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DERIVATIVE IMMUNITY UNDER SECTION 1983: CONSPIRACIES BETWEEN IMMUNE JUDICIAL OFFICIALS AND PRIVATE PERSONS

The Nature and Background of Section 1983

Section 1983 was enacted by Congress as part of the Civil Rights Act of 1871. Together with its jurisdictional counterpart, section 1983 provides a party with a cause of action in the federal courts for an alleged deprivation of a federal right. However, in order to institute a suit under section 1983, the plaintiff must demonstrate that the asserted violation was performed under color of state law. This initial requirement is defined as the equivalent of state action under the fourteenth amendment. The plaintiff must further allege that the state action in question deprived him of a right, privilege or immunity

2. 28 U.S.C. § 1343(3) (1976) provides:
   The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . .
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
4. E.g., The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action . . . that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (same principle).
5. E.g., United States v. Price, 383 U.S. 787 (1966) ("under color of state law" means state action as it has been interpreted under the fourteenth amendment); see Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (same principle); Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (same principle); Green v. Dumke, 480 F.2d 624 (9th Cir. 1973) (same principle).
secured by the Constitution or laws of the United States. Hence, not all unlawful deprivations of liberty are protected under section 1983; "[t]he Civil Rights Act was not intended to create a body of general federal tort law."

The state action requirement imposed by section 1983 does not require the plaintiff to join a public official as a party defendant. It is sufficient if the act in question, although performed by a private individual, is a function exclusively reserved to the sovereign. In recent years, however, the Court has been hesitant to find state action on the "sovereign function" theory. As a result, the majority of section 1983 cases predicate state action on the conduct of persons acting under color of state law. The conduct of the actor need not be legal or otherwise authorized by the state.

For purposes of the state action requirement, not all party defendants must be state actors. Private persons may be sued under section 1983 where it is alleged that they have conspired with state officials in the prohibited action. Thus, "[t] is

6. E.g., Screws v. United States, 325 U.S. 91 (1945) (involving § 242, the criminal counterpart to § 1983); Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (constitutional rights, and rights created under federal law, are protected by § 1983); Fine v. New York, 529 F.2d 70 (2nd Cir. 1975) (same principle); Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (same principle).

7. Lessman v. McCormick, 591 F.2d 605, 609 (10th Cir. 1979).

8. In recent years, state action has been frequently alleged on the grounds that a public official has conspired with private persons to deprive the plaintiff of a federal right. See note 13 and accompanying text infra.

9. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (no state action on the "sovereign function" theory since settling disputes over property is not a function exclusively reserved to the states); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (dictum) (state action is present where a private entity exercises powers traditionally reserved to the states); Marsh v. Alabama, 326 U.S. 501 (1946) (upholding the public function theory with respect to company owned towns).

10. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (adoption of the Uniform Commercial Code, which allows private individuals to settle property disputes, is not state action).


12. Monroe v. Pape, 365 U.S. 167 (1961) (where a defendant possesses power by virtue of state law, misuse of that power is action taken under color of state law); Screws v. United States, 325 U.S. 91, 111 (1945) ("It is clear that under color of law means under pretense of law . . . . Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.").

enough that [the private person] is a willful participant with the State or its agents.\textsuperscript{14} However, where a plaintiff alleges a section 1983 cause of action based on a prohibited conspiracy\textsuperscript{15} between state actors and private persons, the question of immunity frequently arises. This comment will explore the inherent problems in pleading and maintaining a section 1983 suit where private persons have allegedly conspired with immune judicial officials.

\textbf{Judicial Immunity}

Since the Supreme Court's decision in \textit{Shelley v. Kraemer},\textsuperscript{16} the acts of judicial officers have been regarded as "action[s] of the State within the meaning of the fourteenth amendment."\textsuperscript{17} It would seem to follow from this proposition that joining a judge as a party defendant would provide the requisite state action under section 1983.\textsuperscript{18} Traditionally, however, judges have been considered absolutely immune from civil liability for acts performed in the course of their official duties.\textsuperscript{19} A similar immunity has been applied to prosecutors\textsuperscript{20} and legislators.\textsuperscript{21} This

\textsuperscript{14} United States v. Price, 383 U.S. 787, 794 (1966) (cause of action stated under § 1983); Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) \textit{(en banc)} (same principle); Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976), \textit{cert. denied}, 430 U.S. 960 (1977) (same principle); Potenza v. Schoessling, 541 F.2d 670 (7th Cir. 1976) (same principle).

\textsuperscript{15} BLAcK's LAW DICTIONARY 280 (5th ed. 1979) defines conspiracy as: A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.

\textsuperscript{16} 334 U.S. 1 (1948).

\textsuperscript{17} \textit{Id.} at 14; Twining v. New Jersey, 211 U.S. 78 (1908) (the judicial act of the state court is the act of the state).

\textsuperscript{18} In addition to establishing the state action requirement, it is necessary that the defendant has allegedly deprived the plaintiff of a federal right, privilege or immunity. See note 6 and accompanying text \textit{supra}.


\textsuperscript{20} Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors enjoy an immunity from civil suits where the act in question was performed during the course of an official duty).
common law immunity extends to actions brought under the Civil Rights Act. In considering this common law immunity, the Supreme Court reasoned that if Congress wished to abolish the common law immunities, it would have specifically indicated that intent.

The judicial immunity doctrine bars civil suits against judges even where the judicial act was erroneous or malicious. Only if the judge acted in a "clear absence of all jurisdiction" is he amenable to suit. The theory behind this rather broad immunity is its purported indispensability to the "free and fearless administration of justice." The independence of the judiciary must be preserved so that judges may decide the merits of claims without fear of personal liability. Similarly, the maliciousness of the act is irrelevant; to hold otherwise would precipitate numerous claims charging the judge with cor-

22. Pierson v. Ray, 386 U.S. 547 (1967) (judges are immune from civil liability for judicial acts performed during a state court proceeding, and challenged in the federal court in a civil rights action); Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (same principle); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (same principle).
24. Judicial immunity also extends to lower judicial officers as well. See Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976) (court appointed receivers); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (bailiffs); cf. Cross v. Board of Supervisors of San Mateo County, 326 F. Supp. 634 (N.D. Cal. 1968) (deputies of the district attorney benefit from prosecutorial immunity).
25. E.g., Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity applies although the judge is accused of acting corruptly or maliciously).
27. Haldane v. Chagnon, 345 F.2d 601, 603 (9th Cir. 1965).
28. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.
29. Pierson v. Ray, 386 U.S. 547, 554 (1967) ("It is a judge's duty to decide all cases within his jurisdiction . . . . [H]e should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.").
rupt motives. For these policy reasons, it is clear that a judge may not be sued directly under section 1983. Any claim against a judge will be dismissed by reason of the immunity defense. What is unclear is the extent of this immunity, a particularly relevant issue in cases alleging a prohibited conspiracy between judges and private persons.

