

Heightened Pleading

Christopher M. Fairman*

I. Introduction

Rule 8 is the keystone of the system of procedure embodied in the Federal Rules.¹ In 1938, reacting to both the hypertechnical categorization of fact pleading under the codes and the sluggish formalism of common-law pleading, the drafters forged a new balance. Rather than require pleadings to shoulder the multiple burdens of the past—including factual development, winnowing issues, and speedy disposition of meritless claims—the rules would require pleadings to do the one thing they do best: provide notice. Other procedural devices would take over the remaining salutary tasks.² Thus, Rule 8, with its stark simplicity, requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.”³ Enter notice pleading.⁴

Despite this clarity and the Supreme Court’s endorsement of notice pleading in *Conley v. Gibson*,⁵ federal courts have embraced heightened pleading burdens in a variety of situations.⁶ Nowhere has the squeeze been

* Assistant Professor of Law, Michael E. Moritz College of Law at The Ohio State University. I would like to thank my colleagues at the Moritz College for commenting on earlier drafts of this Article, especially Mary Beth Beazley, James Brudney, Sanford Caust-Ellenbogen, Ruth Colker, Arthur Greenbaum, and Marc Spindelman. Thanks also goes to my research assistant Edward Chyun for his thorough and valuable research. I dedicate this Article to the memory of my teacher and mentor, Charles Alan Wright; without his guidance and support I would never have joined the academy.

1. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 467 (1994).

2. See *infra* notes 46–49 and accompanying text (describing alternative procedural devices in the Federal Rules to perform non-notice functions).

3. FED. R. CIV. P. 8(a)(2).

4. To be sure, the drafters themselves recognized an exception and required in Rule 9 that the circumstances constituting fraud or mistake “shall be stated with particularity.” FED. R. CIV. P. 9(b). While this heightened burden appears more a case of historical accident than anything else, the particularization required in this special setting is little more than heightened notice—essentially the newspaper questions of who, what, when, where, and how. As crafted, the pleading rubric of the Federal Rules embodies an easy scheme: heightened pleading for fraud and mistake, notice pleading for everything else.

5. 355 U.S. 41, 47–48 (1957).

6. See, e.g., *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995) (qui tam); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (antitrust); *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 900 (D. Mass. 1991) (CERCLA); *North Jersey Secretarial Sch., Inc. v. McKiernan*, 713 F. Supp. 577, 584 (S.D.N.Y. 1989) (conspiracy); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1303 (D. Colo. 1984) (RICO); *Cimijotti v. Paulsen*, 219 F. Supp. 621, 623 (N.D. Iowa 1963) (defamation). Undoubtedly, examination of the use of heightened pleading burdens in these widely-varying, substantive contexts would further inform the debate on the relative merits of the mechanism. However, thorough treatment of these additional areas is beyond the scope of this Article.

tighter than in civil rights cases. Courts initially turned to heightened pleading out of an apparent hostility to civil rights cases;⁷ they retained it as a procedural fix to murky and shifting qualified immunity jurisprudence.⁸ The end result compelled civil rights plaintiffs to plead facts, often relating to the state of mind of the defendant, without the benefit of discovery. Earlier academic commentary uniformly criticized this inappropriate heightened burden on civil rights plaintiffs.⁹ The Supreme Court ultimately weighed in on its propriety in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.¹⁰ The Court held that heightened pleading in § 1983 claims involving municipalities impermissibly violated the rubric of the Federal Rules.¹¹

This death knell for heightened pleading was fleeting. Despite the Court's admonition, heightened pleading has continued to be used in civil rights cases throughout the federal circuits since 1993.¹² This expansive use led the Court to revisit the issue last term in *Swierkiewicz v. Sorema, N.A.*,¹³ where it held that heightened pleading in an employment discrimination lawsuit was also improper under Rule 8 and *Leatherman*.¹⁴ Given the resilience of heightened pleading after *Leatherman*, the impact of *Swierkiewicz* outside its narrow context is doubtful. Indeed, the Court's reiteration of the value of notice pleading cannot end the heightened pleading problem because post-*Leatherman* infatuation with the device is not limited

7. See, e.g., *Valley v. Maule*, 297 F. Supp. 958, 960 (D. Conn. 1968) (imposing heightened pleading for the first time to a civil rights action).

8. See, e.g., *Elliott v. Perez*, 751 F.2d 1472, 1477–78, 1482 (5th Cir. 1985) (pointing to the immunity doctrine as a basis for heightened pleading). For discussion concerning tensions in the courts of appeals on qualified immunity, see *infra* subpart III(B).

9. See, e.g., C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back*, 49 MO. L. REV. 677, 693 (1984) (questioning the rationale for stricter pleading in civil rights cases); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 471 (1986) (finding inadequate justification for applying stringent pleading requirements in “disfavored” civil rights cases); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 299 (1989) (contending that heightened pleading in civil rights cases contravenes the letter and spirit of the Rules); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 991 (1990) (concluding that factual pleading in civil rights cases is inconsistent with federal civil procedure).

10. 507 U.S. 163 (1993).

11. *Leatherman* invalidated the use of heightened pleading in a § 1983 case premised on municipal liability under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). See *id.* at 168.

12. A clear split has emerged, with some circuits broadly applying *Leatherman* and banning heightened pleading in all cases. Others take a restrictive view of *Leatherman* and permit heightened pleading in all but *Monell* actions. An intermediate position retains heightened pleading, but only in cases where subjective intent is an element of the constitutional claim. See *infra* subpart III(C).

13. 122 S. Ct. 992 (2002).

14. See *id.* at 998–99.

to the courts. Congress has turned to the device twice, both in the Private Securities Litigation Reform Act of 1995¹⁵ and in the Y2K Act.¹⁶

This Article compares the advent, proliferation, and post-*Leatherman* experiences of heightened pleading in the judicially imposed civil rights context with the parallel congressional experiences in securities fraud and Y2K actions.¹⁷ This comparative analysis demonstrates how the device has proven unworkable, whether initially imposed by the courts or Congress. The Article also compares the procedural alternatives to heightened pleading available under both civil rights and securities laws and discusses why those alternatives are preferable. Finally, the Article analyzes how putatively neutral procedural revisions can profoundly affect the course of substantive law.

In all three of the examined areas, underlying substantive uncertainty led to the proliferation of heightened pleading. This growth is particularly evident in both civil rights and securities fraud cases, where uncertainties surrounding the substantive law concerning the required state of mind of defendants, as expressed by qualified immunity and scienter, encouraged the spread of heightened pleading. While the substantive uncertainty led to procedural changes, the alterations in procedure yield a reciprocal substantive change. Whole categories of cases have been singled out for special procedural treatment, thereby limiting the substantive rights of certain plaintiffs. Erecting these procedural hurdles creates classes of disfavored cases and denies plaintiffs determination on the merits—a substantive effect

15. Pub. L. No. 104-67, 109 Stat. 737 (1995) [hereinafter PSLRA] (codified as amended in scattered sections of 15 U.S.C.).

16. 15 U.S.C. §§ 6601–6617 (2001).

17. Professor Richard Marcus first recognized the need for such a comparison between civil rights and securities fraud in a recent essay. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEXAS L. REV. 1749, 1752 (1998). This Article builds upon his scholarship and systematically compares judicial and statutory heightened pleading, thereby filling this void in the literature. In addition to the pre-*Leatherman* scholarship in the civil rights area, others have recently focused on heightened pleading under the PSLRA. This commentary, however, is generally narrowly targeted to deciphering the post-PSRLA landscape and suggesting interpretations to cope with the confusion. See generally Ann M. Olazabal, *The Search for "Middle Ground": Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153 (2001) (describing conflicting interpretations and advocating the interpretive middle ground); Marilyn F. Johnson et al., In re Silicon Graphics Inc.: *Shareholder Wealth Effects Resulting From the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773 (2000) (describing conflicting interpretations and advocating the stringent Ninth Circuit standard); Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457 (1998) (recognizing divergent PSLRA interpretations and developing their own interpretation); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537 (1998) (tracing post-PSLRA conflicts and advocating repeal of the discovery stay). This Article's broader comparative framework is meant to advance the conversation on the merits of heightened pleading in securities fraud, as well as other contexts.

masked as procedural. In the process, the transsubstantive nature of the rules is eroded; the procedure of procedure is ignored.

Part II briefly reviews the history of pleading experiences under the common law and codes, the drafters' reaction to the Federal Rules rubric, and the Supreme Court's notice pleading guidance. Part III traces the advent of heightened pleading in civil rights cases, analyzes its post-*Leatherman* resurgence, and assesses its continued usefulness in this area. Part IV explores the two post-*Leatherman* congressional attempts at heightened pleading. Part V synthesizes the lessons of heightened pleading in these three differing contexts. These lessons combine to form a central theme: the resurgence and resilience of heightened pleading jeopardizes a procedural balance carefully forged by the drafters and embodied in the Federal Rules.

II. Rubric of the Federal Rules

A. Rule 8 and Notice Pleading

Federal Rule of Civil Procedure 8, with its splendid simplicity, stands as the centerpiece of a procedural system designed to rectify the pleading abuses of the past.¹⁸ Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."¹⁹ This "jewel in the crown of the Federal Rules"²⁰ was the drafters' attempt at correcting the negative experiences of pleadings at common law and under the codes. A brief review of these experiences places the advent of Rule 8 in perspective.

While the drafters²¹ of the Federal Rules placed little importance on pleadings,²² the common law fostered a belief in their inherent usefulness.²³ The pleading scheme was premised on the assumption that by proceeding through numerous stages of denial, avoidance, or demurrer, a case eventually would be reduced to a single dispositive issue of fact or law.²⁴ What began

18. See Marcus, *supra* note 9, at 433–39.

19. FED. R. CIV. P. 8(a)(2).

20. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEXAS L. REV. 1897, 1917 (1998).

21. "Drafters" refers to the members of the original drafting committee. This group included Yale Law School Dean, Charles Clark, as its Reporter, and other luminaries, such as Attorney General William Mitchell, Harvard Professor Edmund Morgan, University of Michigan Law Professor Edson Sunderland, University of Virginia Law School Dean Armistead Dobie, and University of Minnesota Law School Professor Wilbur Cherry. The Committee also included Edgar Tolman, George Wharton Pepper, Scott Loftin, George Wickersham, Robert Dodge, George Donworth, Joseph Gamble, Monte Lemann, and Warren Olney. See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 534–35 n.30 (2001) (listing the group's members).

22. See Marcus, *supra* note 17, at 1749 (explaining that the drafters "clearly intended to curtail reliance on the pleadings and minimize pleadings practice").

23. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (2d ed. 1990) [hereinafter WRIGHT & MILLER].

24. *Id.*

as simple oral statements of counsel in response to questions from the court evolved into formal written demands and answers.²⁵ This “wonderfully scientific” system proved to be “wonderfully slow, expensive, and unworkable.”²⁶ Common-law pleading hence came into disrepute because of the “prolonged paper disputations” by lawyers anxious to get admissions without committing themselves.²⁷ This cumbersome system of specialized allegation, saddled with such epithets as “the glory of the technician and the shame of the lover of justice”²⁸ and “the bastard formalism of pleading,”²⁹ generated popular dissatisfaction that gave rise to reform.³⁰

Beginning in the mid-nineteenth century, many states adopted procedural reforms known as the Field Code.³¹ Under the Field Code, emphasis shifted from the detailed pleading of issues to the development of facts by pleading.³² For example, the New York Code required a complaint to include “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”³³ Although hailed by reformers as so simple a child could explain a case to the court,³⁴ the high hopes of the Field Code were unfulfilled. What ensued was a new quagmire of unresolvable disputes as to whether allegations were ultimate fact, evidence, or conclusions—a categorization critical to whether the allegation was proper under the code.³⁵ “Only ultimate facts satisfied the pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.”³⁶ Such a scheme overemphasized hypertechnical distinctions and produced conflicting judicial interpretations.³⁷ The ensuing

25. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943).

26. WRIGHT, *supra* note 1, at 468.

27. Clark, *supra* note 25, at 458.

28. *Id.*

29. *Id.* at 459 n.5.

30. See Marcus, *supra* note 9, at 437–38 (describing popular dissatisfaction and the rise of the reform movement).

31. The Field Code got its name from David Dudley Field, the drafter of the New York Code adopted in 1848. *Id.* at 438. It was “quickly adopted in most other American jurisdictions.” David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395 (1980).

32. 5 WRIGHT & MILLER § 1202, at 71.

33. Act of Apr. 12, 1848, ch. 379, § 120(2), 1848 N.Y. Laws 521 (simplifying and abridging practice, pleadings, and proceedings in the New York state court system).

