California's generic pleading standards, thus requiring an analysis under the *Hanna* constitutional and Rules Enabling Act tests. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965). *See supra* note 212. The federal pleading rule would pass both tests. There are few matters that are more procedural and thus within the proper realm of federal control than pleading. *See Hanna*, 380 U.S. at 472 (noting that the Constitutional provision for a federal court system gives "congressional power to make rules governing practice *and pleading* in those courts") (emphasis added). The federal system has the power to set pleading standards under the Federal Rules of Civil Procedure which differ from state pleading rules, whether they be good faith pleading requirements under Federal Rule 11, joinder limitations under Rule 20, or particularized pleading standards under Rule 9(b). *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enters., 498 U.S. 533, 552 (1991) ("There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."). In addition, much of the substantive element of California's Doe scheme is protected through the tolling aspect of California law. The federal court could allow addition of the true defendant even where he had no notice of the original suit, so long as the plaintiff serves him within three years of filing the original complaint, as provided by California's statute of limitations law. Therefore, the effect on state substantive policies is only "incidental," and the proposed rule comports with the Rules Enabling Act. *See supra* note 212.

232. In some cases, the court need not resort to evaluation of the Doe allegations. Where the plaintiff identifies the John Doe and, within the Rule 4(m) period for service, serves the true defendant with a motion to amend the complaint to properly name him, the motion to amend itself gives the defendant the required notice. *See* FED. R. CIV. P. 4(m), 15(c). The motion states outright that the new defendant is the John Doe.

ery. Case strategy changes. The new defendant may join forces with the other defendants or assert his own claims against them. With generic Doe pleadings, these changes are always possible, making any planning difficult. Particularized Doe allegations will narrow the possibilities and thereby help the court and other parties plan for the contingencies created by the addition of a new party. They can tailor discovery,[233] motions, and amendments around the plaintiff's alleged intent to locate and add another specific party.[234]

The proposed specificity requirement for Doe allegations need not place an impossible burden on the plaintiff. He obviously cannot identify the defendant, but he can distinguish the defendant in some way. After all, he has chosen to sue this unknown person. The description may simply be of the conduct that the plaintiff contends is wrongful. The key is to put the intended defendant on notice, if he were to read the complaint, that he is John Doe. In this regard, state pleading codes provide some useful guidance. Although the original Field Code unknown defendant provision did not require any specificity,[235] New York and other states have augmented this rule to require the plaintiff to describe the Doe defendant.[236] These states require the plaintiff to af-

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233. Particularized pleading will help the plaintiff in his own efforts to identify the John Doe. It will force the plaintiff to conduct pre-filing research sufficient enough to describe the defendant, thereby preparing him for formal discovery after the filing of the suit, when time will be of the essence. In addition, particularized Doe allegations, unlike generic Doe pleading, may force any named co-defendants to investigate and disclose the John Doe defendant's true name. The new automatic disclosure provisions of Federal Rule of Civil Procedure 26 require a defendant to make a reasonable inquiry and disclose relevant information, but that duty is limited to "facts alleged with particularity in the pleadings." FED. R. CIV. P. 26(a)(1); *see also id.* advisory committee's note (1993 Amendment) ("Before making its disclosures, a party has the obligation . . . to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings.").

234. Within the court's general power to control its own docket, it may set limits to ensure that even the defined Doe defendant does not unnecessarily delay the litigation. For example, in its scheduling order under Rule 16, it could limit discovery and set deadlines for identification of the Doe defendant. *See* FED. R. CIV. P. 16(b) (providing that in the initial scheduling order the court may limit the time "(1) to join other parties and to amend the pleadings . . . and (3) to complete discovery"); *see also* Glaros v. Perse, 628 F.2d 679, 685 (1st Cir. 1980) (confirming that district court was not "obliged to wait indefinitely for [plaintiff] to take steps to identify and serve the 'unknown' defendants"); Veteto v. Miller, 829 F. Supp. 1486, 1497 (M.D. Pa. 1992) (dismissing Doe defendants after plaintiff's failure to identify them despite "extensive" discovery over "many years").

235. *See supra* note 27.