THE DOCTRINE OF DERIVATIVE IMMUNITY

As recently confirmed in Adickes v. S.H. Kress & Co., a conspiracy between state actors and private persons subjects even the private persons to liability under section 1983. However, when the sole state actor sued as a party defendant is himself immune from suit, the circuits are in conflict as to the effect of that immunity on the section 1983 cause of action. In determining the effect of judicial immunity, two options are available to the courts. The entire action can be dismissed for lack of subject matter jurisdiction, or because the plaintiff failed to state a claim upon which relief can be granted. The theory behind this is that a private person cannot be held liable since he is not conspiring with persons “acting under color of law against whom a valid claim can be stated.” This is the principle of derivative immunity; there is a lack of state action by virtue of the judge’s immunity and, therefore, the private person is vicariously immune from suit.

The second option available to the courts is to allow the plaintiff to maintain a section 1983 action although the conspirators are immune judges and private persons. Where the section 1983 suit is allowed, immunity is treated as an affirmative defense rather than a jurisdictional issue. Thus, the claim

30. See Doe v. County of Lake, Indiana, 399 F. Supp. 553 (N.D. Ind. 1975) (if judges were not immune for acts committed in bad faith, they would be subject to suits instituted by numerous unsatisfied litigants).
31. See note 22 and accompanying text supra.
33. See note 13 and accompanying text supra.
37. BLACK'S LAW DICTIONARY 399 (5th ed. 1979) defines derivative as: “Coming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another.”
38. E.g., Sykes v. California, 497 F.2d 197 (9th Cir. 1974) (no state action where private persons conspire with immune officials since official immunity extends to the private persons); Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975) (same principle).
39. See Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (judicial immunity is a defense
against the immune official will be dismissed after the court has noted probable jurisdiction, and the case will proceed as against the private persons.\textsuperscript{41}

\textit{Applying Derivative Immunity: Conflicting Decisions}

Although early judicial decisions alluded to the possibility of derivative immunity,\textsuperscript{42} the doctrine of derivative immunity was not recognized until \textit{Haldane v. Chagnon}.\textsuperscript{43} In \textit{Haldane}, the presiding judge in a divorce proceeding signed an order, on petition by the attorneys, requiring the defendant to submit to a mental health examination. The defendant subsequently filed a \textit{pro se} complaint, alleging that the judge, the attorneys, and the bailiff conspired to deprive him of his civil rights.\textsuperscript{44} The court noted that since the judge and bailiff were immune from suit,\textsuperscript{45} no claim could be stated against the attorneys. The attorneys were not state officers and did not conspire with a state officer against whom a valid claim could be stated. "It follows that [the attorneys] could not commit the alleged wrongful acts 'under color of state law'"\textsuperscript{46} and could not be subject to liability.\textsuperscript{47}

Since the \textit{Haldane} decision, the doctrine of derivative immunity has been consistently adhered to in the Ninth Circuit,\textsuperscript{48}

\begin{itemize}
  \item \textsuperscript{40} Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (immunity does not preclude a finding of subject matter jurisdiction; it is a defense and not a jurisdictional issue in a civil rights action).
  \item \textsuperscript{41} It should be noted that in those jurisdictions where derivative immunity is not recognized, plaintiffs can partially void the state action mandate of § 1983. When the immune judge is dismissed from the suit, the case can proceed against the private defendants. Hence, plaintiffs can effectively do indirectly what they cannot do directly: institute a cause of action in the federal courts, under § 1983, against private persons.
  \item \textsuperscript{42} See, e.g., Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949) (questioning whether state action was present where the plaintiff sued private defendants and the judge involved in a suit that plaintiff unsuccessfully litigated in the state courts).
  \item \textsuperscript{43} 345 F.2d 601 (9th Cir. 1965).
  \item \textsuperscript{44} Haldane v. Changnon, 345 F.2d 601 (9th Cir. 1965). Apparently, the bailiff was joined in the suit merely because he happened to be present and associated with the state court proceeding.
  \item \textsuperscript{45} \textit{Id.} The judicial immunity extends to the bailiff since he is a lower judicial official.
  \item \textsuperscript{46} \textit{Id.} at 604-05.
  \item \textsuperscript{47} \textit{Id.} The theory and impact of derivative immunity is clearly expressed in the \textit{Haldane} decision. The attorneys could not be subjected to liability merely because the state actor with whom they conspired was immune from suit. The immunity of the state actor was thought to defeat the state action.
  \item \textsuperscript{48} Sykes v. California, 497 F.2d 197 (9th Cir. 1974) (private persons cannot be held liable under § 1983 for conspiring with a state official who is immune from suit); Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978) (same
although the cases fail to offer any justification for the doctrine.\textsuperscript{49} The derivative immunity principle is similarly applied in the Third,\textsuperscript{50} Fourth,\textsuperscript{51} Sixth,\textsuperscript{52} and Tenth Circuits.\textsuperscript{53} While extending official immunity to private persons also appears to be the established rule in the Second Circuit, that jurisdiction has rendered conflicting opinions.\textsuperscript{54}

In contrast to these circuits, a minority of jurisdictions, including the District of Columbia,\textsuperscript{55} do not adhere to the derivative immunity principle.\textsuperscript{56} For example, in \textit{Sparks v. Duval principle}); Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (same principle); Shakespeare v. Wilson, 40 F.R.D. 500 (S.D. Cal. 1966) (same principle). \textit{But cf.} Briley v. California, 564 F.2d 849 (9th Cir. 1977) (indicating that the derivative immunity issue is an open question and recognition of the doctrine in \textit{Haldane} was only dictum).

49. The decisions rendered in the Ninth Circuit seem to accept the validity of derivative immunity without questioning it. No theories or policies are offered to justify the position that suits against private persons should be dismissed when the state actor they conspired with happens to be immune from suit. \textit{See} notes 44 and 48 \textit{supra}.