34. Clark, *supra* note 25, at 459. Interestingly, adolescence appears to be the benchmark under the Federal Rules. See 5 WRIGHT & MILLER § 1202, at 75 (noting that “it has been said that ‘a sixteen year old boy could plead’ under these rules”).

35. See Marcus, *supra* note 9, at 438 (explaining the categorization and the propriety of each).

36. Roberts, *supra* note 31, at 395.

37. *Id.* at 395–96. See 5 WRIGHT & MILLER § 1202, at 71 (stating that “[t]his requirement was based on a failure to perceive that the distinction between facts and conclusions is one of degree only, not of kind”); see also *id.* § 1218, at 178–79.

confusion created a pleading system that rivaled the waste, inefficiency, and delay of the common-law practice it was designed to reform.³⁸

It is with this experience that the architect of the Federal Rules, Charles E. Clark, and his fellow drafters created an entirely different procedural vision for pleadings.³⁹ They wanted something simple, uniform, and transsubstantive.⁴⁰ Historically, pleadings have served four key functions: (1) providing notice of a claim or defense, (2) stating facts, (3) narrowing issues to be litigated, and (4) allowing for quick disposition of sham claims and defenses.⁴¹ Pleading, both at common law and under the codes, shouldered all four of these responsibilities.⁴² Convinced that pleadings were inadequate to perform these functions, Clark initially recommended the abolition of all pleading motions.⁴³ While this view did not carry the day, Rule 8 was carefully drafted to avoid the use of the loaded words—“fact,” “conclusion,” and “cause of action”—that had plagued the earlier pleading regimes.⁴⁴ Instead, a party need only provide a “short and plain statement of a claim” entitling one to relief.⁴⁵

The significance of Rule 8 is best seen in light of the procedural system as a whole. Instead of requiring pleadings to serve the multiple functions of notice, fact development, winnowing, and early disposition, under the Federal Rules pleadings serve but a single function: providing notice. In turn, the Federal Rules provide alternative techniques that are better suited to fulfilling the non-notice functions.⁴⁶ Fact development is achieved through discovery.⁴⁷ Issues are narrowed through discovery or partial summary judgment.⁴⁸ Quick elimination of sham claims and defenses is achieved with summary judgment.⁴⁹ Rule 8 operates as a keystone to an entire procedural

38. Clark, *supra* note 25, at 460. *See also* Roberts, *supra* note 31, at 396 (noting the high social cost of the system); 5 WRIGHT & MILLER § 1218, at 179 (describing the years of frustration under the codes and the inevitable result of traps for the unwary and inexperienced and the tactical advantages to the adroit).

39. Marcus, *supra* note 17, at 1749; *see also* Stempel, *supra* note 21, at 534–35 n.30 (listing other drafters).

40. *See* Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 550 (1998) (describing the drafters’ intent to create procedures that generalized across substantive lines).

41. *See* 5 WRIGHT & MILLER § 1202, at 68 (listing the four functions); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1025 (1989) (listing the same).

42. 5 WRIGHT & MILLER § 1202, at 68; Louis, *supra* note 41, at 1025.

43. Marcus, *supra* note 9, at 439.

44. *Id.*

45. FED. R. CIV. P. 8(a)(2).

46. 5 WRIGHT & MILLER § 1202, at 69.

47. *See* FED. R. CIV. P. 26–37.

48. *See id.*; FED. R. CIV. P. 56.

49. *See* FED. R. CIV. P. 56.

system where the only function left to be provided by pleadings alone is notice.⁵⁰

The notice function of pleading, however, cannot be divorced from the global vision of the drafters: litigants should have their day in court.⁵¹ Consequently, the Rules were designed to encourage determination on the *merits*.⁵² Rule 1 embodies this with its command for “just, speedy, and inexpensive determination of every action.”⁵³ The break with common-law and code pleading is but an illustration. These earlier pleading regimes denied litigants their day in court not because their claims lacked merit, but because of procedural technicalities. The Federal Rules remove these “procedural booby traps.”⁵⁴ Thus, notice pleading and the Rules as a whole establish merits determination as a new procedural norm.⁵⁵

While providing notice is the goal of Rule 8, critical for this examination of heightened pleading is an appreciation of just what level of pleading specificity the Rule envisioned. Clark himself described the quantum of notice required:

The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.⁵⁶

Clark believed that there could be a considerable difference in the amount of detail presented by different pleaders, but the broad and flexible requirements

50. See 5 WRIGHT & MILLER § 1202, at 68–69 (asserting that the non-notice functions traditionally ascribed to pleadings are reassigned in the Federal Rules).

51. Charles Clark, in particular, was committed to access, including the corollary problem of providing legal services to the poor. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502–04 (1986) (describing Clark’s reform commitment).

52. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.8, at 25 (2001) (concluding that the rules are integrated to promote the resolution of disputes on the merits); Byron C. Keeling, *Toward a Balanced Approach to ‘Frivolous’ Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1127–28 (1994) (noting that the drafters sought to elevate substance over form in resolving disputes); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 2–3 (1988) (noting that the Rules were adopted to provide litigants access to the courts and judgments based on facts, not form).

53. FED. R. CIV. P. 1; see also 4 WRIGHT & MILLER § 1029 (describing Rule 1 as the most important philosophical mandate).

54. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (“These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court.”).

55. The Supreme Court recently reiterated that “[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.” *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 999 (2002).

56. Clark, *supra* note 25, at 460–61. Clark’s protégé, Professor Moore, stressed in his treatise that pleadings “do little more than indicate generally the type of litigation that is involved.” 2A J. MOORE & J. LUCAS, *MOORE’S FEDERAL PRACTICE* ¶ 8.03, at 8–11 (2d ed. 1985).

of Rule 8 are best reflected in the Federal Forms provided as examples for practitioners.⁵⁷

In the decades that immediately followed adoption of the Federal Rules, there was not universal acceptance of Rule 8's simplicity and brevity.⁵⁸ The chief issue in dispute was whether Rule 8's requirement that a pleader allege that he is "entitled to relief" meant that a *prima facie* case must be alleged.⁵⁹ In 1952, the Ninth Circuit Judicial Conference adopted a resolution advocating amendment of Rule 8(a)(2) requiring the short, plain statement of the claim also to "contain the facts constituting a cause of action."⁶⁰ The Ninth Circuit's motivation appeared to be general concern that the simplified pleading of Rule 8 encouraged the filing of unjustified lawsuits and delayed the ability of defendants to extricate themselves.⁶¹ The poster child for advocates of amendment was Judge Clark's opinion⁶² in *Dioguardi v. Durning*.⁶³

57. See Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) (arguing that the forms are the best indicator of the detail necessary in a complaint). Consider a basic traffic accident. As Clark explained, "if one were merely to claim 'damages for X for \$10,000 for personal injuries,' there would be little to afford a basis for *res judicata* in the case." Clark, *supra* note 25, at 461. However, the four-sentence Federal Form 9, Complaint for Negligence, provides all the notice necessary: the date and location, the allegation that "defendant negligently drove a motor vehicle against plaintiff," and a general description of plaintiff's damages. See Form 9, Appendix of Forms, FED. R. CIV. P. According to Clark, because the plaintiff will not have had many accidents of that kind at that time and place, *res judicata* is clear. However, the mere allegation of negligence in operating a motor vehicle leaves the parties uncommitted to the actual cause of the alleged negligence such as speeding, failure to signal, or failure to look out. Clark, *supra* note 25, at 461-62. Under the new system of the Federal Rules, litigants would then use the expanded discovery devices to get to the merits of the case and winnow the issues. With this information in hand, the case could move on to summary disposition, if appropriate, or to trial on the merits. Marcus, *supra* note 9, at 440. To describe the pleading embodied in Federal Form 9 as simple and brief is an understatement. Nonetheless, by rule it fully complies with the pleading requirements of the Federal Rules. See FED. R. CIV. P. 84 ("The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."). Indeed, Wright and Miller describe the Forms as "excellent models of brevity and clarity" and advise the practitioner to "follow the relevant form" if possible. 5 WRIGHT & MILLER § 1223, at 204.

58. See WRIGHT, *supra* note 1, at 473 (speculating that the minority criticism may have been generated by those nostalgic and expert in the old ways).

59. See 5 WRIGHT & MILLER § 1216, at 150-65 (describing the challenge of defining what language constituted a "claim showing that the pleader is entitled to relief").

60. Discussion, *Claim or Cause of Action*, 13 F.R.D. 253 (1953). The Ninth Circuit's challenge has been colorfully described as a "guerilla attack" on the Federal Rules. RICHARD H. FIELD ET AL., CIVIL PROCEDURE 524 (7th ed. 1997).

61. See 5 WRIGHT & MILLER § 1216, at 165 (noting the Ninth Circuit's concern). This type of judicial insistence that stricter pleading requirements can prevent meritless lawsuits remains to this day, as the post-*Leatherman* judicial and statutory use of heightened pleading illustrates. See discussion *infra* Parts III & IV.

62. Judge Clark's authorship undoubtedly contributed to the attention garnered by this case. WRIGHT, *supra* note 1, at 473.

63. 139 F.2d 774 (2d Cir. 1944). The continued significance of *Dioguardi* was recently confirmed at oral argument in *Swierkiewicz* when the Court directed the petitioner to begin discussion of notice pleading, not with *Conley v. Gibson*, but with the "classic" *Dioguardi* decision.

Consider the colorful facts of *Dioguardi*. A consignee of a shipment of medicinal tonics, John Dioguardi, had his shipment tied up in customs over a dispute concerning the payment of charges allegedly to have been paid by the consignor. The Collector of Customs held the tonic for a year, then sold it at auction. Dioguardi's *pro se* complaint alleged that the defendant "sold my merchandise to another bidder with my price of \$110, and not of his price of \$120" and that "three weeks before the sale, two cases, of 19 bottles each case, disappeared."⁶⁴ The government moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action.⁶⁵ The trial court granted the motion with leave to amend. Dioguardi then filed an amended complaint with "obviously heightened conviction" but this too was dismissed and judgment entered.⁶⁶ Judge Clark, writing for the Second Circuit, reversed: "[H]owever inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction"⁶⁷

As Professor Wright notes, it is difficult to see how the Second Circuit could have held otherwise. Affirmance would have denied Dioguardi a hearing on the merits when the claim would have been meritorious if the facts as alleged by Dioguardi were true.⁶⁸ The trial court had no way of deciding if the facts were as Dioguardi claimed because the government brought forth only the motion to dismiss, rather than going to the merits with a summary judgment motion. Unquestionably, *Dioguardi*'s aftermath fueled its controversy. On remand, Dioguardi failed to prove his claims on the merits; judgment was ultimately entered for the government.⁶⁹ The judgment was later affirmed by the Second Circuit.⁷⁰ Thus, *Dioguardi* became a focal point for critics of Rule 8 who envisioned strict pleading rules as saving judicial resources.⁷¹

In the aftermath of *Dioguardi* and the Ninth Circuit's proposed amendment, the Advisory Committee on the Civil Rules considered the

See Transcript of Oral Argument, *Swierkiewicz v. Sorema, N.A.*, No. 00-1853, available at 2002 WL 54497, at 6 (U.S. Oral Arg. Jan. 15, 2002).

64. *Dioguardi*, 139 F.2d at 774.

65. *Id.*

66. *Id.* at 775.

67. *Id.*

68. See WRIGHT, *supra* note 1, at 474 (discussing the correctness of the decision).

69. *Dioguardi v. Durning*, 151 F.2d 501, 501-02 (2d Cir. 1945).

70. *Id.* at 502. The record reflected that there was substantial evidence to support the district court's findings that the goods were destroyed according to law due to spoiling and that the bid accepted was actually the highest bid made. *Id.*

71. See WRIGHT, *supra* note 1, at 474-75 (stating and rejecting the strict pleading argument); JACK H. FRIEDENTHAL, MARY KAY KANE, & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.8, at 261 (3d ed. 1999) (describing criticism of *Dioguardi* and its role as a focal point for opposition to the new rules).

proposal.⁷² In October 1955, the Advisory Committee not only rejected the proposed amendment, but went so far as to draft a lengthy note rejecting the criticism.⁷³ The note makes several significant points. First, contrary to the critics' allegations, Rule 8 *does* envision a statement of circumstances, occurrences, and events in support of the claim.⁷⁴ However, the intent and effect of the rules is to permit the claim to be stated in general terms.⁷⁵ Second, the Advisory Committee explicitly rejected the notion that *Dioguardi* held that a pleader need not supply information disclosing a ground for relief.⁷⁶ Rather, the complaint stated sufficient facts and the court construed them as sustaining the pleading. The Advisory Committee concluded that Rule 8 did not need tinkering:

[T]he rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "causes of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.⁷⁷

The liberality of Rule 8—and the level of specificity necessary to conform to it—was thus reaffirmed by the rulemakers.