236. New York modified the Field Code in 1876 to add a requirement that plaintiff describe the Doe defendant. *See* Act of June 2, 1876, ch. 448, § 451, 1876 N.Y. Laws 1, 85 ("Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defend-

firmatively allege that the name of the defendant is not known and to describe John Doe to the extent possible, including his role in the alleged wrongful conduct.[237]

On the Doe plaintiff side, state rules provide no pleading models.[238] A pleading rule for Doe plaintiffs should not attempt to do too much. Whether plaintiff's privacy interests are sufficient to warrant pseudonymous protection necessarily requires a case-by-case factual determination. The standards for this analysis are best left to the courts to develop and apply in their discretion.[239] Therefore, the pleading rule should not dictate the circumstances under which a plaintiff or in some cases the defendant, may proceed under a pseudonym, but instead merely require the pseudonymous party to inform the other parties and the court of his basis for filing as John Doe. The substance of these allegations should reflect the discretionary factors of the current state of the law on pseudonymity.[240] If the court or the other parties disagree with the alleged propriety of the Doe designation, they can challenge

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ant . . . by a fictitious name, or by as much of his name is known, adding a description, identifying the person intended."); *see also* Hogan, *supra* note 117, at 62 n.42. Current New York procedure requires plaintiff to designate "so much of [the defendant's] name and identity as is known." N.Y. CIV. PRAC. L. & R. 1024 (McKinney 1976). *See also* WIS. STAT. § 807.12 (1977) ("When the name or part of the name of any defendant . . . is unknown to the plaintiff, such defendant may be designated a defendant by so much of the name as is known or by a fictitious name . . . adding such description as may reasonably indicate the person intended."); COLO. R. CIV. P. 9(a)(2) ("When a party is designated in the caption as one 'whose name is unknown' the pleader shall allege such matters as are within his knowledge to identify such unknown party and his connection with the claim set forth."); P.R. R. CIV. P. 15.4 ("Whenever a plaintiff does not know the true name of a defendant, he shall so state in the complaint, setting forth the specific claim he allegedly has against said defendant."). *See also supra* note 198 (discussing Nevada's new particularized standards for pleading Doe defendants).

237. *See* statutes and rules cited *supra* note 236.

238. Indeed, only a few states even acknowledge the possibility of a pseudonymous plaintiff in their general pleading codes. Illinois, for example, allows parties, presumably including plaintiffs, to appear by fictitious names "[u]pon application and for good cause shown." ILL. COMP. STAT. ANN. ch. 735, § 5/2-401(e) (Michie 1993). In 1990, Texas, in an effort to combat secrecy in litigation, adopted standards for confidentiality including the sealing of court records which, although not aimed at pseudonymous plaintiffs, may apply to them. TEX. R. CIV. P. 76a. *See generally* Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991).

239. Many rules, including portions of Rule 15, appropriately leave development of such discretionary standards to the courts. *See, e.g.*, FED. R. CIV. P. 15(a) (amendments to pleadings shall be "freely [granted] when justice so requires").

240. See *supra* notes 89-99 and accompanying text for a discussion of the discretionary factors a court must weigh.

the Doe complaint just as they would challenge any other defect apparent from the complaint allegations.[241]

Pleading a John Doe complaint would only start the case. It would not dictate that the plaintiff is entitled to proceed as a John Doe beyond the initial pleading stage.[242] A case that may be appropriate for pseudonymity at the pleading stage, while the defendant challenges the legal merits of the claim, may not be appropriate in later phases, when

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241. Rule 12, for example, already provides motions by which the defendant can challenge the sufficiency of the complaint. *See* FED. R. CIV. P. 12. Others, such as the media, can challenge the pseudonymity through intervention procedures, or amici briefs. *See* FED. R. CIV. P. 24. The author's proposed procedure, which lets the defendant and the court decide if they want to challenge pseudonymity, would conserve judicial resources more than a rule that would require the plaintiff to file a motion in every case. Professor Steinman, for example, proposed that the plaintiff file a motion for leave to proceed pseudonymously, at the time he files the complaint or shortly thereafter. Steinman, *supra* note 77, at 86-87. She suggested that the motion be accompanied by a brief "citing pertinent legal precedent" and affidavits "containing the facts supporting pseudonymously, and the facts necessary to establish standing and the existence of a case or controversy." *Id.* at 86. This author's proposed pleading rule, combined with the constraints of Federal Rule 11, would serve much of the same purpose as the procedure proposed by Professor Steinman. The plaintiff must allege the basis for proceeding under a pseudonym, and if and when defendant or the court challenges the procedure, the plaintiff will then file his legal authority. The fact that the defendant is the party who files the motion will not put the burden of persuasion on defendant. The plaintiff, who is departing from the norm of open disclosure, must bear the burden of persuading the court that he merits pseudonymous protection. The proposed pleading rule merely lets plaintiff initially satisfy that burden through pleading, rather than a separate motion. *See also* discussion *infra* at notes 242-45.