51. Dennis v. Hein, 413 F. Supp. 1137 (D.S.C. 1976) (suit brought by lessee against lessor and immune magistrate was dismissed for failure to state claim upon which relief could be granted).


56. Kermit Constr. Corp. v. Banco Credit y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976). In \textit{Kermit}, the First Circuit abandoned the doctrine of derivative immunity. The plaintiff had brought a civil rights action against a bank, a construction company, and a court appointed receiver. The plaintiff alleged that the defendants conspired to place the corporation in receivership and thus avoid paying a corporate debt. The court, in reversing the trial court, held that the complaint stated a § 1983 cause of action. Although the receiver was immune from suit, the court determined that the bank and construction company could not seek the shelter of this immunity. The conspiracy itself was action taken under color of state law; the fact the receiver
County Ranch Co., the Fifth Circuit abandoned the rule of derivative immunity. The Sparks decision overruled a long line of precedent upholding the immunity.

In Sparks, the plaintiffs filed suit under section 1983 alleging that a judge conspired with private persons to deprive the plaintiffs of their constitutional rights. Since the judge was immune from suit, the appellate court held that the remaining defendants did not conspire with anyone against whom a valid section 1983 claim could be stated. The complaint was dismissed, but a rehearing en banc was granted.

In the en banc rehearing, the panel refused to extend a derivative immunity to private persons who conspire with immune judges. "[C]onspirators act under color of law and can be sued for damages in a section 1983 action when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme." In reaching the conclusion that private defendants can be held liable although they conspire with an immune judge, the Sparks court distinguished between state action and remedies. The presence of the judge in the suit established the requisite state action; the judge's immunity merely precluded obtaining damages against him.

was himself immune from suit was irrelevant. This holding has subsequently been upheld in First Circuit decisions. See Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), cert. denied, 439 U.S. 910 (1978) (immunity of the state official has no bearing on the state action); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977) (private parties who conspire with immune officials are subject to liability under § 1983).

Sparks initially began as a dispute over the use of certain properties. The plaintiffs operated oil and gas wells on land adjacent to the defendant's corporation. The defendant filed suit to enjoin the oil production on the grounds it was polluting his property. The trial judge granted a temporary injunction. The plaintiffs subsequently filed suit, under § 1983, against the judge and certain private defendants, alleging they conspired to deprive the plaintiffs of their oil production. The plaintiffs alleged that the true motivation behind the request and issuance of the injunction was to halt the oil production and cause the plaintiff's lease to terminate under a contract nonproduction clause. The judge allegedly received a bribe for issuing the injunction.

Sparks v. Duval County Ranch Co., 588 F.2d 124 (5th Cir. 1979).

Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980).

Id.

Id. at 983.
Whether a judge's immunity precludes a finding of state action or simply bars the plaintiff from obtaining relief against the judge is a question the Seventh Circuit has frequently confronted. Because the majority of cases have been dismissed on the pleadings, the current position of the Seventh Circuit with respect to derivative immunity is difficult to ascertain. Early decisions seemed to indicate that the judge's immunity defeats the state action requirement. Recent cases, however, imply a willingness to abandon the derivative immunity doctrine, and recognize state action despite the judge's immunity. If the derivative immunity principle is abandoned, judicial immunity will have no effect on state action, although the plaintiff will be precluded from pursuing a remedy against the judge.

Whether or not state action and remedies are viewed as distinct issues is the decisive factor in determining the application of derivative immunity. Those jurisdictions which apply derivative immunity believe state action is absent where the state actor is immune from suit, since no remedy is available against him. Those jurisdictions which consider state action and remedies as separate issues have no need to apply the derivative

64. Id. The Sparks court treated judicial immunity as a defense rather than a jurisdictional issue.
65. See generally cases cited in note 140 infra.
66. Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975) (allegations of a conspiracy between public officials and private persons are not sufficient to establish liability under § 1983) (dictum); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970), cert. denied, 401 U.S. 915 (1971) (dictum) (same principle); see Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969) (recognizing the rule of derivative immunity by implication).
67. Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (Fairchild, C.J., concurring) (implying private persons can be held liable for conspiring with an immune judge where the pleadings of the conspiracy are sufficiently specific); see Grow v. Fisher, 523 F.2d 875, 878 (7th Cir. 1975) ("[W]e find somewhat disturbing the lack of any rationale for a rule which would appear to carry over governmental immunity to private individuals. The trend of recent judicial decisions has been in the direction of limiting the scope of immunity rather than enlarging it.").
68. Where the derivative immunity principle is not adhered to, the plaintiff is still precluded from obtaining a remedy against the judge. However, the private defendants who conspired with the judge will be subject to liability under a § 1983 suit.
69. See Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (derivative immunity not applied since the unavailability of a remedy against the judge is unrelated to the question of whether state action is present); Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977), cert. denied, 434 U.S. 972 (1977) (where there is no remedy available against a state official, private persons cannot be liable for conspiring with the state official because there is no state action).
immunity fiction.\textsuperscript{71} State action is present when a state actor is involved in a prohibited conspiracy. The immunity of the state actor is a defense which merely bars a civil judgment against the state actor.\textsuperscript{72} Whichever view a circuit adopts largely depends on public policy considerations.

\textit{Public Policy Considerations}

Policy considerations underlie the divergent views on the issue of derivative immunity. In determining whether and to what extent an immunity should be granted, the courts focus on two elements: (1) the existence of an immunity accorded at common law, and (2) the public policy considerations supporting that immunity.\textsuperscript{73} With respect to the judiciary, both elements support the grant of an immunity. Judges typically enjoyed an absolute immunity at common law\textsuperscript{74} and the immunity is thought to be necessary to the proper and independent administration of justice.\textsuperscript{75} A judge cannot effectively exercise his discretion in deciding civil and criminal cases where there is always present the threat that he may be subject to liability.\textsuperscript{76}

While these considerations support the grant of a judicial immunity, allowing private persons to vicariously benefit from that immunity poses a more difficult problem. Private persons enjoyed no immunity at common law nor are they "confronted with the pressures of office, the . . . decision making or the constant threat of liability."\textsuperscript{77} On the contrary, it is axiomatic that individuals should be held liable "for the natural consequences

\textsuperscript{71} Derivative immunity appears to be a legal fiction which is employed to justify dismissal of a § 1983 suit. Private persons are not really \textit{immune} from being sued. However, if the court wants to preclude suits involving immune officials, the only way it can do so is to extend that immunity to the private persons, through a fiction of "vicarious" immunity.