While the Advisory Committee's proposed report, with its clarifying note on Rule 8, was not adopted by the Supreme Court,⁷⁸ the high court weighed in on the issue directly in 1957 with its seminal pleading opinion, *Conley v. Gibson*.⁷⁹ *Conley* was a class action lawsuit brought by African American members of a railway union against the union for violating its statutory duty of fair representation to its members.⁸⁰ The complaint alleged that the railroad purported to abolish forty-five jobs held by African American union members, when in fact the jobs were refilled with white workers.⁸¹ According to the plaintiffs, despite repeated pleas, the union, acting according to plan, did not protect them against these discriminatory discharges or give them comparable protection to white members.⁸² Among the union's responses was that the complaint failed to state a claim upon which relief could be granted in that it did not set forth specific facts to

72. The Judicial Conference of the United States referred the Ninth Circuit's proposal to the Advisory Committee. REPORTS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1952).

73. See 5 WRIGHT & MILLER § 1216, at 165.

74. See 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, Appendix F, at 777 (2002).

75. *Id.*

76. *Id.*

77. *Id.*

78. 5 WRIGHT & MILLER § 1216, at 165. For a more complete explanation of the fate of the 1955 Report, see 4 WRIGHT & MILLER § 1006, at 36–37.

79. 355 U.S. 41 (1957).

80. *Id.* at 42.

81. *Id.* at 43.

82. *Id.*

support its general allegations of discrimination.⁸³ The district court dismissed the claim; the Fifth Circuit affirmed.⁸⁴

The Supreme Court reversed, holding that the complaint conformed to the requirements of the Federal Rules.⁸⁵ In so doing, the Court articulated two pleading corollaries. First, “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.”⁸⁶ Because the allegations raised in the complaint, if proven, would constitute a breach of the union’s statutory duty of fair representation, dismissal was inappropriate.⁸⁷ Second, as to the requisite factual detail necessary, the Court was unequivocal:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.⁸⁸

Thus, “simplified ‘notice pleading,’” made possible by the liberal discovery and pretrial procedures of the Rules, controls.⁸⁹

While the Court-created label “notice pleading” has been criticized,⁹⁰ its essential components are plain. The Rule 8(a)(2) mandate that a federal pleading be “a short and plain statement of a claim showing that the pleader is entitled to relief” requires that a claim be stated with brevity, conciseness, and clarity.⁹¹ The Rule was designed to avoid technicalities.⁹² Indeed, the

83. *Id.* at 47.

84. *Id.* at 41.

85. *Id.* at 48.

86. *Id.* at 45–46.

87. *Id.* at 46.

88. *Id.* at 47.

89. *Id.* at 47–48. The Ninth Circuit apparently finds these two corollaries “conflicting guideposts.” See *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989). The *Ascon* panel noted that, on the one hand, *Conley* embraced the liberality of pleading by declaring that a complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts in support of his claim. *Id.* at 1155. “On the other hand, elsewhere in the *Conley* opinion the court indicated that some facts must indeed be pleaded.” *Id.* However, these twin requirements do not conflict. They merely illustrate the fact that Rule 8 does “contemplate a statement of circumstances, occurrences, and events in support of the claim being presented.” 5 WRIGHT & MILLER § 1215, at 145; see also *infra* notes 96–97 and accompanying text.

90. See 5 WRIGHT & MILLER § 1202, at 72–73 (calling the label “unfortunate” and favoring the use of “simplified” or “modern” pleading instead); see also Clark, *supra* note 57, at 181 (asserting that the Advisory Committee did not intend for the rules to entail mere notice pleading). Indeed, the Court itself may be transitioning to the “simplified” appellation. In addition to using “notice pleading” in *Swierkiewicz*, the Court also referred to a “simplified notice pleading standard,” a “simplified standard for pleading,” and a “simplified pleading system.” *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 998–99 (2002).

91. See 5 WRIGHT & MILLER § 1215, at 136.

92. *Id.* at 137.

pleading need only give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.⁹³ As long as the opposing party and the court can have a basic understanding of the claim being made, the requirements are satisfied.⁹⁴ The discovery process then allows parties to fill in the details. In other words, one may “sue now and discover later.”⁹⁵ Implicit in this notice requirement is a “statement of the circumstances, occurrences, and events in support of the claim being presented.”⁹⁶ Hence, the criticism and fear that notice pleading requires merely a statement that a suit has been filed and damages claimed is unfounded.⁹⁷ However, the pleader should not have to worry about a particular form of the statement or allegations of specific facts to cover every element of the substantive law involved. Underscoring the elimination of all technicalities in pleading is Rule 8(e)’s directive that pleadings “shall be simple, concise, and direct” and Rule 8(f)’s admonition that all pleadings are to be liberally construed as to do substantial justice.⁹⁸ Even though more complex complaints will obviously require greater specificity,⁹⁹ the Federal Forms—in their brevity and simplicity—serve as important guideposts for Rule 8 compliance.¹⁰⁰ The drafters’ vision of Rule 8 is clear. Gone is the scientific symmetry of the common law and fact-laden statements of the Field Code; the Federal Rules seek only “fair notice and the doing of justice.”¹⁰¹

B. Rule 9 and Pleading with Particularity

Despite the innovation of Rule 8 and its simplicity, the Federal Rules do contemplate specific situations in which pleading with greater particularity is required. Rule 9 requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with

93. *Id.* at 138.

94. FRIEDENTHAL ET AL., *supra* note 71, § 5.7, at 259.

95. *Elliott v. Perez*, 751 F.2d 1472, 1482–83 (5th Cir. 1985) (Higginbotham, J., concurring).

96. *See* *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 42 (6th Cir. 1988) (quoting 5 WRIGHT & MILLER § 1215, at 145).

97. *See* FRIEDENTHAL ET AL., *supra* note 71, § 5.7, at 259 (evaluating criticisms of notice pleading).

98. FED. R. CIV. P. 8(e), (f). The liberality of pleading is further reflected by the ease of amendment. *See* FED. R. CIV. P. 15 (setting forth amendment procedures); Marcus, *supra* note 9, at 440 (noting that “amendment of pleadings is freely granted”).

99. *See* 5 WRIGHT & MILLER § 1217, at 169 (noting that “in the context of a multiparty, multiclaime complaint each claim should be stated as succinctly and plainly as possible”).

100. *See* *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 998 n.4 (2002) (noting that notice pleading can be met by compliance with the Forms); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that the Federal Forms demonstrate that all Rule 8 requires is fair notice of the plaintiff’s claim and the grounds supporting it); WRIGHT, *supra* note 1, at 469 (noting that the Forms “indicate the brevity and the simplicity that Rule 8(a) contemplates”).

101. WRIGHT, *supra* note 1, at 469; *see also* Clark, *supra* note 57, at 181 (discussing the general notice requirements of the rules).

particularity.”¹⁰² An appreciation for Rule 9’s history, purpose, and requirements is vital for an understanding of the appropriateness of contemporary heightened pleading.¹⁰³

The history of this rule is cryptic at best. The rule appeared in the first draft of the Federal Rules and reappeared unchanged in all subsequent drafts.¹⁰⁴ In the hearings and proceedings before both Congress and the American Bar Association Institutes, there was no discussion of proposed Rule 9(b).¹⁰⁵ The drafters themselves offered little insight into its purpose; the Advisory Committee notes of 1937 merely refer to a similar requirement in the English rules of practice.¹⁰⁶ Judge Clark, however, identified the real roots of the rule: “While useful, this rule probably states only what courts would do anyhow and may not be considered absolutely essential.”¹⁰⁷

If requiring greater particularity in pleading a fraud claim is “what courts would do anyhow,” examination of the rationale for use of this heightened pleading requirement is in order. At the outset, it is important to note that while Rule 9 speaks in terms of averments of both fraud *and* mistake, there is a dearth of application of the rule in the mistake context.¹⁰⁸ In contrast, there is ample explanation for why courts are inclined to require greater particularity for a fraud claim.

There is broad consensus that the particularity requirement is imposed in fraud cases for four reasons: protection of reputation, deterrence of frivolous or strike suits, defense of completed transactions, and providing adequate notice.¹⁰⁹ The essence of the protection-of-reputation rationale is

102. FED. R. CIV. P. 9(b).

103. Most states have also adopted procedural rules similar to Rule 9(b). See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 769–70 & nn.94–95 (2001) (listing state rules and judicial decisions establishing heightened pleading requirements). Examination of these state pleading requirements is beyond the reach of this Article, but they provide another fruitful source for assessing the merits of pleading with particularity.

104. William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965 (1987).

105. *Id.*

106. FED. R. CIV. P. 9(b) advisory committee’s note (“See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, R. 22.”); see also Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1439 (1984) (“The advisory committee that formulated the Federal Rules of Civil Procedure derived rule 9(b) from the rules of practice then followed in the English courts.”).

107. Clark, *supra* note 25, at 463–64. Elsewhere, Clark has described the first sentence of Rule 9 as derived from Order 19, Rule 6 of the English Rules for the Supreme Court under the Judicature Act of 1937. CHARLES E. CLARK, CODE PLEADING § 48, at 313 n.87 (2d ed. 1947).

108. See 5 WRIGHT & MILLER § 1298, at 660 (devoting only one paragraph to pleading mistake with particularity and noting that few federal courts have addressed the issue).

109. See, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (describing the purposes of Rule 9(b) as ensuring that the defendant has sufficient information to defend, protecting against frivolous suits, eliminating actions where the facts are learned postdiscovery, and protecting the defendant from reputational harm); *Acito v. IMCERA*

that it is a serious matter to charge someone with fraud. Because of the potential damage to a defendant's reputation and the implication of moral turpitude, no one should be allowed to make such an allegation without going on record as to what specifically constituted the fraud.¹¹⁰

Rule 9(b)'s particularity requirement has also been associated with deterrence of strike suits and other frivolous claims.¹¹¹ Theoretically, strike suits, designed to maximize nuisance value and to extort high settlement offers, would be frustrated by enhancing the plaintiff's pleading burden. By requiring more particularized pleading, Rule 9(b) serves to deter or shorten the duration of such actions, thereby reducing their nuisance value.¹¹²

The reluctance of courts to reopen settled transactions is yet another purpose offered for the particularity requirement.¹¹³ For a court to be willing

Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995) (describing them as providing notice, protecting reputation, and preventing strike suits); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (providing notice, protecting the defendant, reducing strike suits, and preventing baseless claims); *see also* 5 WRIGHT & MILLER § 1296, at 579–82 (describing the reasons advanced for the particularity requirement); Richman et al., *supra* note 104, at 961–65 (enumerating and discussing the four reasons); Note, *supra* note 106, at 1439 (noting that commentators point toward these rationales).

110. *See* FRIEDENTHAL ET AL., *supra* note 71, at 288 (noting that at common law, fraud claims “were disfavored because of allegations of immorality”); Richman et al., *supra* note 104, at 961–62 (evaluating arguments in favor of the reputational protection rationale); *see also* *Ross v. A.H. Robins, Co.*, 607 F.2d 545, 557 (2d Cir. 1979) (stating that Rule 9(b) stems from the desire to protect defendants from the harm to their reputations or to their goodwill when they are charged with serious wrongdoing).

111. *See, e.g.*, *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997) (identifying the prevention of strike suits as one of Rule 9(b)'s purposes); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994) (same); *In re GlenFed, Inc., Sec. Litig.*, 11 F.3d 843, 847 (9th Cir. 1993) (“Rule 9(b) also serves to deter suits pursued for their settlement value, rather than their merits.”), *vacated on other grounds*, 42 F.3d 1541 (9th Cir. 1994) (en banc). Technically, a “strike suit” refers to a securities fraud suit or shareholder derivative action brought without a good faith belief in prevailing on the merits and advanced only for settlement value. *See* *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 191 n.5 (1st Cir. 1999) (defining “strike suit”); *Haft v. Eastland Fin. Corp.*, 755 F. Supp. 1123, 1127 n.6 (D.R.I. 1991) (same). *But see In re Oxford Health Plans, Inc.*, 192 F.R.D. 111, 118 (S.D.N.Y. 2000) (arguing that “strike suits exist today only in the eyes of the beholder” and contending that modern practice has rendered them obsolete).

112. *See* *Ross*, 607 F.2d at 557 (highlighting that in securities litigation Rule 9 serves to reduce the *in terrorem* value of a lawsuit); *see also* Richman et al., *supra* note 104, at 962 (setting forth, albeit skeptically, the notion that the particularity requirement serves as a deterrent).