One commentator has recently proposed a far more demanding procedure: that the plaintiff notify defendant of his intent to proceed under a pseudonym *before* he files his complaint. *See* Milani, *supra* note 78, at 1707-08. Such notification would allow the defendant the opportunity to try to protect his own privacy interests and himself proceed under a pseudonym. *Id.* at 1707. This approach, however, complicates procedure and requires earlier notice than otherwise required under most statutes of limitation and service rules. Moreover, it is unnecessary in many Doe plaintiff cases. Professor Milani is concerned about the defendant's privacy in cases accusing him of a stigmatizing tort, but the proposed early notification procedure applies to all Doe plaintiff cases. In addition, the defendant's concern in these cases is to shield his identity from the public, not the plaintiff, who obviously knows who he is suing. As noted by Professor Steinman, this need can be satisfied, in many but not all cases, by the defendant moving to seal the record. Steinman, *supra* note 77, at 87. This motion can precede or accompany the defendant's answer, in which he will designate himself as John Doe. The plaintiff's own privacy concerns, as well as Rules of Professional Conduct that limit comments to the media and prohibit actions taken to harass others, hopefully will curb plaintiff's deliberate seeking of publicity before defendant can move to seal the record. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.6 & 4.4.

242. In this sense, the joinder rules are analogous. They merely set pleading standards independent of the other implications of joinder of claims. For example, Federal Rule 18 provides a broad right to join "as many claims, legal, equitable, or maritime, as the party has against the opposing party." FED. R. CIV. P. 18(a); *see also id.* advisory committee's note. It, however, does not mandate that the claims be tried together. *See* FED. R. CIV. P. 42(b) (noting court's authority to order separate trial of claims). Nor does it impact the court's jurisdiction over the claims. *See* FED. R. CIV. P. 82 (providing that the Federal Rules do not extend or limit jurisdiction or venue).

the defendant needs discovery of information concerning the particular plaintiff.[243] Balancing of the competing interests should continue as necessary throughout the litigation.[244] Likewise, the court should consider the degree of pseudonymity needed and decide whether the court alone should know the plaintiff's true identity or whether the defendant and his attorney may also know it.[245]

The fictitious name pleading allegations, whether for the Doe plaintiff or the Doe defendant, would themselves be subject to Federal Rule 11, which requires the plaintiff to conduct a reasonable inquiry and to certify both the factual and legal contentions in the complaint.[246] Therefore, the plaintiff cannot, under Rule 11, allege a Doe defendant unless he first tried to identify that defendant. Similarly, the plaintiff cannot use the Doe pseudonym unless he has a good faith basis in the law for seeking privacy protection.[247] If the plaintiff does not heed these warnings and abuses the Doe pleading provisions, he would violate Rule 11 just as he would by filing any other unfounded pleading.

The new Doe pleading rules could appropriately fit in a number of the current Federal Rules of Civil Procedure, including: Rule 8, regarding general pleading; Rule 9, regarding special pleading; Rule 10,

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243. In James v. Jacobson, 6 F.3d 233 (4th Cir. 1993), for example, the trial court allowed the plaintiffs to use pseudonyms during pleading and discovery but demanded that they use their real names at trial. 6 F.3d at 235. On an interlocutory appeal, the Fourth Circuit reversed because the district court did not balance the relevant factors, not because the court had separate rulings for pre-trial and trial. *Id.* at 238-42.

244. In every case, the court should consider what measures it should take to protect the plaintiff, public, and the defendant throughout the litigation. As Professor Steinman proposes:

> [A]t every stage of the proceedings, the court should employ a balancing test that weighs the rights and interests of each litigating party and the interests of the public. The courts should not permit pseudonymous litigation on demand nor categorically disallow it. Very early in the litigation the public will have relatively little interest in the litigants' names. Despite the fact that pleadings and other filings that identify the litigants are historically part of the public record, their accessibility, apart from any judicial decision in the case, does not promote the first amendment [sic] values and policy grounds that form the foundation of public rights of access. Consequently, prior to judicial action, a balancing test that reflects the low level of public interest in access and disclosure is appropriate: it should suffice that the litigant show a legitimate interest that is rationally served by pseudonymity.