\textsuperscript{72} Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (\textit{en banc}), \textit{cert. denied}, 445 U.S. 943 (1980); see Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), \textit{cert. denied}, 439 U.S. 910 (1978) (state action is present where private persons conspire with state officials, although the officials are not subject to liability); Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceño, 547 F.2d 1 (1st Cir. 1976) (although the immunity of a court appointed receiver precluded a damage remedy against him, joining the receiver as a party defendant provided the requisite state action).

\textsuperscript{73} Sparkman v. McFarlin, 601 F.2d 261, 273 (7th Cir. 1979) (\textit{en banc}).

\textsuperscript{74} See note 19 and accompanying text \textit{supra}.

\textsuperscript{75} Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) (without the ability to operate independently, the judiciary would cease to be a respectable and useful institution).

\textsuperscript{76} Pierson v. Ray, 386 U.S. 547 (1967) (subjecting judges to liability would lead to unprincipled decision-making and intimidation).

of their act."\textsuperscript{78} The Supreme Court has applied this maxim to section 1983\textsuperscript{79} which is especially appropriate considering that even official immunities only protect the office holder during the performance of official duties.\textsuperscript{80} Thus, the policy considerations supporting judicial immunity are not applicable to private persons.

More important, it is not accurate to assume that the immunity of the state actor involved somehow destroys the requisite state action. The official need not even be joined in the suit to fulfill the state action requirement,\textsuperscript{81} therefore, his immunity or lack thereof should be even less significant. As long as one acting under color of state law is involved in the conspiracy, state action is provided.\textsuperscript{82} The absence of a remedy against the immune state official should not eliminate an action against the private persons nor should it lessen their responsibility for their acts.\textsuperscript{83} The courts have consistently held, in cases which were not brought under the Civil Rights Act, that the immunity of one or more conspirators does not preclude conviction of the remaining conspirators.\textsuperscript{84} In civil rights actions where constitutional rights are at issue, it is questionable whether the courts should deviate from the rule allowing recovery against the non-immune conspirators.


\textsuperscript{79} Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), cert. denied, 439 U.S. 910 (1978) (the notion that individuals should be responsible for their own acts applies to civil rights actions).

\textsuperscript{80} E.g., Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Texas 1976) ("Common law immunities extend only so far as the interests of the common good demand protection for the holder of the office from liability for carrying out his official functions. [J]udicial immunity is restricted to . . . protecting judicial freedom in the process of deciding civil and criminal cases.").

\textsuperscript{81} Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) (as long as a person performed an act under color of law, state action is present; the state actor need not be joined as a party defendant).

\textsuperscript{82} E.g., Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (state action is established through the conduct of a person acting under color of law).

\textsuperscript{83} Downs v. Sawtelle, 574 F.2d 1, 15 (1st Cir. 1978), cert. denied, 439 U.S. 910 (1978) ("The ultimate destiny of the private party can in no way be said to depend on the status of the official with whom he conspired or upon the defenses available to that official.").

\textsuperscript{84} Fransworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938) (although Japanese officials could not be sued because of diplomatic immunity, the private persons with whom they conspired were held liable); Ewald v. Lane, 104 F.2d 222 (D.C. Cir. 1939) (where interspousal immunity barred the plaintiff's suit against her husband, the husband's co-defendants were still held liable); United States v. Crum, 404 F. Supp. 1161 (W.D. Pa. 1975) (an individual can be held liable for his part in a conspiracy although his co-conspirators are immune from prosecution); see generally 91 A.L.R.2d 700, 722-23 (1963) (discussing the effect of a conspirator's immunity on the liability of the co-conspirators).
It should be noted that there are policy considerations which favor extending a derivative immunity to private persons who conspire with public officials. Perhaps the best reason for extending the immunity is the discouragement of frivolous civil rights actions. If private persons can be held liable for their part in the conspiracy, unsatisfied litigants would be induced “to sue everyone in convenient range,” naming the judge who ruled against them as a defendant in order to allege the requisite state action. The threat of frivolous civil rights actions is apparent. An increasing number of cases are brought by pro se litigants who lost in the state courts and request enormous damages in the federal courts.

Related to the consideration of discouraging frivolous claims is the fear that abandoning derivative immunity would alter the relationship between the federal and state courts. “[A]nyone dissatisfied with the results of the litigation in the state court can allege a ‘conspiracy’ sufficient to obtain federal court review of his claim.” The result would be the broadening of the provisions of section 1983 in an unprecedented and unintended manner. The federal courts were never intended to operate as a reviewing board for every state court decision.

A further consideration favoring derivative immunity is the fear the private persons would otherwise hesitate to report crimes and testify as witnesses. This fear, however, is counter-

85. E.g., Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (Sprecher, J. concurring) (the courts want to avoid entertaining frivolous civil rights claims).
87. Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977) (plaintiff filed a pro se complaint); Hill v. McLellan, 490 F.2d 859 (5th Cir. 1974) (pro se complaint filed by a state prisoner); Kamster v. Zaslawsky, 355 F.2d 526 (7th Cir. 1966) (plaintiff requested $1,000,000 in compensatory damages and $10,000,000 in punitive damages); Lowery v. Hauk, 422 F. Supp. 490 (C.D. Cal. 1976) (plaintiff requested damages in excess of $1,000,000 for being removed from a courtroom); Stambler v. Dillon, 302 F. Supp. 1250 (S.D. N.Y. 1969) (unsuccessful litigants in three actions brought in the state courts filed a civil rights suit in the federal court requesting $500,000 in damages).
88. Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (dissenting opinion) (in the absence of derivative immunity, the federal courts would be hearing no claims which are properly within the jurisdiction of the state courts).
89. See Dennis v. Hein, 413 F. Supp. 1137, 1141 (D.S.C. 1976) (“To allow the courts to entertain actions based on such allegations as this of conspiracy between private citizens and judicial officers would subject every complainant in every case to potential liability and an alarming possibility of suit under the ever-broadening provisions of § 1983.”).
90. French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) (federal courts are not intended to be arbiters of state court decisions).
balanced by the fact that private persons' involvement in crimes would go unremedied under the derivative immunity principle. While private persons would be less hesitant to report crimes where derivative immunity is recognized, they would also be less hesitant to engage in crimes.