113. *See* Richman et al., *supra* note 104, at 964–65 (discussing the arguments against upsetting judgments); *see also* *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F. Supp. 2d 980, 982 (N.D. Ind. 2000) (noting that Rule 9(b) requires fraud to be pleaded with particularity because plaintiffs “frequently ask courts in effect to rewrite the parties’ contract or otherwise disrupt established relationships”); *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997) (“The requirement traces back to common law presumptions of *caveat emptor* and to the reluctance of English courts to reopen settled transactions.”). *But see* Note, *supra* note 106, at 1439 (claiming that “contemporary courts generally do not even express concern about reopening completed transactions”).

to entertain such charges, the allegations must be severe enough to warrant the difficulties inherent in re-examination of completed transactions.¹¹⁴

The final reason supporting the use of particularized pleading for fraud, and perhaps the most frequently cited,¹¹⁵ is notice. The purpose in this context is to give the defendant fair notice of the fraud allegations.¹¹⁶ Because of the intrinsic amorphousness of a fraud claim, greater pleading specificity is necessary to let the defendant know precisely what conduct the plaintiff believes constitutes a fraud.¹¹⁷ Similarly, the need for particularized pleading is enhanced because fraud claims may reach back to cover actions of years before.¹¹⁸

While all of these purported reasons for the use of heightened pleading in the fraud context have been challenged elsewhere,¹¹⁹ the mandate of the rule is clear: the circumstances constituting fraud must be stated with particularity. However, what exactly is required to comport with the rule's mandate? The textbook definition of fraud is: (1) a false representation of material fact, (2) defendant's knowledge that the representation is false, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages.¹²⁰ Rule 9(b), however, does not explicitly require the allegation of the elements of a fraud claim.¹²¹ Rather, the "circumstances constituting fraud" must be stated with particularity. "Circumstances" means the time, place, and contents of the false representation, the identity of the person making it, and "what he obtained thereby"¹²²—in other words, the who, what,

114. See 5 WRIGHT & MILLER § 1296, at 580 (describing the reluctance of courts to reopen completed transactions).

115. See Richman et al., *supra* note 104, at 963 (stating that notice is "perhaps the most frequently cited purpose"). But see Note, *supra* note 106, at 1439 (stating that the "principle rationale contemporary courts have offered" is deterrence of strike suits).

116. See Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000) (stating that the purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which they are based"); Hart v. Bayer Corp., 199 F.3d 239, 248 n.6 (5th Cir. 2000) (same).

117. See Richman et al., *supra* note 104, at 963 (quoting Miller v. Merrill, Lynch, Pierce, Fenner & Smith, 572 F. Supp. 1180, 1184 (N.D. Ga. 1983)) (outlining the heightened need for adequate notice).

118. *Id.* at 964.

119. See *id.* at 961–65; Note, *supra* note 106, at 1439–48; see also 5 WRIGHT & MILLER § 1296, at 581–82.

120. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984); see 5 WRIGHT & MILLER § 1297, at 584–89 (listing the elements of fraud).

121. Nonetheless, as Professors Wright and Miller note, the numerous cases that so require make it prudent for the practitioner to plead all the elements of fraud. See 5 WRIGHT & MILLER § 1297, at 590.

122. See 5 WRIGHT & MILLER § 1297, at 590; Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997) ("Pleading fraud with particularity in this circuit requires 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'"); see also Koch, 203 F.3d at 1236 ("[T]his court requires a complaint alleging fraud to set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.") (citations and quotations omitted).

when, where, and how of a newspaper story.¹²³ The drafters did not envision that this Rule would be a high hurdle to clear.¹²⁴

Moreover, the particularization requirement cannot be divorced from Rule 8. Instead, the two must be read in tandem.¹²⁵ Hence, the particularity required in Rule 9(b) should be simple, brief and designed to give the defendant fair notice of the fraud claim.¹²⁶ As with Rule 8, the Federal Forms model the appropriate level of detail required. Federal Form 13, relating to a fraudulent conveyance, rivals the negligence form in its terseness.¹²⁷

Of equal importance to what Rule 9(b) requires is what it explicitly does not. The second sentence of the rule states: “Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”¹²⁸ This rule merely recognizes that requiring specificity of a defendant’s state of mind is unworkable and undesirable.¹²⁹ It is unworkable because of the inherent

123. See *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (creating the newspaper analogy); see also *Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994) (noting the newspaper analogy).

124. See *Clark*, *supra* note 25, at 463–64 (noting that Rule 9(b) “may not be considered absolutely essential”). Soon after the adoption of the Federal Rules, a panel of the Second Circuit (including Judge Clark) issued a per curiam opinion in a fraud case rejecting dismissal. See *Levenson v. B. & M. Furniture Co.*, 120 F.2d 1009 (2d Cir. 1941). Even though the complaint did not allege fraud “with as much particularity as is desired,” the court found that that such an omission was not fatal. *Id.* at 1009. After all, “it [was] only a pleading.” *Id.*

125. See *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n.20 (2d Cir. 1979) (pointing out that particularity must be harmonized with Rule 8); *Denny v. Barber*, 576 F.2d 465, 467 (2d Cir. 1978) (“[Rule] 9(b) must be reconciled with [Rule] 8(a)(2) . . .”).

126. See *WRIGHT*, *supra* note 1, at 477 (“Rule 9(b) must be read in the light of Rule 8(a).”); see also 5 *WRIGHT & MILLER* § 1298, at 617–21 (stating that simplicity and flexibility are contemplated by the rules); *Richman et al.*, *supra* note 104, at 971 (noting that the vagueness of certain fraud cases may require greater particularity to ensure the type of notice required by Rule 8(a)(2)). Professor Louis’s survey of fraud cases, however, leads him to the conclusion that there are two competing Rule 9(b) interpretations, one lenient and one strict. He nonetheless concludes that the lenient approach—reading Rule 9 as requiring notice of fraud—is the correct one. See *Louis*, *supra* note 41, at 1038–41.

127. Federal Form 13 provides the who (Defendant C.D.), the what (defrauded plaintiff on a promissory note), the when (on or about), and the how (conveying all property to another to hinder collection on the note). See Form 13, Appendix of Forms, FED. R. CIV. P. Brevity aside, this model complaint certainly gives the alleged fraudfeasor sufficient notice of the allegation to respond. See FED. R. CIV. P. 84 (stating that the Forms are sufficient to comply with rules). Federal Form 7 provides a model for a complaint for money paid by mistake. It has an amazingly brief, one-sentence substantive allegation, providing little in the way of guidance as to what meets the particularity requirement. See Form 7, Appendix of Forms, FED. R. CIV. P. (“Defendant owes plaintiff ___ dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b).]”).

128. FED. R. CIV. P. 9(b).

129. See *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir. 1996) (“[A] plaintiff realistically cannot be expected to plead a defendant’s actual state of mind.”); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 700 (6th Cir. 1996) (noting the difficulty in meeting a heightened pleading burden for malice); see also 5 *WRIGHT & MILLER* § 1301, at 674–75 (discussing the difficulty of pleading a state of mind with specificity).

difficulty in expressing a state of mind with greater specificity and because such attempts would require the setting forth of evidence in the pleadings, leading to unnecessary prolixity.¹³⁰ Thus, particularization, besides its inherent difficulty, runs against the pleading scheme of simplicity, brevity, and notice.¹³¹

Thus, Rules 8 and 9 present a consistent pleading vision. A complaint should be simple, concise, and put the defendant on notice of the claim asserted. In the case of fraud, a special niche is carved out, largely by historical accident, requiring particularization of the circumstances surrounding the fraud so the defendant will have sufficient notice. Despite the higher threshold required for fraud, the special burden has “not posed a significant barrier” to common-law fraud claims.¹³² The same cannot be said for the other areas in which a heightened pleading standard has been imported. Indeed, the difficulty—and impropriety—of extending Rule 9’s particularity requirement to other types of cases forced Supreme Court clarification in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.¹³³

C. *Leatherman and Limits*

Despite the seeming clarity regarding pleading requirements under the Federal Rules, judicially imposed heightened pleading requirements blossomed in many areas; chief among these is the civil rights context.¹³⁴ Federal courts began to impose a heightened pleading requirement in § 1983¹³⁵ cases during the 1960s, fueled by concerns over burgeoning dockets and a perception of recurring frivolousness.¹³⁶ Heightened pleading then proliferated in the context of qualified immunity for government actors and their protection from vexatious litigation, ultimately spreading to civil rights

130. 5 WRIGHT & MILLER § 1301, at 674.

131. See *Vector*, 76 F.3d at 700 (stating that requiring particularity in pleading malice does not fit within the scheme of the Federal Rules).

132. FRIEDENTHAL ET AL., *supra* note 71, at 289.

133. 507 U.S. 163 (1993).

134. The advent of judicially imposed heightened pleading is given complete treatment later in this Article. See *infra* subpart III(A). Some preliminary discussion, however, is necessary to put *Leatherman* in context.

135. 42 U.S.C. § 1983 (2001) [hereinafter § 1983] provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

136. See *infra* subpart III(A).

claims covering so-called *Monell* actions against municipalities for official policies causing torts where an immunity rationale is inapplicable.¹³⁷ The development of heightened pleading in the Fifth Circuit illustrates this trend perfectly.

While not the first court of appeals to require heightened pleading in § 1983 cases,¹³⁸ the Fifth Circuit seized upon the procedural device with aplomb. In *Elliott v. Perez*,¹³⁹ the Fifth Circuit adopted a heightened pleading standard for cases involving government actors in their individual capacity. The *Elliott* panel reasoned that official immunity from liability also provided immunity against encumbering discovery and litigation.¹⁴⁰ To ensure this protection, a plaintiff's complaint must "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."¹⁴¹ The Fifth Circuit later extended the heightened pleading requirement into the municipal liability context in *Palmer v. City of San Antonio*.¹⁴² The *Palmer* panel assumed that heightened pleading logically applied not only to cases involving public officials and immunity, but to all § 1983 cases,¹⁴³ without explaining why it should apply to municipalities that, as a matter of substantive law, cannot claim an immunity defense.¹⁴⁴ It is with these judicially created heightened pleading standards firmly entrenched that *Leatherman* unfolds.

The *Leatherman* story is chilling.¹⁴⁵ The case addresses two separate incidents of police misconduct involving the execution of search warrants by

137. See *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). In *Monell*, the Supreme Court engaged in an extensive re-analysis of the Civil Rights Act and concluded that Congress intended municipalities to be included in § 1983 claims where an official municipal policy caused a tort. See *id.* at 664–91.

138. See *Wingate*, *supra* note 9, at 683–84 (describing the Third Circuit as the first to expound the rule); *Blaze*, *supra* note 9, at 952 (calling the Third Circuit the "recognized leader in use of the stringent pleading requirements").

139. 751 F.2d 1472 (5th Cir. 1985).

140. *Id.* at 1479. The court relied upon an extensive discussion of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Supreme Court addressed the need to guard against the dangers of litigation as well as liability in a defendant-official immunity context. See *id.* at 816–17 (stressing that the process involved in litigation, such as discovery, "can be peculiarly disruptive of effective government").

141. *Elliott*, 751 F.2d at 1473.

142. 810 F.2d 514, 516–17 (5th Cir. 1987).

143. See *id.*; see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir. 1992) (explaining the *Palmer* decision's *sub silencio* application of heightened pleading), *rev'd*, 507 U.S. 163 (1993).

144. See *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (rejecting § 1983 qualified immunity for municipalities). All circuits were not so rote in their application of a heightened pleading standard to § 1983 cases against municipalities. See *Karim-Panahi v. Los Angeles Police Dep't.*, 839 F.2d 621, 624 (9th Cir. 1988) (rejecting heightened pleading in a municipal context).

145. Because of the procedural posture of *Leatherman*—review of a motion to dismiss—all of the plaintiffs' allegations were accepted as true by the reviewing courts. See *United States v.*

a special drug task force.¹⁴⁶ The first involved Charlene Leatherman, her son, and two dogs. While driving in Fort Worth, the Leathermans were suddenly stopped and surrounded by police who threatened to shoot them. During their detention, the officers informed them that other law enforcement officers were in the process of searching their home. When the family returned home, they found one dog lying dead twenty-five feet from the front door, having being shot three times. The other dog was lying in a pool of blood in the master bedroom. Apparently shot at close range with a shotgun, brain matter was splattered throughout the room.¹⁴⁷ After the officers discovered nothing of relevance from the search, they proceeded to “loung[e] on the front lawn of the Leatherman home for over an hour, drinking, smoking, talking, and laughing, apparently celebrating their seemingly unbridled power.”¹⁴⁸

The second incident involved a police raid on the home of Gerald Andert. This invasion was based on a warrant alleging the odor of methamphetamine coming from the Andert home. While the family¹⁴⁹ was mourning the death of Marie Andert, the family matriarch, officers burst into the home. Without provocation, officers began beating the sixty-four-year-old grandfather; the resulting head wound ultimately required eleven stitches. Not content with the beating, the officers forced the family to lie face down on the floor where the officers continued to insult and threaten them. After an hour-and-a-half search, the officers left empty-handed, having found no evidence of drug manufacturing.¹⁵⁰

The plaintiffs sued several municipalities¹⁵¹ in connection with these two incidents under § 1983, alleging a failure to adequately train officers in the execution of search warrants and dog confrontation.¹⁵² The allegations in the complaint were “boilerplate,” alleging no underlying facts other than the events described to support the assertion that the municipalities had adopted

Gaubert, 499 U.S. 315, 327 (1991) (citing this standard for review). This description of the events is gleaned from the *Leatherman* opinions and is, of course, similarly limited.