Steinman, *supra* note 77, at 36 (footnotes omitted).

245. Such considerations should include how to determine the res judicata effect in this and later litigation. *See supra* note 90.

246. *See* FED. R. CIV. P. 11(b)(2)-(3). Rule 11 recognizes that the plaintiff may need further investigation or discovery to get evidentiary support for some factual allegations, but it requires the plaintiff to specifically identify in the complaint any allegations in need of further investigation. FED. R. CIV. P. 11(b)(3).

247. FED. R. CIV. P. 11(b)(2).

governing the form of pleadings; Rule 15, providing for the amendment of pleadings; Rule 17, governing parties; Rules 20 or 21, governing the joinder of parties; and Rule 25, regarding the substitution of parties. Because the proposed Doe pleading rules would require particularized pleading, Federal Rule 9, which governs items that must be alleged with particularity in federal complaints, provides the most logical place for the fictitious name pleading standards. A new ninth paragraph of Rule 9 should provide:

> *(i) Fictitious Names of Parties. Any pleading which designates a defending party by a fictitious name shall allege that the actual name of the defending party is unknown and shall describe such defending party, including the defending party's connection to the claim set forth. When a party seeks to designate itself by a fictitious name in a pleading, the party shall allege the grounds for proceeding by a fictitious name, as determined by the applicable law, and in cases in which the court's jurisdiction is based on diversity of citizenship of the parties, the pleading party shall allege its own citizenship.*

In addition, Federal Rule 10(a) needs some clarification given its confused history in Doe cases and should be amended to read:

> (a) Captions; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, *whether such names are actual or fictitious as provided for in Rule 9(i)*, but in the other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

These two simple changes to the rules governing pleading in federal courts would eliminate much of the confusion surrounding modern federal Doe practice.[248]

B. Relation Back of Doe Defendant Substitutions

The failing of the current relation back standard in Rule 15(c)(3) in Doe cases is that the initial pleading a Doe defendant is not a "mistake." Elimination of the mistake clause altogether, however, is not the answer. Rule 15(c) otherwise adequately balances the competing interests of the plaintiff and defendant. In non-Doe cases, the mistake re-

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248. The 1966 Advisory Committee's note to Rule 17(a) of the Federal Rules of Civil Procedure should remain unchanged. *See supra* notes 109-15 and accompanying text. The note appropriately condemns an abuse of Doe practice that would not be permitted under the new Doe pleading rules—a lawyer pleading a Doe party in the hope of eventually finding a client who will fill the shoes of John Doe.

quirement gives the potential defendant some basis for assessing why he was not named in the suit. It directs his attention to the complaint. If the potential defendant can determine from the complaint that the plaintiff made a mistake in identifying him as the defendant, then he should reasonably understand that he was the intended defendant. Thus, in a non-Doe case, the mistake requirement serves the same purpose as particularized Doe allegations in a Doe case. It therefore should be retained.

Instead, the Doe scenario should be added to the mistake clause of Rule 15(c)(3).[249] The rule simply needs to acknowledge Doe pleading as an additional means by which the potential defendant may learn that he is the intended defendant. The language of this acknowledgement depends on the Doe pleading standards. If the pleading rule is appropriately narrow and requires plaintiff to describe the defendant, as does proposed Rule 9(i), then Rule 15(c) would require only minor modification. A new clause to the main body of Rule 15(c)(3) will accomplish this result:

> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party *or the alleged lack of knowledge as to the proper party's identity as provided for in Rule 9(i)*, the action would have been brought against the party.[250]

This version thus returns the mistake clause to its original function and provides clarity for Doe amendments.

Rule 15 need not make any special mention of the time during which the plaintiff should identify and move to substitute the actual defendant. The 120 day notice requirement should spur diligence by the plaintiff. Although the defendant could receive the requisite notice

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249. Other rules, such as the proposed new Doe pleading provision of Rule 9(i), could appropriately set forth the relation back standards for Doe substitutions. Rule 17(a), for example, provides a relation back rule specific to that rule. FED. R. CIV. P. 17(a) (substitution of the real party in interest "shall have the same effect as if the action had been commenced in the name of the real party in interest"); *see also supra* note 108. However, given that Rule 15(c) already sets forth the other tests for relation back—same transaction and timely notice—and that those tests will apply also to Doe substitutions, Rule 15(c) is the most appropriate place for the Doe relation back standard.