Finally, it is suggested that if private persons can be liable for their participation in a conspiracy, the judge may be required to submit to discovery and appear as a witness. Requiring the judge to appear at the trial would unduly hamper the judicial process. Furthermore, the plaintiff would have an opportunity to do indirectly what he cannot do directly: involve the judge in litigation and proceed against only private persons under section 1983.

It has been proposed that derivative immunity should only be enjoyed by those private persons who acted in subjective and objective good faith. However, this approach would still involve the judge in litigation. If the private person acted in bad faith, he could still be sued under section 1983 in federal court. Section 1983 does not seem to contemplate the purity of the private person's motives. Moreover, the argument that derivative immunity depends on the private person's motives presupposes that the presence of the immune judge provides the state action factor. The theory of derivative immunity is that since the judge is immune from suit, there is no state action present. Since it is questionable whether the status of the

the absence of derivative immunity, would be discouraged from being involved in the "judicial treatment of crime and misconduct").

93. Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (the judge would be required to testify on the issue of the private person's participation in the alleged conspiracy).

94. Id. The judge could not perform his official duties for the period of time he was required to participate in the trial.

95. See note 41 supra.

96. 28 CASE W. RES. L. REV. 1014 (1978) (the test of derivative immunity should be whether the private person acted in good faith); see Hagopian v. Consolidated Equities Corp., 397 F. Supp. 934 (N.D. Ga. 1975) (implying a private defendant may be held liable for damages under § 1983 if he acted pursuant to an improper motive).

97. The judge would still be required to testify and be subjected to discovery if the private person is found to have acted in bad faith.

98. If there is a conspiracy between a state official and private persons to deprive the plaintiff of a constitutional right, this satisfies the requirements to bring a suit under § 1983. The existence of a conspiracy does not depend on the motives of a conspirator. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

99. E.g., French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) (court dismissed suit brought against prosecutors and private defendants; since the prosecutors were immune from suit, there was no action taken under color of law).
state official should affect state action, certainly state action should not depend on the good or bad faith of a private person.\textsuperscript{100}

Thus, it appears that a jurisdiction must either adhere to the concept of derivative immunity or abandon it; there is no workable compromise. The major competing values are the necessary redress of a plaintiff's constitutional deprivation\textsuperscript{101} versus the discouragement of frivolous claims and the broadening of state action.\textsuperscript{102} It would seem that where a plaintiff has been deprived of a constitutional right redressable under section 1983, his claim should not be defeated because the state actor involved happens to be immune.\textsuperscript{103}

Curiously, a number of courts, particularly the Seventh Circuit, have managed to decide the derivative immunity issue without even reaching it.\textsuperscript{104} Rather than formulate a rule for or against extending immunity to private persons, the cases are dismissed for insufficient pleadings.\textsuperscript{105} The theory and propriety of this policy is the focus of the next section.

\section*{Pleading the Conspiracy}

Despite the conflict in the circuits on the application of derivative immunity, the courts appear to be in agreement on one aspect of these cases. Whenever a plaintiff predicates a section 1983 suit on a prohibited conspiracy between judges\textsuperscript{106} and private persons, the courts will carefully scrutinize the sufficiency of the pleadings. If the presence of the judge in the suit is sufficient to establish state action where the private person acts in bad faith, then it should be sufficient where an act was performed in good faith. State action depends on the state actor, not on the status of the private defendants.

\textsuperscript{100} If the presence of the judge in the suit is sufficient to establish state action where the private person acts in bad faith, then it should be sufficient where an act was performed in good faith. State action depends on the state actor, not on the status of the private defendants.

\textsuperscript{101} The importance of providing the plaintiff with redress in a federal court may be somewhat undermined by the fact that the plaintiff can still bring a cause of action against the private defendants, for damages, in the state court. See Bartlett v. Duty, 174 F. Supp. 94 (N.D. Ohio 1959).

\textsuperscript{102} See, e.g., Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (discussing the competing policy considerations for and against derivative immunity).

\textsuperscript{103} See Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (dictum) (immunity of the state actor should not preclude a finding of state action; immunity is a defense and unrelated to the jurisdictional issue of whether state action is present).

\textsuperscript{104} E.g., Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (the court refused to adopt a rule for or against derivative immunity; instead, the court proposed a stringent pleading requirement).

\textsuperscript{105} See generally cases cited in note 140 infra.

\textsuperscript{106} Judges are dealt with in this comment because many of the conspiracy suits brought under § 1983 involve a judge as the state actor. However, the rules which will be enunciated equally apply to any immune public official alleged to provide the requisite state action.
of the pleadings.\textsuperscript{107} This policy of "scrutinizing the pleadings" is especially pronounced in civil rights actions.\textsuperscript{108} The courts are concerned that the plaintiff is trying to use the Civil Rights Act as a vehicle to collaterally attack criminal convictions\textsuperscript{109} or to raise solely state law claims.\textsuperscript{110}

Since state law claims and purely private misconduct are not remedied under section 1983,\textsuperscript{111} the federal courts must ascertain whether the allegations could support a finding of state action.\textsuperscript{112} To sufficiently meet the state action requirement, the plaintiff must do more than merely state vague and conclusory allegations. It is unclear how much more would be required in the way of pleading the cause of action.

\textit{Elements of the Cause of Action}

There are two essential elements under section 1983 which a plaintiff must allege in order to avoid a dismissal on the pleadings. First, the plaintiff must claim that there was a conspiracy in which at least one participant involved acted under color of

\textsuperscript{107} See Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (\textit{en banc}) (Swygert, Cummings & Wood JJ., dissenting) (the courts are requiring more than the Federal Rules of Civil Procedure with respect to the specificity of the allegations). \textit{But see} Canty v. Brown, 383 F. Supp. 1396, 1399 (E.D. Va. 1974), \textit{aff'd}, 526 F.2d 587 (4th Cir. 1975), \textit{cert. denied}, 423 U.S. 1062 (1976), ("[C]ivil rights complaints are to be broadly construed in order to effectuate the high congressional priority placed upon the vindication of civil rights' deprivations.").