146. The task force was the Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU). *Leatherman*, 954 F.2d at 1055.

147. *Id.* at 1055–56.

148. *Id.* at 1056.

149. The Andert family included Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos, Kevin Lealos, Jerri Lealos, Shane Lealos, and Trevor Lealos. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 755 F. Supp. 726, 727–28 (N.D. Tex. 1991), *rev'd*, 507 U.S. 163 (1993).

150. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1056 (5th Cir. 1992), *rev'd*, 507 U.S. 163 (1993).

151. The municipalities sued were: TCNICU, Tarrant County, the City of Lake Worth, and the City of Grapevine. Plaintiffs also sued the Director of TCNICU, Tim Curry, and Tarrant County Sheriff Don Carpenter. Both were sued solely in their official capacities. *Leatherman*, 755 F. Supp. at 727.

152. *Leatherman*, 954 F.2d at 1056.

policies, customs, or practices condoning the officers' conduct.¹⁵³ Three of the defendants¹⁵⁴ moved to dismiss the complaint under Rule 12(b)(6) arguing that the complaint did not adequately allege facts under the Fifth Circuit's heightened pleading standard.¹⁵⁵ The district court granted the motion for all defendants, movants and nonmovants alike.¹⁵⁶

On appeal to the Fifth Circuit, the plaintiffs conceded that their complaint did not meet the circuit's heightened pleading standard, but urged the court to abolish the rule.¹⁵⁷ The Fifth Circuit declined the invitation. Constrained by *Elliott* and *Palmer* and confronted with a pleading that did not state any facts with respect to the inadequacy of police training, the court affirmed.¹⁵⁸ In a special concurrence, Judge Goldberg detailed the common criticisms of heightened pleading.¹⁵⁹ While admitting the impressive wealth of authority against heightened pleading, Goldberg politely declined to "reexamine the wisdom of this circuit's heightened pleading requirement" until either the en banc court or the Supreme Court reversed the settled precedent.¹⁶⁰ The Supreme Court accepted the challenge.¹⁶¹

In an amazingly brief¹⁶² and unanimous opinion by Chief Justice Rehnquist, the Court struck down the use of heightened pleading in *Monell* actions under § 1983.¹⁶³ The *Leatherman* defendants advanced two

153. *Id.* The district court described the Leathermans' complaint as "blunderbuss in character" and "describ[ing] only isolated incidents." Specifically, "[t]here [was] no mention in the complaint of more than one incident of confrontation by officers . . . with family dogs." As to the Andert allegations, they were "boilerplate" and failed to provide "any specificity or particularity as to [the] elements of the inadequate training theory." See *Leatherman*, 755 F. Supp. at 730.

154. The movants were TCNICU, Curry, and Carpenter. *Leatherman*, 954 F.2d at 1056.

155. *Id.* Alternatively, the movants requested summary judgment for failure to establish the necessary elements of municipal liability. The district court also granted this alternative motion. *Id.* at 1057. Following the Supreme Court's action in this case, on remand the district court re-entered summary judgment. The Fifth Circuit subsequently affirmed. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388 (5th Cir. 1994).

156. *Leatherman*, 954 F.2d at 1057.

157. *Id.* at 1058 (Goldberg, J., specially concurring).

158. *Id.* at 1057–58.

159. *Id.* at 1058–60 (Goldberg, J., specially concurring).

160. *Id.* at 1060 (Goldberg, J., specially concurring).

161. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 505 U.S. 1203 (1992) (granting petition for certiorari).

162. The text of the opinion covers all of six pages in the United States Reporter. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

163. The unanimity and brevity are startling given the Court's previous attempt to consider the issue. See *Siegert v. Gilley*, 500 U.S. 226 (1991). In *Siegert*, the Court granted certiorari to resolve whether a heightened pleading standard in a *Bivens* action precluded limited discovery. *Id.* at 237 (Marshall, J., dissenting). The majority opinion, also by Rehnquist, recharacterized the grounds for granting certiorari and dispensed with the case at "an analytically earlier stage." *Id.* at 227. In so doing, the majority completely avoided the issue on which certiorari was granted. Nonetheless, Justice Kennedy's concurrence endorsed the use of heightened pleading in the context of official immunity, calling the tool a workable solution to avoid disruptive discovery. *Id.* at 235–36 (Kennedy, J., concurring). In stark contrast, Justice Marshall dissented, finding "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 246 (Marshall, J., dissenting). This

arguments; both were rejected. First, they contended that, because municipalities are free from *respondeat superior* liability, they were also immune from suit.¹⁶⁴ The Court had little difficulty in pointing out the glaring error in the defendants' argument: freedom from liability does not equal immunity from suit.¹⁶⁵ While a municipality cannot be liable under a *respondeat superior* theory, it can still be sued.¹⁶⁶ The Court, however, left open the issue of heightened pleading where immunity was a component: "We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."¹⁶⁷

The defendants' second argument was that the heightened pleading requirement was a misnomer for the greater factual specificity inherently necessary under the Federal Rules in more complex cases. The Court cut through this argument and found it "quite evident that the 'heightened pleading standard' is just what it purports to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief."¹⁶⁸ Such a standard, reasoned the Court, "is impossible to square" with the liberal system of notice pleading set up by the Federal Rules under Rule 8(a)(2) and interpreted by *Conley v. Gibson*.¹⁶⁹ Moreover, Rule 9(b)'s imposition of a particularity requirement in certain cases—fraud and mistake—reflects the Federal Rules' ability to impose a heightened standard where desired.¹⁷⁰ Invoking *expressio unius est exclusio alterius*¹⁷¹ and finding *Monell* actions absent from the Rule 9 short list, the Court rejected the heightened pleading standard.¹⁷² The Chief Justice left us with the following lamentation:

Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must

criticism of the majority's approach was particularly accurate since the facts that must be pleaded—the defendant's state of mind—were peculiarly in the hands of the defendant, making limited discovery appropriate. *Id.* (Marshall, J., dissenting). Given this polarization, *Leatherman*'s unanimity is surprising.

164. *Leatherman*, 507 U.S. at 166.

165. *Id.*

166. *Id.*

167. *Id.* at 166–67. This statement has certainly provided fuel for those circuits that have vigorously embraced heightened pleading and helps explain the post-*Leatherman* vitality of the procedural device. See *infra* subpart III(C).

168. *Leatherman*, 507 U.S. at 167.

169. *Id.* at 168. For a complete discussion of notice pleading and *Conley*, see *supra* subpart II(A).

170. *Leatherman*, 507 U.S. at 168. For a complete discussion of Rule 9(b), see *supra* subpart II(B).

171. "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

172. *Leatherman*, 507 U.S. at 168.

be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.¹⁷³

Given the clarity and logic used by the Court in striking down the use of heightened pleading against municipalities under § 1983, one would expect *Leatherman* to serve as the death knell for the device. Commentators writing on the heels of the decision certainly believed that it would do so.¹⁷⁴ However, as Parts III and IV demonstrate, heightened pleading requirements have risen like the Phoenix from the ashes of *Leatherman*.

D. *The Swierkiewicz Fix?*

The post-*Leatherman* resilience of heightened pleading recently prompted the Court to provide more guidance. On February 26, 2002, it handed down *Swierkiewicz v. Sorema, N.A.*,¹⁷⁵ addressing the propriety of heightened pleading in an employment discrimination case. Akos Swierkiewicz, a 53-year-old Hungarian native, was employed as the senior vice president and chief underwriting officer of a reinsurance company, principally owned and controlled by a French parent company.¹⁷⁶ Swierkiewicz sued his former employer, alleging national origin and age discrimination, after being first demoted and later fired.¹⁷⁷

The United States District Court for the Southern District of New York dismissed the complaint, finding that Swierkiewicz “ha[d] not adequately alleged a prima facie case, in that he had not adequately alleged circumstances that support an inference of discrimination.”¹⁷⁸ In an unpublished opinion, a Second Circuit panel made a single statement concerning

173. *Id.* at 168–69.

174. See Paul J. McArdle, *A Short and Plain Statement: The Significance of Leatherman v. Tarrant County*, 72 U. DET. MERCY L. REV. 19, 42 (1994) (contending that it is too soon to fully assess the ultimate effect but that “it is hard to find that *Leatherman* addresses anything less than all of the cases governed by Rule 8’s provisions on pleading”); Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839, 851 (1994) (contending that *Leatherman* can and should be read to end the use of heightened pleading in all areas of law); Eric H. Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 N.C. L. REV. 1085, 1112 (1994) (arguing that the Court has probably turned its back on heightened pleading by basing its holding on the Federal Rules instead of policy grounds).

175. 122 S. Ct. 992 (2002).

176. *Id.* at 995.

177. Swierkiewicz alleged that Francois Chavel, Sorema’s president and CEO, transferred the bulk of Swierkiewicz’s responsibilities to a 32-year-old French national. After the demotion, Chavel allegedly isolated Swierkiewicz from business meetings. Swierkiewicz then presented Sorema’s general counsel with a memo of his grievances, prompting a quick response: “resign without a severance package or be dismissed.” Chavel fired Swierkiewicz after he refused to resign. *Id.* at 995–96.

178. *Id.* at 996.

heightened pleading: “It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6).”¹⁷⁹ The court of appeals then dismissed because the allegations were “insufficient as a matter of law to raise an inference of discrimination.”¹⁸⁰ The Supreme Court granted certiorari.¹⁸¹

In yet another unanimous opinion, this time penned by Justice Thomas, the *Swierkiewicz* Court held that an employment discrimination complaint need not contain specific facts establishing a prima facie case of discrimination, but instead must only comport with Rule 8’s “short and plain statement of a claim.” In reaching this result, the Court focused on the law of Title VII, the Court’s own precedent, and the Federal Rules rubric.

The Title VII framework set forth in *McDonnell Douglas Corp. v. Green*¹⁸² requires a plaintiff in a private, nonclass employment discrimination lawsuit to prove by a preponderance of the evidence a prima facie case of discrimination.¹⁸³ This evidentiary burden, however, is not a pleading standard and is therefore not properly applied to the complaint of *Swierkiewicz*. “This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.”¹⁸⁴ As the Court noted, to require otherwise makes no sense in the context of Title VII where a plaintiff might prevail without proving all the prima facie elements if there were direct evidence of discrimination.¹⁸⁵ Therefore, to impose a heightened pleading standard would require a plaintiff to plead more facts than ultimately needed to prove the case on the merits were direct evidence of discrimination discovered.

Moreover, the Court stressed that its own precedent and support for simplified notice pleading forecloses heightened pleading in this context. All *Conley* requires is that the defendant be given fair notice of the plaintiff’s

179. *Swierkiewicz v. Sorema, N.A.*, No. 00-9010, 2001 WL 246077, at *1 (2d Cir. Mar. 12, 2001).

180. *Id.* at *2.

181. See *Swierkiewicz v. Sorema, N.A.*, 533 U.S. 976 (2001) (granting certiorari). The Court granted review on the following question: “Must [an employment-discrimination] plaintiff do more in his complaint than put his employer on notice of his discrimination claims, *i.e.*, must he also plead specific facts showing that at trial he can make out [a] prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)?” *Summary of Orders*, 70 U.S.L.W. 3201 (BNA) (Oct. 2, 2001).

182. 411 U.S. 792 (1973).

183. To prove a prima facie case of discrimination under *McDonnell Douglas*, a plaintiff must be a member of a protected group, qualified for the job in question, and affected by an adverse employment action under circumstances giving rise to an inference of discrimination. *Id.* at 802.

184. *Swierkiewicz*, 122 S. Ct. at 997.