250. To read the full text of Rule 15(c), see *supra* note 15.

in any number of ways, the plaintiff's own motion to substitute the actual defendant is the best way to ensure that the defendant gets the required notice. The motion itself, so long as the plaintiff serves it on the defendant within 120 days, will both notify the new defendant of the lawsuit, thus satisfying Rule 15(c)(3)(A), and tell him that he is the intended John Doe defendant, thereby satisfying Rule 15(c)(3)(B). Besides the 120 day notice requirement in Rule 15(c), the court otherwise has the power under Rules 15(a) and 16 to reject late amendments that disrupt the litigation and prejudice the existing parties.[251] Finally, whether plaintiff has delayed in his efforts to identify John Doe would be relevant to whether plaintiff had good cause for his failure to serve the Doe defendant within 120 days as required under Rule 4(m).[252]

C. *Diversity Jurisdiction and Venue of Actions with Doe Defendants*

The proposed Doe pleading practice would heighten the need for clarity concerning the proper treatment of Doe defendants in determining diversity and venue. Congress already has recognized the benefits of a single rule governing the effect of Doe defendants on removal.[253] It chose to disregard Doe defendants in removed actions unless and until the plaintiff names and seeks to add them to the suit.[254] The same rule should also extend to original diversity and venue decisions in Doe cases.

A single rule unifying the treatment of Doe defendants for all three forum decisions would reduce procedural uncertainty and treat the parties more fairly. Courts already try to simplify forum selection

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251. In ruling on a motion to amend under Rule 15(a), the court must consider any undue delay by the plaintiff and any resulting prejudice to the other parties. *See supra* note 49. Rule 16 lets the court limit the time during which the parties may amend the complaint. *See* FED. R. CIV. P. 16(b); *see also supra* note 234.

252. The 120 day service directive in Rule 4 is not at odds with the proposed Doe practice. Rule 4(m) mandates that the court give the plaintiff extra time to serve defendants where he shows good cause for his failure to timely serve all the defendants. *See supra* note 171. Therefore, Rule 4 is sufficient on its face to accommodate Doe practice so long as courts use their discretion and do not rigidly apply a 120 day deadline for service of Doe defendants. *See* Brown v. Nichols, 8 F.3d 770, 774 (11th Cir. 1993) (vacating dismissal of Doe defendants whom the plaintiff had not served seven months after filing of the complaint and remanding for a finding of good cause under the prior version of Rule 4(m)); Clorox Co. v. Inland Empire Wholesale Grocers, Inc., No. CV-93-4528-JMI (EX), 1994 WL 687095, 1 (C.D. Cal. Apr. 14, 1994) (deciding sua sponte to direct parties to name and serve the Doe defendants within 120 days of filing of the complaint but allowing the plaintiff to extend that deadline "due to the status of discovery or other reasons").

253. *See* 28 U.S.C. § 1441(a) (1994); discussion *supra* at text accompanying notes 144-53.

254. *Id.*

by using the same rules where feasible. For the most part, the rules for determining diversity in removed actions are the same as those for original actions.[255] Similarly, the majority of federal courts use the same "domicile" standard to determine both an individual's citizenship for jurisdiction purposes and his residence under the venue statute.[256] The same rule for removed and original diversity actions would even the playing field. A bifurcated rule would give named defendants the exclusive choice of federal forum in Doe cases.[257] The plaintiff would have to file all original Doe suits with state law claims in state court even if the named defendants were diverse from plaintiff. Yet, the Doe defendants could remove the same case to federal court once they are identified. Similarly, a different rule for venue would mean that these same named defendants, once they removed a Doe action, could not then move to transfer the removed action to a federal district court in their home state.[258]

The single rule now governing removed actions—that courts should disregard Doe defendants unless and until the plaintiff moves to substitute an actual person for John Doe[259]—is the best rule to govern

255. *See* 28 U.S.C. § 1441(b) (1994); 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 306-19 (1985). A federal court's diversity jurisdiction on removal is more narrow than in original actions in one important respect—defendants may not remove an action from a court of a state in which they are citizens even if they are diverse from the plaintiff because, presumably, a "home state" defendant does not need the benefit of a neutral federal forum against the out-of-state plaintiff. *See* § 1441(b).