\textsuperscript{109} See Barnes v. Dorsey, 354 F. Supp. 179 (E.D. Mo. 1973) (civil rights actions are inappropriate vehicles for collaterally attacking state criminal convictions).

\textsuperscript{110} Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968) (pleadings should be scrutinized to be sure the plaintiff is not using the Civil Rights Act solely to appeal state court judgments or to raise purely state law claims).


\textsuperscript{112} \textit{See}, e.g., Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (\textit{en banc}), \textit{cert. denied}, 445 U.S. 943 (1980) (amended complaint sufficient to support a finding of state action where it alleged a conspiracy involving a state actor in considerable detail).

\textsuperscript{113} Slotnick v. Stavisky, 560 F.2d 31 (1st Cir. 1977) (complaint will not survive a motion to dismiss if it contains only vague, conclusory allegations not supported by facts); Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) (same principle); Kamsler v. Zaslawsky, 355 F.2d 526 (7th Cir. 1966) (same principle); Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964) (same principle); Johnson v. Teasdale, 456 F. Supp. 1093 (W.D. Mo. 1978) (same principle).
state law. Second, the plaintiff must allege that the conspiracy deprived him of a right, privilege or immunity secured by the Constitution or the laws of the United States. The majority of complaints result in dismissal for failure to sufficiently plead the state action element.

In pleading the requisite state action element, the plaintiff must do more than broadly claim the existence of a conspiracy. The courts appear to have adopted a three step analysis in determining the presence or absence of a conspiracy. In the first step, the court determines whether the plaintiff has alleged a "meeting of the minds" between the public official and the private persons. At a minimum, the "meeting of the minds" requirement presumes a common understanding between the parties, or the performance of "joint and willful activity." Although there must be a willful participation in the conspiracy, crimes resulting from the conspiracy need not be specifically intended. In civil actions, it is sufficient if there is a showing of concerted action or a civil partnership.

116. The high dismissal rate for failure to sufficiently plead state action is due, in part, to the principle of derivative immunity. Those states recognizing derivative immunity hold that there is no state action where the state actor involved is immune from suit. See note 50 supra.
117. French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) (it is not sufficient that the plaintiff charge a conspiracy and recite verbatim the Civil Rights Act); Dinwiddie v. Brown, 230 F.2d 465, 469 (5th Cir. 1956) ("merely characterizing [defendant's] conduct as conspiratorial does not set out allegations upon which relief can be granted"); Bartlett v. Duty, 174 F. Supp. 94 (N.D. Ohio 1959) (general charge of conspiracy is merely an unacceptable conclusory statement).
119. E.g., Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (a conspiracy requires that there be a common understanding between the state actor and the private defendants). But see Hoffman-LaRouche, Inc. v. Greenburg, 447 F.2d 872 (7th Cir. 1971) (it is not necessary that each conspirator know the exact limitations of the unlawful venture).
120. Potenza v. Schoessling, 541 F.2d 670 (7th Cir. 1976) (private persons jointly engaged in prohibited action with a state official are conspiring under color of law); Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975) (it is necessary to show that private persons and a state actor have willfully participated in a conspiracy).
123. See Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959) (comparing a conspiracy with a civil partnership).
The second step requires the plaintiff to allege that one or more overt acts were committed by the defendants in furtherance of the conspiracy. In alleging the commission of the overt acts, the days and dates upon which the alleged acts took place should be specified. It should be noted that if the plaintiff alleges the commission of an act by one co-conspirator in a particular district, that district may obtain jurisdiction over all the conspirators.

The final step in the courts' analysis of the allegations is the format of the pleadings themselves. It is not sufficient that the plaintiff avers a mere suspicion; specificity of the conduct is required such as "will permit an informed ruling whether the wrong complained of is of federal cognizance." This specificity requirement is relaxed somewhat where the plaintiff files a pro se complaint. In pro se cases, the complainant does not benefit from counsel and the court is more willing to construe the pleadings liberally. Nevertheless, the majority of pro se complaints result in a dismissal on the pleadings.


125. See Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (complaint sufficient where it alleged days on which the defendants performed the prohibited acts). But see Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959) (it is not necessary to specify the dates upon which the alleged acts took place).

126. Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973) (district wherein one conspirator committed an overt act may obtain jurisdiction over all conspirators provided they are properly served with process).

127. This step in the court's analysis deals with the form of the pleadings as opposed to the substance of the pleadings. Even where a "meeting of the minds" is alleged, coupled with the commission of overt acts, the court will look to the specificity of the allegations.


129. Kauffman v. Moss, 420 F.2d 1270, 1275 (3d Cir. 1970); see also Dinwiddie v. Brown, 230 F.2d 465 (5th Cir. 1956) (court will not accept allegations merely giving a state claim the guise of a civil rights action); Shakespeare v. Wilson, 40 F.R.D. 300 (S.D. Cal. 1966) (requiring judicially cognizable statements).

130. See Clark v. Zimmerman, 394 F. Supp. 1166 (M.D. Pa. 1975) (in forma pauperis actions should be dismissed only if they are wholly frivolous or malicious).


Defeating the Motion to Dismiss

The high dismissal rate of civil rights complaints is attributable to a failure to comply with the court's interpretation of the Federal Rules of Civil Procedure[133] and a failure to plead with specificity. In addition to the general allegations of conspiracy, purpose, and color of law, the plaintiff must set forth particularized averments. The plaintiff should allege "particularly what the defendants did to carry the conspiracy into effect, whether such acts fit within the framework of the conspiracy alleged, and whether such acts, in the ordinary course of events, would proximately cause injury to the plaintiff."

Almost invariably, the defendants respond to the conspiracy allegations with a motion to dismiss. Where a motion to dismiss is made, the courts will assume that the material allegations of the complaint are true[137] and will construe the allegations most favorably to the pleader. Despite these concessions, plaintiffs' complaints do not ordinarily survive the motion to dismiss. In the Seventh Circuit, for example, the appellate court has never had to adopt a per se rule for or against derivative immunity. This is because no complaint in the

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134. Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (case dismissed because the pleadings lacked specificity); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) (same); Bartlett v. Duty, 174 F. Supp. 94 (N.D. Ohio 1959) (same).