185. See *id.* at 997–98 (giving an example of a situation in which the *McDonnell Douglas* framework does not apply even as an evidentiary standard in an employment discrimination case).

claim. The Court was explicit: “This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”¹⁸⁶

The Court’s conclusion was firmly grounded in the rubric of the Federal Rules. According to the Court, the exceptions to Rule 8’s simplified pleading are found in Rule 9(b). “Just as Rule 9(b) makes no mention of municipal liability [under § 1983], neither does it refer to employment discrimination.”¹⁸⁷ Thus, the Court held that “complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).”¹⁸⁸ This pleading standard is consistent with other provisions of the Federal Rules. It comports with Rule 8(e)’s abolition of technical forms of pleading and 8(f)’s requirement to construe pleadings so as to do substantial justice.¹⁸⁹ If a pleading fails to provide sufficient notice, a defendant can use Rule 12(e) and move for a more definite statement.¹⁹⁰ Claims lacking in merit are to be dealt with by summary judgment through Rule 56.¹⁹¹ These Rules serve a common purpose—“to focus litigation on the merits of a claim.”¹⁹²

The Supreme Court has now twice gotten it right. As with *Leatherman* before it, the reasoning of *Swierkiewicz* would appear to foreclose judicially imposed heightened pleading in civil rights cases. However, given heightened pleading’s resurgence in the past decade and the way federal courts narrowly read *Leatherman*, it is likely that the circuits most enamored with the device will simply limit *Swierkiewicz* to employment discrimination cases, as they limited *Leatherman* to § 1983 claims against municipalities.¹⁹³ To fully appreciate this pessimism, consider the complete experience of heightened pleading in civil rights cases.

III. Judicially Imposed Heightened Pleading: The Civil Rights Experience

Civil rights cases constitute the most active area of judicially imposed heightened pleading requirements. The device arose out of the twin rationales of presumption of frivolousness and protection of the defendant. Federal courts later embraced heightened pleading as a tool to deal with the uncertainties surrounding the substantive law of qualified immunity. It spread to other contexts as if by rote. Even though heightened pleading has been eliminated in *Monell* actions and, most recently, in employment

186. *Id.* at 998 (relying on both *Conley* and *Leatherman*).

187. *Id.*

188. *Id.*

189. *Id.*; FED. R. CIV. P. 8(e)(1), (f).

190. *Swierkiewicz*, 122 S. Ct. at 998; FED. R. CIV. P. 12(e).

191. *Swierkiewicz*, 122 S. Ct. at 998–99; FED. R. CIV. P. 56.

192. *Swierkiewicz*, 122 S. Ct. at 999 (referring to the purpose of the notice pleading standard).

193. See *infra* subpart III(C). But see *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 762–65 (D.N.J. 2002) (abandoning the use of heightened pleading in § 1983 prison litigation case on the strength of *Swierkiewicz*).

discrimination cases, the device survives. The resilience of the pleading requirement in the face of this Supreme Court authority makes this area a fruitful one from which to begin an assessment of the continued vitality of heightened pleading.

A. Genesis of Heightened Pleading

The first civil rights case to impose a heightened pleading requirement was *Valley v. Maule*.¹⁹⁴ The plaintiffs brought a conspiracy claim against the City of Bristol and certain police officers under sections 1983 and 1985. In a terse opinion,¹⁹⁵ the district court dismissed the claims under Rule 12(b)(6) because the complaints were “utterly devoid of any factual allegations.”¹⁹⁶ Rejecting the plaintiffs’ argument that notice pleading applied, the court opined that “[a]s a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts.”¹⁹⁷ The district court, however, offered no direct authority for this pronouncement.¹⁹⁸ Indeed, two of the court’s cited cases even rejected a heightened pleading burden.¹⁹⁹ Authority aside, what motivated the court was a misplaced policy rationale:

The reason for this exception is clear. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in litigation, and still keep the doors of the federal courts open to legitimate claims.²⁰⁰

194. 297 F. Supp. 958 (D. Conn. 1968); see *Blaze*, *supra* note 9, at 948 (noting that *Valley* was the first case to articulate the heightened-pleading rule in a civil rights case); *Wingate*, *supra* note 9, at 683 (identifying *Valley* as the first such case).

195. The text of the opinion covers only three pages in the Federal Supplement. See *Valley*, 297 F. Supp. at 959–61.

196. *Id.* at 960.

197. *Id.*

198. The district court listed four cases with the “*cf.*” signal. *Id.* at 961. Three of the cases involved conspiracy claims where, as a matter of substantive law, an overt act in furtherance of the conspiracy is necessary. See *Powell v. Workmen’s Compensation Bd.*, 327 F.2d 131, 137 (2d Cir. 1964); *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir. 1959); *Bargainer v. Michal*, 233 F. Supp. 270, 273–74 (N.D. Ohio 1964). Thus, failure to allege with particularity might warrant a dismissal for failure to state a claim, not because of a heightened pleading burden, but because of the substantive requirements. For further discussion of *Valley*’s use and misuse of authority, see *Blaze*, *supra* note 9, at 949.

199. In *Hoffman*, the court stated that a plaintiff “should not be required here to plead his evidence.” 268 F.2d at 294–95. In *Jemzura v. Belden*, 281 F. Supp. 200, 204 (N.D.N.Y. 1968), the court referred to notice pleading requirements with approval.

200. *Valley*, 297 F. Supp. at 960.

Thus, the heightened pleading requirement was justified on two familiar bases: deterrence of frivolous claims and protection of the defendant.²⁰¹ Both are subject to criticism.²⁰² While it is undeniable that the volume of civil rights cases increased dramatically²⁰³ both before and after *Valley*, the only basis from which to conclude that they are more frivolous than any other type of lawsuit is anecdotal.²⁰⁴ Indeed, judicial perceptions of frivolousness may more accurately reflect the judges' own hostility to civil rights claims.²⁰⁵ As for protection of the defendant, a heightened pleading burden on plaintiffs certainly shields defendants from discovery and litigation expense. However, it imposes a reciprocal—and possibly insurmountable—burden on civil rights plaintiffs: pleading specific factual information that may only be in the hands of the defendant without the benefit of discovery.²⁰⁶ Such a realignment of procedural burdens contravenes the rubric of the Federal Rules, the preference for merits determination, and the federal mandate to provide redress for these constitutional violations.²⁰⁷

201. Both of these rationales are also used as justification for Rule 9(b) and particularized pleading in fraud cases. See *supra* notes 109–12 and accompanying text. *Valley* also states, without supporting authority, that civil rights cases should be brought in state, rather than federal, court. 297 F. Supp. at 960. This challenge to civil rights actions seems especially dubious given the federal nature of the right being redressed. See Wingate, *supra* note 9, at 691 (criticizing the state-court rationale).

202. For a particularly interesting critique of *Valley* from a critical race theory perspective, see Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 108–10 (1994); see also Matt Graves, Note, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159, 182–85 (2001) (discussing the racial dimension of heightened pleading).

203. See Blaze, *supra* note 9, at 935–36 (describing the volume and noting a 2000% increase in civil rights actions from 1966 to 1987). The bulk of this increase, however, is due to *pro se* prisoner litigation. See *id.* at 936–37 (noting that half of the civil rights actions filed in 1987 were prisoner-initiated). In 1996, Congress adopted a special screening and dismissal procedure to deal specifically with this recognized problem area. 28 U.S.C. § 1915A (2001); see also *infra* notes 307–309 and accompanying text (describing statutory solution to prisoner litigation).

204. See Wingate, *supra* note 9, at 688 (arguing that there is no hard evidence to support the claim of frivolousness); Brooks, *supra* note 202, at 109 (noting that there is no way of knowing whether the percentage of frivolous civil rights cases is greater or less than that of other types of cases); Blaze, *supra* note 9, at 975 (finding anecdotal support for frivolousness in prisoner litigation, but concluding that the burden on the courts is exaggerated). There is, of course, anecdotal evidence to the contrary. See *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 927 (3d Cir. 1976) (Gibbons, J., concurring in part and dissenting in part) (denying that, in his experience, *pro se* prisoner litigation proves to be more frivolous than other litigation).

205. See Wingate, *supra* note 9, at 688–89.

206. See *id.* at 690.

207. See Blaze, *supra* note 9, at 960–69 (arguing that heightened pleading is inconsistent with the framework of the rules and contrary to the purpose of civil rights statutes).

B. Proliferation of Heightened Pleading

Criticisms aside, heightened pleading proliferated based on the authority and rationale of *Valley*.²⁰⁸ The Third Circuit, the “recognized leader” in the application of heightened pleading,²⁰⁹ adopted the device with enthusiasm and ultimately required all civil rights cases to meet its specificity burden. The Third Circuit’s experience is instructive. In a trilogy of cases,²¹⁰ a dismissal of a *pro se* complaint for broad and conclusory allegations insufficient to provide notice metamorphs into a blanket rule of heightened pleading for all civil rights cases.

Begin with *Negrich v. Hohn*.²¹¹ The *Negrich* court upheld dismissal of a *pro se* § 1983 complaint against six state and county officials. The plaintiff alleged that all the defendants inflicted cruel and unusual punishment on him while he awaited trial, including placing him on a bread and water diet, repeatedly beating him, forcing him to sign a statement, denying him access to his attorney, and raising false charges against him.²¹² In affirming the dismissal, the Third Circuit stated what is a basic component of notice pleading: a complaint is insufficient if it is broad and conclusory.²¹³ The *Negrich* complaint, in essence, failed to provide adequate notice to the defendants because it failed to identify which of the defendants were responsible for the unconstitutional treatment.²¹⁴ Consequently, *Negrich* is arguably consistent with basic notice pleading procedure.²¹⁵ It is transformed, however, into a blanket rule of heightened pleading by dicta in *Kauffman v. Moss*.²¹⁶

Kauffman sued law enforcement officials under § 1983 for conspiracy in securing his conviction based upon the alleged use of perjured testimony.²¹⁷ The district court dismissed the complaint both on collateral estoppel grounds and for broad, conclusory allegations.²¹⁸ The Third Circuit

208. See, e.g., *Rotolo*, 532 F.2d at 922 (requiring a heightened pleading standard, citing *Valley*); *Kauffman v. Moss*, 420 F.2d 1270, 1275–76 n.15 (3d Cir. 1970) (stating the exception to notice pleading for civil rights cases and quoting *Valley* for its rationale); *Pettman v. U.S. Chess Fed’n*, 675 F. Supp. 175, 177 (S.D.N.Y. 1987) (endorsing the reasoning of *Valley*); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 381 (D.N.J. 1983) (noting the specificity requirement and citing *Valley*).

209. See *Blaze*, *supra* note 9, at 952 (labeling the Third Circuit as the recognized leader); *Wingate*, *supra* note 9, at 683–84.

210. See *Negrich v. Hohn*, 379 F.2d 213 (3d Cir. 1967); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970); *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976).

211. 379 F.2d 213 (3d Cir. 1967).

212. *Id.* at 214.

213. *Id.* at 215–16. For discussion of the notice requirements and allegations, see *supra* notes 91–97 and accompanying text.

214. *Id.*

215. See *Rotolo*, 532 F.2d at 924 (Gibbons, J., concurring in part and dissenting in part) (arguing that the *Negrich* complaint merely failed to give adequate notice).

216. 420 F.2d 1270 (3d Cir. 1970).

217. *Id.* at 1272.

218. *Id.*

reversed the dismissal on collateral estoppel and remanded to allow amendment of the complaint.²¹⁹ In allowing the amendment, the court directed the appellant to adhere to the “*Negrich* exception to the general rule of notice pleading.”²²⁰ The *Negrich* exception, as articulated for the first time in *Kauffman*, required that all “complaints in civil rights case[s] must be specifically pleaded in order to avoid a motion to dismiss.”²²¹

*Rotolo v. Borough of Charleroi*²²² solidified this extension of heightened pleading. A building inspector sued the four councilmen who voted to terminate him for exercise of his First Amendment right; the district court dismissed for failure to plead with specificity.²²³ The Third Circuit concluded that the district court applied the proper standard and restated the heightened pleading requirement with clarity: “In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity.”²²⁴ Specifically, the allegations failed to indicate “when, where, and how Rotolo had ‘exercised his First Amendment privileges’” and “state[d] no facts upon which to weigh the substantiality of the claim.”²²⁵ In so doing, the court embraced the twin rationales of *Valley*: that public officials need protection, and that civil rights cases are likely to be frivolous.²²⁶

In a separate opinion, Judge Gibbons dissented from the application of a heightened pleading requirement.²²⁷ According to Gibbons, while not “artistically drafted,” the complaint gave the defendants adequate notice of the claim and legal basis for the relief the plaintiff sought.²²⁸ Characterizing *Negrich* as a notice case and *Kauffman* as dicta, Gibbons found no support for a heightened pleading requirement contravening Rule 8 and *Conley*.²²⁹ Moreover, Gibbons challenged the very foundation of the justification for particularized pleading expressed in *Valley*:

The most amazing and disturbing feature of the majority’s adoption of a special fact pleading rule for civil rights cases, however, is that it is

219. *Id.* at 1274–76.