256. Many courts interpret the "resides" language of the venue statute to mean an individual's domicile, which is the test courts use to determine the parties' citizenship for the diversity jurisdiction. *See* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3805, at 34-35 (1986) ("[T]he great bulk of authority . . . applies the same test of domicile in determining 'residence' for venue purposes as is applied in determining 'citizenship' for jurisdictional purposes.").

257. *See* Macheras v. Center Art Galleries, 776 F. Supp. 1436, 1440 (D. Haw. 1991) (rejecting ban on Doe defendants in original diversity action because different rules for original and removed actions would confine plaintiffs to state court while "giving defendants a forum selection advantage, entirely unrelated to the basis of jurisdiction[:] . . . . the unilateral power to determine the forum.").

258. A federal court may transfer an action to any other district in which venue is proper. 28 U.S.C. §§ 1404(a), 1406(a) (1994). In a removed action, a Doe defendant would not frustrate the initial venue determination because the removal statute provides that the proper venue is the district which encompasses the state court from which the action is removed. 28 U.S.C. § 1441(a) (1994). Only when the named defendants then want to transfer to their own home district will the presence of the unnamed Doe defendants frustrate the court's venue determination in a removal case.

259. The proposed provision expressly provides that the effect of the Doe defendant on the court's diversity jurisdiction should not be reached unless and until the plaintiff seeks to formally join the true defendant to the action. This aspect is not currently part of the Doe provision in the

all three forum determinations.[260] First, the current rule cures problems unique to removal and should not be abolished in removal cases.[261] Furthermore, whether John Doe, once named, will in fact destroy diversity or venue is mere speculation.[262] If the new defendant destroys diversity, the court has two options. It can simply deny the motion to amend, or grant it and then dismiss the action.[263] In a removed action, the court

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removal statute. The proposal would cure a brewing conflict concerning whether a court in a removed action may consider the citizenship of a Doe defendant when the parties contend they actually know the John Doe's citizenship. In Tompkins v. Lowe's Home Ctr., 847 F. Supp. 462 (E.D. La. 1994), the court held that defendant Lowe's could not remove the action under Section 1441(a) where it knew that the Doe defendant was its own employee and not diverse from plaintiff. *See also* Brown v. TranSouth Financial Corp., 897 F. Supp. 1398, 1401 (M.D. Ala. Aug. 14, 1995) ("[W]hen a plaintiff's allegations give a definite clue . . . by specifically referring to an individual who acted as a company's agent, the court should consider the citizenship of the fictitious defendant."). By contrast, in Brouillette v. Greyhound Lines, Inc., Civ. A. No. 923170, 1992 WL 365295 (E.D. La. Nov. 25, 1992), the court applied a literal reading of Section 1441(a) and refused to consider the likely citizenship of the Doe defendant. There, a Louisiana plaintiff argued that John Doe "must surely reside in the Baton Rouge area" but the court said such argument was of "no import" because Section 1441(a) dictated that it disregard John Doe's citizenship. *Id.* at 1. Such speculation and disagreement creates needless procedural uncertainty. Unless and until the plaintiff actually chooses to name the Doe defendant by amendment, John Doe is not a party and should not destroy diversity or venue.

260. To be sure, this rule may increase the number of diversity actions in federal court while some critics argue for abolition of diversity jurisdiction altogether. *See generally* Report of the Federal Courts Study Committee, April 2, 1990, at 38-43 ("substantial majority" of congressional study committee recommending that diversity jurisdiction be "virtually eliminated"); *Diversity of Citizenship Jurisdiction, 1982: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties and The Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (hearings on the abolition or curtailment of diversity jurisdiction). Nevertheless, with the exception of cases in which any named defendant is from the forum state, see *supra* note 255, the proposed Doe defendant rule will not increase the pool of cases which could properly end up in federal court beyond that already permitted by the removal rule. The change would just increase the chances of these cases going to federal court by providing that choice to the plaintiffs as well as defendants. Moreover, one of the problems with federal diversity jurisdiction may be the very limits imposed to curb exercise of diversity jurisdiction. Each limit creates needless procedural disputes. Even more judicial resources are wasted when those "limits" are subject to different rules for different cases, an ill which the author proposes to cure. *See* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 220 (1982) ("With many of the preliminary, time-consuming, issues removed from dispute, the total amount of court time spent on diversity cases may not undergo the enormous increase some fear, since these simplified individual cases would require less judicial time.").