136. Complaints are most frequently met with a motion to dismiss in jurisdictions which adhere to derivative immunity. If the state actor involved is immune from suit, the motion is likely to be granted without regard to the sufficiency of the complaint. See, e.g., Sykes v. California, 497 F.2d 197 (9th Cir. 1974).


138. Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) (pleadings are construed most favorably to the pleader). But see Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978) (the court will not consider points which were not raised in the pleadings when reviewing a motion for judgment on the pleadings).

139. Sparkman v. McFarlin, 601 F.2d 261, 265 (7th Cir. 1979) (en banc) ("The Seventh Circuit has in the past often avoided establishing . . . a per
Seventh Circuit, alleging a prohibited conspiracy, has survived a motion to dismiss.¹⁴⁰

Recently, in *Sparkman v. McFarlin*,¹⁴¹ the plaintiff brought suit under section 1983 alleging that she was deprived of due process and equal protection of the law when she was ordered to be sterilized without her knowledge or consent.¹⁴² The sterilization order was issued in an *ex parte* proceeding and was never filed in the court.¹⁴³ The plaintiff was unaware of the consequences of the surgery, having been informed she was merely having her appendix removed.¹⁴⁴

Courts have consistently held that sterilizations performed under similar circumstances are unconstitutional.¹⁴⁵ One case even refused to allow the judge who ordered the sterilization to benefit from judicial immunity.¹⁴⁶ The *Sparkman* court, however, ruled that no claim can ever be stated against private parties alleged to have conspired with immune judicial officials . . . .”.

¹⁴⁰ Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (complaint dismissed for insufficient pleadings); Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) (same); Hansen v. Ahigrimm, 520 F.2d 768 (7th Cir. 1975) (same); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970), cert. denied, 401 U.S. 915 (1971) (same); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969) (same); Kamsler v. Zaslawsky, 355 F.2d 526 (7th Cir. 1966) (same); Davis v. Foreman, 251 F.2d 421 (7th Cir. 1958), cert. denied, 356 U.S. 974 (1958) (same).

¹⁴¹ 601 F.2d 261 (7th Cir. 1979) (en banc). *Sparkman* had an interesting procedural history. The plaintiff brought an action, pursuant to § 1983, against the judge who ordered her sterilized, the attorneys who drafted the petition for sterilization, the doctors who performed the sterilization, her mother, and the hospital where the operation was performed. The district court dismissed the complaint on the grounds that the only state actor joined as a defendant was immune from suit. The Court of Appeals for the Seventh Circuit reversed, holding that the judge acted in excess of jurisdiction and therefore the judge was not protected by judicial immunity. The Supreme Court granted certiorari and reversed the appellate court decision, holding that the judge was immune from suit. The Court declined to consider whether the judge's immunity precluded suit against the private defendants.

On remand, the appellate court dismissed the case for insufficient pleadings of any conspiracy between the judge and the private defendants. *Sparkman* was subsequently heard by the Seventh Circuit *en banc*. A *per curiam* order was filed which affirmed the appellate court decision. Four separate concurring opinions were submitted which seemed to indicate a willingness to hold private persons liable if they conspire with an immune state official. The judges held that in *Sparkman*, however, the pleadings were insufficient to allege the conspiracy.

¹⁴² *Id.*

¹⁴³ *Id.* The plaintiff received no notice of the hearing in which the judge signed the sterilization order.

¹⁴⁴ *Id.*


ever, found it unnecessary to reach the constitutional issue. The court simply dismissed the case due to insufficient pleadings.\footnote{Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc).} The plaintiff was not afforded an opportunity to amend the complaint or proceed with further discovery\footnote{Id.} despite Federal Rule of Civil Procedure 15(a),\footnote{Id. at 45-46 (emphasis added).} by which leave to amend complaints should be "freely given in the interests of justice."\footnote{Id. at 45-46 (emphasis added).} It cannot be maintained that Sparkman is an aberration. When courts determine that complaints alleging a conspiracy are insufficient, the trend is to dismiss the complaints rather than to grant leave to amend.\footnote{[This case] reminds us of the need for periodic exercise, for over and over and over again—but apparently not often enough—this court who ordered the plaintiff sterilized acted in excess of his jurisdiction and was not entitled to judicial immunity).}

The policy of dismissing complaints which lack particularized pleadings is predicated on the concern that federal courts would otherwise be set up "as an arbiter of the correctness of every state [court] decision."\footnote{Johnson v. Stone, 266 F.2d 803, 804 (7th Cir. 1959) (quoting Bottone v. Lindsley, 170 F.2d 705, 707 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949)).} While this is a valid consideration, requiring particularized pleadings to avoid dismissal\footnote{Id. at 45-46 (emphasis added).} has not been viewed favorably by the Supreme Court. In \textit{Conley v. Gibson},\footnote{Id.} for example, the Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."\footnote{Id. See Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), cert. denied, 434 U.S. 975 (1977) (leave to amend shall be freely given).} Subsequent court decisions have consistently adhered to the \textit{Conley} holding.\footnote{E.g., Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (dissenting opinion and cases cited therein). A test proposed for whether or not to grant leave to amend the complaint should be granted is "whether . . . allegations of other facts consistent with the challenged pleading could cure the deficiency in the complaint." Asher v. Harrington, 461 F.2d 890, 895 (7th Cir. 1972).}
Requiring particularized pleadings is not only inconsistent with the Supreme Court's ruling that motions to dismiss should be granted sparingly, it is in derogation of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires only that the plaintiff present a "short and plain statement of the claim." This provision has been interpreted as a form of "notice pleading." With respect to notice pleading, it is sufficient if the plaintiff sets forth a claim and provides the defendants with fair notice of the basis of the claim. Federal Rule of Civil Procedure 8(f) similarly proposes a lenient consideration of complaints, providing that "all pleadings shall be so construed as to do substantial justice."