220. *Id.* at 1275–76 n.15.

221. *Id.* at 1275.

222. 532 F.2d 920 (3d Cir. 1976).

223. *Id.* at 921–22.

224. *Id.* at 922.

225. *Id.* at 923. The court’s stated goal of weighing substantiality is particularly troubling given the mere *notice* function pleadings should serve at this early stage in the litigation.

226. *See id.* at 922 (recognizing that a “substantial number of the cases are frivolous” and subject public officials to “vexation and perhaps unfounded notoriety”).

227. *See id.* at 923–27 (Gibbons, J., concurring and dissenting). While the majority found that the district court applied the proper heightened pleading standard, it remanded because the court failed to allow the plaintiff an opportunity to amend both as to specificity and to jurisdiction. *Id.* at 922–23. Judge Gibbons dissented from the panel’s holding on the applicability of the standard, but concurred in the remand for amendment on jurisdiction. *Id.* at 927.

228. *Id.* at 924.

229. *Id.* at 925–26.

apparently justified, if at all, by the fact that civil rights cases, especially prisoner *pro se* civil rights complaints, have been thought by some judges to be burdensome, vexatious and largely unfounded. I do not share that viewpoint These are not overwhelming the federal courts to the exclusion of other worthwhile business, and have not been, in my experience at least, any more likely to be frivolous than other classes of litigation. Nor are the issues such as demand special pleading rules.²³⁰

Judge Gibbons's protestations aside, other circuits joined the Third Circuit in applying heightened pleading to all civil rights cases.²³¹

The judicial concern for protection of government officials embodied in *Valley* and the Third Circuit trilogy further fueled adoption of heightened pleading as a tool to cope with the qualified immunity quandary. Modern immunity jurisprudence recognizes that "officials whose functions do not require complete insulation from liability have traditionally been afforded . . . qualified immunity."²³² The Supreme Court, however, has struggled to articulate the appropriate test for qualified immunity. The test for qualified immunity once contained both subjective and objective elements.²³³ By focusing on what an official "knew or reasonably should have known" or the official's "malicious intention," qualified immunity became an intensively fact-based inquiry.²³⁴ This subjective component risked generating extensive

230. *Id.* at 927.

231. *See, e.g.*, *Elliott v. Perez*, 751 F.2d 1472, 1479 n.19 (5th Cir. 1985); *Cohen v. Ill. Inst. of Tech.*, 581 F.2d 658, 663 (7th Cir. 1978) (requiring particularized facts in civil rights cases). Professor Blaze contends that in practice all circuits applied some form of heightened pleading—even those expressly rejecting it. *See* Blaze, *supra* note 9, at 952–55. For example, Blaze notes that the Tenth Circuit had expressly rejected heightened pleading as a standard, but dismissed complaints when they contained only bare conclusory allegations. *Compare* *United States v. Gustin-Bacon Div.*, 426 F.2d 539, 542 (10th Cir. 1970) (rejecting a heightened pleading requirement) *with* *Wiggins v. New Mexico Sup. Ct. Clerk*, 664 F.2d 812, 817 (10th Cir. 1981) (dismissing a conclusory *pro se* complaint). While there is certainly the potential to backdoor a heightened pleading requirement in the guise of prohibition of conclusory pleadings, this does not appear to be the case here. Rather, the dismissal in *Wiggins* is completely consistent with Rule 8 and notice pleading. An allegation of a constitutional violation is insufficient to provide notice and state a claim showing entitlement to relief without some factual explanation of the nature of the constitutional violation. *Wiggins* had none. *See Wiggins*, 664 F.2d at 816 (noting that the complaint merely alleged "'gross disregard' for Wiggins' Fifth and Fourteenth Amendment rights"). The Tenth Circuit's most recent experience has been a bizarre flip-flop of repeated rejection and adoption of heightened pleading. *See infra* note 266. Blaze's assertion of widespread use of heightened pleading, however, is correct. *See also* Tobias, *supra* note 9, at 297 (noting that every circuit required particularity in pleading civil rights cases).

232. *Elliott*, 751 F.2d at 1476–77.

233. *See* *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (defining the test); *Elliott*, 751 F.2d at 1477 (describing Supreme Court immunity jurisprudence).

234. *Elliott*, 751 F.2d at 1477 n.14. As articulated by *Wood*, the qualified immunity test was defeated if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood*, 420 U.S. at 322.

discovery and litigation costs, as well as disruption to the government's operation.²³⁵ Recognizing these costs, the Supreme Court reformulated the qualified immunity test as solely an objective one in *Harlow v. Fitzgerald*:²³⁶ “[G]overnment officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²³⁷ This new test was directly targeted at avoiding excessive disruption of the government caused by discovery and to allow insubstantial claims to be resolved on summary judgment.²³⁸ Indeed, the Court warned: “Until this threshold immunity question is resolved, discovery should not be allowed.”²³⁹

The reformulated qualified immunity doctrine and the Court's admonition to prevent disruptive discovery provided a new basis for heightened pleading.²⁴⁰ The Fifth Circuit's *Elliott v. Perez*²⁴¹ is a prime example. Based on *Harlow* and its theme of protecting government officials from disruption, the Fifth Circuit called for a departure from the liberal policy of notice pleading under Rule 8:

Once a complaint against a defendant state legislator, judge, or prosecutor (or similar officer) adequately raises the likely issue of immunity—qualified or absolute—the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.²⁴²

This heightened pleading requirement goes well beyond *Harlow* in two significant ways. First, it shifts the burden to the plaintiff to anticipate and plead with particularity facts sufficient to negate an affirmative defense, rather than requiring the defendant to raise the issue.²⁴³ Second, it extends

235. See *Elliott*, 751 F.2d at 1477–78.

236. 457 U.S. 800 (1982).

237. *Id.* at 818.

238. *Id.*

239. *Id.*

240. See *Blaze*, *supra* note 9, at 958–60 (describing how courts have relied on immunity doctrine to support more stringent pleading requirements).

241. 751 F.2d 1472 (5th Cir. 1985).

242. *Id.* at 1482. In his concurrence, Judge Patrick Higginbotham recognized the tension with the Federal Rules but claimed that tension would not prevent him from reaching the same conclusion. He contended that a particularity requirement was unnecessary because of the flexible meaning of Rule 8's “short and plain statement of a claim.” According to Judge Higginbotham, absent detailed facts negating immunity, no federal claim is stated. *Id.* at 1482–83 (Higginbotham, J., concurring).

243. The Supreme Court has unequivocally held that qualified immunity is an affirmative defense that need not be anticipated by the plaintiff in his complaint. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Seventh Circuit addressed this problem in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991). Calling a heightened pleading requirement misleading, the court made clear that

the particularity requirement to “all material facts on which he contends he will establish his right to recovery” and is not limited solely to the immunity issue. While other courts of appeals were less sweeping in their application, most embraced heightened pleading in civil rights cases where qualified immunity was at issue.²⁴⁴

With an almost good-for-the-goose-good-for-the-gander approach, heightened pleading extended to cover suits where qualified immunity was not at issue: § 1983 suits against municipalities for unconstitutional policies. In *Monell v. New York City Department of Social Services*,²⁴⁵ the Supreme Court reversed its previous interpretation of § 1983²⁴⁶ and held that municipalities were not totally immune from suit.²⁴⁷ *Monell*, however, rejected liability based on *respondeat superior* and limited liability to situations in which the injury was a result of the municipality’s policy or custom.²⁴⁸ While *Monell* left open the question of some form of immunity, the Court eventually explicitly rejected immunity—qualified or absolute—for municipalities.²⁴⁹

the plaintiff did not have to anticipate an immunity defense and negate it in the complaint; only the minimal hurdle of Rule 8 must be met. *Thomas*, 937 F.2d at 345. However, once asserted, the plaintiff must “produce specific, nonconclusory factual allegations” that will establish the necessary mental state or face dismissal on a motion for summary judgment. *Id.* at 344–45. This is, of course, a semantic difference, unless the plaintiff has an opportunity for discovery. *Thomas* sends mixed signals. At a point immediately following announcement of its heightened standard, the court says that “[u]nless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.” *Id.* at 345. Later, however, the court implies that Rule 56 allows for the exercise of discretion. *Id.*

244. Some circuits did take the seemingly sweeping approach. See *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (applying a tightened Rule 8 in all § 1983 cases); *Sawyer v. County of Creek*, 908 F.2d 663, 665–66 (10th Cir. 1990) (requiring the plaintiff’s complaint to include all factual allegations necessary to sustain a conclusion that the defendant clearly violated established law). Others adopted a special type of heightened pleading in immunity cases, limiting application to those cases where intent is an element of the alleged tort. See *Siebert v. Gilley*, 895 F.2d 797, 801–02 (D.C. Cir. 1990) (adopting heightened pleading, but only where the constitutional violation turns on an unconstitutional motive), *aff’d on other grounds*, 500 U.S. 226 (1991); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (following *Siebert* and adopting heightened pleading only where intent is an element of the constitutional tort).

245. 436 U.S. 658 (1978).

246. See *Monroe v. Pape*, 365 U.S. 167, 187–92 (1961) (concluding that Congress did not intend to include municipalities in § 1983), *overruled in part*, *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

247. *Monell*, 436 U.S. at 690.

248. *Id.* at 694.

249. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Undoubtedly, the uncertain contours of municipal liability contributed to the receptiveness of federal courts to embrace a procedural alternative such as heightened pleading. Indeed, from 1985–1989 the Court issued six opinions in an attempt to more clearly define the limits of municipal liability. See, e.g., *City of Canton v. Harris*, 489 U.S. 378 (1989); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). It is not surprising that jurists have referred to the confusion in this area in the most unflattering terms. Judge Tuttle of the Eleventh Circuit recited the district court’s lamentation that “[t]he law is

In this atmosphere of uncertainty, the federal courts turned to the now familiar procedural device of heightened pleading. One rationale for the extension of heightened pleading to *Monell* actions was the frequently heard refrain of preventing vexatious litigation, with its attendant discovery and trial burdens.²⁵⁰ In fact, according to some courts, the concern magnified in a municipal context. While a typical § 1983 claim against an individual for a single incident involves manageable discovery and trial, municipal claims involving policies risk sweeping discovery of many individuals and episodes.²⁵¹ Hence, federal courts applied heightened pleading to protect both municipalities and themselves from this burden in the absence of detailed pleadings.²⁵² Other courts adopted heightened pleading for municipal claims in an attempt to guard against *respondeat superior*.²⁵³ Still other courts—notably the Fifth Circuit—defaulted to heightened pleading in *Monell* cases, sometimes without any explanation at all.²⁵⁴ Such adoption, however, was not universal. The Ninth Circuit repeatedly rejected heightened pleading in *Monell* cases holding that a claim for municipal liability under § 1983 was sufficient “even if the claim is based on nothing more than a bare allegation that [an officer’s] conduct conformed to official policy, custom, or practice.”²⁵⁵ This circuit split set the stage for the Supreme Court’s intervention in *Leatherman*.

screwed up in this area.” *Lucas v. O’Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987). Judge Edith Jones of the Fifth Circuit noted that there was such confusion that the courts were forced to “read the tea leaves.” *Stokes v. Bullins*, 844 F.2d 269, 272–73 (5th Cir. 1988).

250. See, e.g., *United States v. City of Philadelphia*, 644 F.2d 187, 206 (3d Cir. 1980) (requiring fact pleading because the potential for frivolous suits allegedly causes municipal defendants to suffer expense and harassment); *La Plant v. Frazier*, 564 F. Supp. 1095, 1097 (E.D. Pa. 1983) (“This standard [of heightened pleading] operates to eliminate frivolous claims, and to guard the reputations of public servants who are particularly susceptible to these claims.”); *Smith v. Ambrogio*, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (applying heightened pleading to certain municipal claims due to the threat of excessive discovery).

251. See *Smith*, 456 F. Supp. at 1137.

252. *Id.*

253. For example, the Seventh Circuit applied heightened pleading in this context to prevent a plaintiff from adding boilerplate *Monell* allegations to proceed to discovery, thereby resurrecting *respondeat superior*. See *Strauss v. City of Chicago*, 760 F.2d 765, 766–68 (7th Cir. 1985) (justifying heightened pleading to preserve *Monell*’s prohibition against *respondeat superior*).

254. See *Palmer*, 810 F.2d at 516–17 (applying heightened pleading without explanation for its extension to municipal liability); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir. 1992) (discussing the *sub silencio* assumption behind application of heightened pleading), *rev’d*, 507 U.S. 163 (1993).