261. *See supra* notes 144-53 and accompanying text.

262. The risk that John Doe belatedly will disrupt the court's authority to hear the case is real but one that Congress already has deemed insignificant in the removal context. *See supra* note 153.

263. The court may have to dismiss the action even if it denies the motion to amend if the new defendant is a necessary and indispensable party under Rule 19 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. PRO. 19(a) & (b) (defining necessary and indispensable parties). Whether the plaintiff can resort to state court at this point, after the limitations period has ex-

has the additional option of granting the motion to substitute the non-diverse defendant and then remanding the action to state court.[264] If the new defendant disrupts the plaintiff's venue choice[265] and the new defendant objects to venue,[266] the court has the option of transferring the case to another federal court.[267]

Although the current removal rule's treatment of Doe defendants is itself proper,[268] its provision more appropriately belongs in Section 1332,[269] which defines the limits of diversity jurisdiction for both original and removed diversity actions. Section 1332(c) already provides special rules for determining the citizenship of corporations, liability insurers and legal representatives of estates, infants, and incompetents.[270] These rules govern diversity determinations in both original and removed actions.[271] Therefore, it is a logical spot to include a special rule on Doe defendants. A new section (c)(3) of Section 1332 should now read:

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pired, will depend on state tolling rules, which in turn may depend on whether the federal court allowed formal joinder of the actual defendant before dismissing the action. *See supra* note 158.

264. *See* 28 U.S.C. § 1447(e) (1994); *supra* note 151.

265. Often, venue will not be disturbed. Venue will be at issue only if the plaintiff based venue on the place of residence of the named defendants and if the new defendant does not "reside" in the same state as the original defendants.

266. Venue is a defense that may be waived, even through inadvertence. *See, e.g.*, FED. R. CIV. P. 12(g), (h)(1). That defendant is joined late does not act as a waiver of his objection to venue. Rule 19, for example, which addresses the addition of necessary parties to an action, preserves the newly joined defendant's right to object to venue. FED. R. CIV. P. 19(a) ("If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.").

267. *See, e.g.*, 28 U.S.C. § 1406(a) (1994) (providing for transfer to "cure" improper venue).

268. 28 U.S.C. § 1441(a) (1994). *But see supra* note 259.

269. 28 U.S.C. § 1332 (1994).

270. Section 1332 (c) currently provides:

> (c) For the purposes of this section and section 1441 of this title—
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
>
> (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1332(c)(1)-(2).

271. § 1332(c).

(c) For the purposes of this section, section 1335, and section 1441 of this title—

. . . .

(3) The citizenship of unknown defendants[272] *designated by fictitious names shall be disregarded unless and until they are identified by their actual names and formally joined in the action.*

The reference to Doe defendants in current section 1441(a) will become redundant and may be eliminated.

The venue rule should be amended in a similar manner as the diversity provision. The venue statute, like the diversity statute, already has special venue rules for corporations, aliens, the federal government, and foreign states.[273] A new Section 1391(g) should now read:

(g) The residence of defendants sued under fictitious names shall be disregarded unless and until they are identified by their actual names and formally joined in the action.

V. CONCLUSION

With these five rule and statutory changes, Doe parties can become in the rulebooks what they already are in practice—recognized litigants. Doe parties are now a fact of life in federal practice. They ensure that claims may be brought and heard on their merits. Without Doe defendants, the plaintiff may not be able to hold the proper party responsible for the wrongs he suffered. Without the option of himself proceeding as a John Doe, the plaintiff may not bring a controversial claim that is important to society as a whole. Litigants and courts have recognized these legitimate and important functions of John Doe, and it is time that the Federal Rules also meet John Doe.

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272. Plaintiffs who proceed by fictitious names must still allege their citizenship just as any other plaintiff. For the author's proposed Rule 9(i), see *supra* part IV.A.

273. *See* 28 U.S.C. §§ 1391(c)-(f) (1994) (concerning corporations, aliens, the federal government, and foreign states, respectively).