While the courts have not ignored Federal Rule 8, the Rule is typically invoked to justify dismissing a complaint. Generally, the reason for dismissal is the plaintiff's failure to state his claim succinctly, briefly, and clearly. Undeniably, certain lengthy and conclusory complaints warrant a summary dismissal. It is unlikely, however, that Rule 8 was designed solely to provide the courts with justification for dismissing cases. Rule 8 should also provide a basis for approving complaints without requiring a particularized fact to support

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157. FED. R. CIV. P. 8(a)(2) provides that "[a] pleading which sets forth a claim for relief shall contain. . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."
158. E.g., Sundstrand Corp. v. Standard Kollsman Indus., Inc., 488 F.2d 807 (7th Cir. 1973) (notice pleading is sufficient under the Federal Rules).
159. Conley v. Gibson, 355 U.S. 41 (1957) (the purpose of Federal Rule 8 is fulfilled where the defendant is provided with adequate notice of the basis of plaintiff's claim); Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (Swygert, Cummings, & Wood, JJ. dissenting) (same principle).
160. FED. R. CIV. P. 8(f).
Complaints should be construed especially liberally in conspiracy cases since “joint activity” between defendants is particularly difficult to both plead and prove.\textsuperscript{164} Further, there is a distinction between surviving a motion to dismiss and prevailing on the merits.\textsuperscript{165} Uncertainty with respect to the plaintiff’s success at trial should not preclude granting the plaintiff an opportunity to present his claim.\textsuperscript{166}

**Conclusion**

In order to successfully allege a section 1983 cause of action on the grounds of a prohibited conspiracy, the plaintiff must allege that at least one defendant acted under color of state law.\textsuperscript{167} Where the state actor involved is immune from suit, however, a plaintiff’s likelihood of successfully maintaining a cause of action is minimal in jurisdictions which recognize derivative immunity. Jurisdictions which have adopted derivative immunity will dismiss the complaint since the private persons vicariously benefit from the public official’s immunity.\textsuperscript{168}

\textsuperscript{163} See Conley v. Gibson, 355 U.S. 41 (1957) (while pleadings could benefit from particularization, that is not sufficient cause to dismiss the claim on the pleadings); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (same principle); Harman v. Valley Nat’l Bank of Ariz., 339 F.2d 564, 567 (9th Cir. 1964) (“The mere fact that some of the allegations in the complaint are lacking in detail is not a proper ground for dismissal.”). But see Lee v. Alabama, 364 F.2d 945 (5th Cir. 1966), cert. denied, 395 U.S. 927 (1969), rehearing denied, 396 U.S. 871 (1969) (implying that allegations of conspiracy must comply with Federal Rule 9(b) which requires particularized pleadings); Hill v. Lewis, 361 F. Supp. 813 (E.D. Ark. 1973) (same by implication).

\textsuperscript{164} See Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (Swygert, Cummings & Wood, JJ. dissenting) (conspiracies are generally clandestine, and it is difficult to provide direct evidence of an agreement between the defendants).

\textsuperscript{165} See, e.g., Cook & Nichol, Inc. v. Plimso1 Club, 451 F.2d 505, 510-11 (5th Cir. 1971) (referring to the plaintiff’s allegations, the court stated that “[w]hether this is all steam, or whether there is some substance depends on the proof offered... [at trial]... [A]ll we have determined... is that the complaint states a claim... and cannot therefore be disposed of on the pleadings.”); Webb v. Standard Oil Co., 414 F.2d 320 (5th Cir. 1969) (the complaint stated a claim and could not therefore be disposed of on the pleadings, although the court implied that plaintiff’s chances of success at trial were minimal).

\textsuperscript{166} Id. But cf. Clark v. Zimmerman, 394 F. Supp. 1166 (M.D. Pa. 1975) (if the plaintiff’s complaint is totally frivolous, or he has no chance of success at trial, then the motion to dismiss should be granted).

\textsuperscript{167} E.g., Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (state action is a requirement of a federal civil rights claim). In addition to state action, the plaintiff must allege that the act in question deprived him of a right, privilege or immunity secured by the Constitution or laws of the United States. See 42 U.S.C. § 1983 (1976).

\textsuperscript{168} The theory of derivative immunity is that the private persons have not conspired with anyone against whom a valid claim can be stated. Therefore, state action is lacking and the complaint must be dismissed with respect to the private persons as well. See note 38 supra.
The policy of extending immunity to private persons fulfills the important objective of restricting access to the federal courts and the review of state court decisions. Nevertheless, to the extent that derivative immunity leaves valid federal claims unredressed, the principle is questionable. "Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials, those factors were resolved by Congress in favor of those who claim a deprivation of constitutional rights." 

Even in jurisdictions where derivative immunity is not adhered to, attorneys will have a difficult time alleging a section 1983 cause of action. Surviving a motion to dismiss will be the most formidable obstacle. Despite the caveat that "technical pleading requirements [should not] defeat the vindication of . . . constitutional rights," the courts seem to be requiring an extremely particularized pleading of the conspiracy. This particularized pleading requirement is in derogation of the Federal Rules of Civil Procedure and the judicial principle that motions to dismiss should be granted sparingly.

The particularized pleading barrier is especially difficult to overcome since pleading and proving a section 1983 conspiracy is not an easy task. Additionally, the courts have failed to set forth criteria indicative of a sufficient pleading. Regardless of

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169. Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (Swygert, Cummings, & Wood, JJ., dissenting) (discussing the policy considerations for and against derivative immunity).
172. E.g., Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (rather than adopt a rule for or against derivative immunity, the court will require a claim to be accompanied by particularized pleadings). But cf. Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980) (abandoning derivative immunity and suggesting a relaxation of the pleading requirements).
174. Conley v. Gibson, 355 U.S. 41 (1957) (motion to dismiss should be granted only when there is no set of facts upon which the plaintiff would be entitled to relief); Haggy v. Solem, 547 F.2d 1363 (8th Cir. 1977) (same principle).
175. E.g., Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (en banc) (affirming the appellate court decision holding that the pleadings were insufficient, without setting forth reasons for the decision). But see Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 (1980). In Sparks the court set forth certain factors which a sufficient pleading requires, and held that the complaint in question was sufficient. However, Sparks involved an easy situation wherein the judge clearly accepted a bribe for which he rendered a decision in favor of the defendants. Most cases are not this clear-cut, as conspiracies generally do
the merits of the this approach, however, it certainly cannot be ignored. The proper recourse for plaintiffs' attorneys is to particularly set forth all allegations relevant to the issue, and to emphasize the policy considerations militating in the plaintiff's favor.\textsuperscript{176} Perhaps the courts will recognize that derivative immunity and particularized pleading requirements result in more than just the discouragement of frivolous civil rights claims. The vindication of valid civil rights claims is defeated as well.

\textit{Jacquelyn F. Kidder}

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\textsuperscript{176} See notes 77-80 and accompanying text \textit{supra}.