255. See *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986) (allowing bare allegations to survive motion to dismiss); see also *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 624 (9th Cir. 1988) (reiterating the *Shah* standard).

C. *Post-Leatherman Circuit Split*

Leatherman resolved the circuit split and struck down the use of heightened pleading in § 1983 cases against municipalities.²⁵⁶ While its holding is limited to *Monell* actions, the Court's reasoning should apply with equal force to all civil rights cases. Grounded in the framework of the Federal Rules, the Court reaffirmed *Conley* and the liberal system of notice pleading under Rule 8(a)(2).²⁵⁷ Despite the simplicity of its reasoning, the Court revealed some reservations, noting it had "no occasion to consider whether . . . qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."²⁵⁸ This reservation has led to divergent interpretations of the limits of *Leatherman* by the federal courts, breathing new life into heightened pleading in a post-*Leatherman* world.

To characterize the post-*Leatherman* law of heightened pleading in § 1983 cases as "uncertain" is an understatement. The courts of appeals have taken very different views on the extent that *Leatherman* applies outside of the narrow *Monell* context in which it was forged. Categorization is difficult,²⁵⁹ often hampered by intracircuit division.²⁶⁰ The recent addition of

256. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). For complete treatment of *Leatherman*, see *supra* subpart II(C).

257. *Id.* at 168.

258. *Id.* at 166–67.

259. The Third Circuit illustrates the categorization difficulty. Prior to *Leatherman*, the Third Circuit imposed a heightened pleading requirement in all § 1983 cases. See *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988); see also *supra* notes 209–30 and accompanying text (describing the Third Circuit's development of heightened pleading). After *Leatherman*, the district courts in the circuit split on whether heightened pleading remains outside of the municipal liability context. Compare *Briley v. City of Trenton*, 164 F.R.D. 26, 28–29 (D.N.J. 1995) (holding that the Third Circuit's heightened pleading for cases involving individual defendants survives *Leatherman*), and *Biase v. Kaplan*, 852 F. Supp. 268, 286–87 n.15 (D.N.J. 1994) (rejecting *Leatherman*, as applied to a *Bivens* action, and requiring heightened pleading where subjective intent is an element), with *Loftus v. S.E. Pa. Transp. Auth.*, 843 F. Supp. 981, 984–85 (E.D. Pa. 1994) (applying *Leatherman* and rejecting heightened pleading), and *Comp v. Warren*, No. Civ.A.93-5436, 1994 WL 30303, at *3 (E.D. Pa. Feb. 3, 1994) (applying *Leatherman* to an individual government actor), and *McCallen v. Holland-Hull*, No. Civ.A.93-3415, 1994 WL 34251, at *1 (E.D. Pa. Jan. 31, 1994) (reasoning that *Leatherman* compels the rejection of a heightened specificity requirement). Despite the confusion in the district courts, the Third Circuit has not directly clarified the issue. However, in the context of a Title VII discrimination claim, the court recently declared: "Discrimination and other civil rights claims are clearly subject to notice pleading." *Weston v. Pennsylvania*, 251 F.3d 420, 429 (3d Cir. 2001) (emphasis added). The court further opined that *Leatherman* rejected the notion that a heightened pleading standard "should apply in civil rights cases." See *id.* at 429–30. Similarly, in the context of a § 1983 conspiracy claim, the court applied *Leatherman*, noting no more was required of a § 1983 plaintiff. See *Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998). Post-*Swierkiewicz*, one district court in the circuit recently abandoned heightened pleading in a § 1983 prison litigation case. See *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 762–65 (D.N.J. 2002). Most recently, the Third Circuit appears to embrace notice pleading on the strength of *Swierkiewicz*. See *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 564 (3d Cir. 2002) (noting that discrimination claims only require a short and plain statement); *Ray v. Kertes*, 285 F.3d 287, 297 (3d Cir. 2002) (rejecting heightened pleading as

Swierkiewicz to the mix further contributes to the uncertainty. Nonetheless, three patterns emerge: (1) a broad application of *Leatherman* banning heightened pleading in all cases, (2) a restrictive view of *Leatherman* permitting heightened pleading in all but *Monell* actions, and (3) an intermediate position retaining heightened pleading, but only in cases where subjective intent is an element of the constitutional claim.

1. *No Heightened Pleading.*—The Seventh and Tenth Circuits typify the expansive view of *Leatherman* and apply it to all civil rights cases. As the Seventh Circuit states with clarity: “[T]here is no heightened pleading requirement for civil rights actions.”²⁶¹ This is true regardless of issues of qualified immunity²⁶² or intent.²⁶³ Pleading in civil rights cases must simply comport with Rule 8 and notice pleading.²⁶⁴ Judge Easterbrook succinctly describes the ease of meeting the pleading standard and surviving a motion to dismiss post-*Leatherman* in the context of a discrimination claim: “‘I was turned down for a job because of my race’ is all a complaint has to say.”²⁶⁵ Similarly, the Tenth Circuit now appears to apply *Leatherman* to all civil rights cases, flipping from its previous positions retaining heightened pleading where qualified immunity was implicated.²⁶⁶

a component of the Prison Litigation Reform Act). If one were to classify, the Third Circuit probably lies in the no-heightened-pleading category. However, the circuit still has not directly confronted the intersection of heightened pleading and subjective intent cases. See *infra* subpart III(C)(3).

260. See *infra* note 266 and accompanying text (describing the Tenth Circuit’s shifting position); see also *infra* note 276 and accompanying text (detailing the Eleventh Circuit’s shift).

261. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 (7th Cir. 1994); see *Montgomery v. Sheahan*, No. 96C230, 1997 WL 139470, at *3 (N.D. Ill. Mar. 21, 1997) (holding that no heightened pleading requirement applies in § 1983 or other civil rights cases, on the strength of *Baxter* and *Leatherman*).

262. See *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 497 (7th Cir. 1993) (stating that there is no special pleading standard in qualified immunity cases).

263. See *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (noting that intent can be averred generally in § 1983 cases).

264. *Baxter*, 26 F.3d at 734. The Seventh Circuit’s commitment to notice pleading has been reinforced by *Swierkiewicz*. See *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (“[T]here is no requirement in federal suits of pleading the facts or the elements of a claim . . .”); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (“[A]s the Supreme Court and this court have emphasized, there are no special pleading rules for prisoner civil rights cases.”).

265. *Bennett*, 153 F.3d at 518.

266. The Tenth Circuit repeatedly reaffirmed its commitment to heightened pleading in immunity cases post-*Leatherman*. See *Dill v. City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998) (applying a heightened pleading standard in an immunity case); *Breidenbach v. Bolish*, 126 F.3d 1288, 1292 n.2 (10th Cir. 1997) (rejecting *Leatherman* and applying heightened pleading in the immunity context); see also *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990) (describing the heightened pleading standard). The court recently retreated from this position in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). In a lengthy discussion, the court recognized it was typically bound by its own precedent, but seized upon the Supreme Court’s opinion in *Crawford-El v. Britton*, 523 U.S. 574 (1998), as justification to revisit the issue. Finding no difference between the D.C. Circuit’s heightened burden of proof on summary judgment that was

2. *Heightened Pleading, Except for Monell Actions.*—In direct contrast, circuits such as the Fifth and Eleventh limit *Leatherman* and its prohibition on heightened pleading to *Monell* actions.²⁶⁷ The court that spawned *Leatherman*—the Fifth Circuit—is especially assertive (and creative) in perpetuating heightened pleading. In *Schultea v. Wood*,²⁶⁸ the en banc court reaffirmed its commitment to heightened pleading in cases involving

rejected by the Supreme Court in *Crawford-El* and its own heightened pleading requirement, the Tenth Circuit abandoned heightened pleading. *Currier*, 242 F.3d at 916. But heightened pleading remains strong in other circuits. See *Judge v. City of Lowell*, 160 F.3d 67, 73–75 (1st Cir. 1998) (holding that the heightened pleading requirement survives both *Leatherman* and *Crawford-El*). For discussion of *Crawford-El*, see *infra* notes 286–91 and accompanying text. One interesting caveat concerning heightened pleading in the Tenth Circuit remains. In *Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000), the Tenth Circuit reaffirmed its use of heightened pleading in § 1983 conspiracy claims, rejecting *Leatherman*, but remaining silent as to *Crawford-El*. Similarly, *Currier* was silent as to *Scott*, but much of the reasoning of the *Currier* panel would appear to apply to that case as well. See *Currier*, 242 F.3d at 916 (arguing that heightened pleading in civil rights cases has no support in the Federal Rules). It is therefore unclear if heightened pleading survives in the Tenth Circuit in the narrow context of § 1983 conspiracy claims.

267. The Fourth, Sixth, and Eighth Circuits probably fall into this category as well. The Fourth Circuit adopted a heightened pleading standard in cases for money damages against government officials. *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 764 (4th Cir. 1990). In a post-*Leatherman Monell* case, the court noted that notice pleading obviously was required but specifically expressed no view on heightened pleading in the immunity context. *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994). However, in an unpublished opinion, the Fourth Circuit continued to apply its heightened pleading standard. See *White v. Downs*, No. 95-2177, 1997 WL 210858, at *3 (4th Cir. Apr. 30, 1997).

The Sixth Circuit also appears to endorse broad use of heightened pleading, but with a twist. Post-*Leatherman* and pre-*Swierkiewicz*, the circuit embraced heightened pleading requiring specific, nonconclusory factual allegations in the complaint when qualified immunity was at issue. *Rippy v. Hattaway*, 270 F.3d 416, 424–25 n.3 (6th Cir. 2001); *Kain v. Nesbitt*, 156 F.3d 669, 672 n.4 (6th Cir. 1998); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995). The circuit’s rule was not without its internal judicial critics. See *Rippy*, 270 F.3d at 425–28 (Gilman, J., concurring) (criticizing the circuit’s heightened pleading standard and arguing that *Crawford-El* invalidated it). Amazingly, despite *Rippy*’s reaffirmation of heightened pleading in 2001, a recent panel overturned the circuit’s heightened pleading rule by relying not on *Swierkiewicz*, but on *Crawford-El*. See *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002) (“We conclude that the Supreme Court’s decision in *Crawford-El* invalidates the heightened pleading requirement that we enunciated in *Veney*.”). The court was quick to point out that “although *Crawford-El* invalidates *Veney*’s circuit-created heightened pleading requirement, *Crawford-El* permits district courts to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery in cases in which the plaintiff must prove wrongful motive and in which the defendant raises the affirmative defense of qualified immunity.” *Id.* at 504–05. Thus, in the Sixth Circuit, the district courts are free to impose the heightened pleading requirement previously required by the circuit.

Similarly, the Eighth Circuit also appears to have retained heightened pleading. The circuit originally adopted heightened pleading for all complaints seeking damages against government officials. *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989). After *Leatherman*, the circuit continued to apply heightened pleading in individual capacity suits. *Edgington v. Missouri Dep’t of Corr.*, 52 F.3d 777, 779 n.3 (8th Cir. 1995). However, in a terse, recent opinion concerning a *pro se* prisoner complaint, a panel concluded that a free-exercise-of-religion claim was adequately pleaded, citing *Swierkiewicz* and stating in a parenthetical that “federal pleading is notice pleading only.” *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir. 2002). Given the absence of discussion, it is unclear if this represents a shift in Eighth Circuit pleading practice.

268. 47 F.3d 1427 (5th Cir. 1995) (en banc).

government actors—with a twist. To avoid potential conflict with Federal Rules 8 or 9, *Schultea* retains the heightened pleading burden but shifts it to a Rule 7 reply.²⁶⁹ This “practical working marriage of pleading and qualified immunity”²⁷⁰ operates as follows. The plaintiff files a § 1983 complaint against a government actor, presumably meeting only the Rule 8 threshold. When the public official pleads the affirmative defense of qualified immunity in his answer, the court on motion or *sua sponte* requires the plaintiff to reply to the defense with particularity.²⁷¹ Of course, the district court may ban discovery during this pleading stage.²⁷² Thus, the Fifth Circuit retains its pre-*Leatherman* particularity requirement, but moves the scrutiny from the complaint to the reply.²⁷³

The Eleventh Circuit retains heightened pleading in a more conventional fashion. Prior to *Leatherman*, the Eleventh Circuit—like the Fifth—required “tightened” pleading in § 1983 cases involving qualified immunity.²⁷⁴ Later, the district courts in the Circuit found *Leatherman* non-controlling outside of the *Monell* context and continued to use the Circuit’s heightened requirement until provided with further direction.²⁷⁵ The

269. Using *Leatherman*’s own maxim—*expressio unius*—*Schultea* holds that Rule 8(a)(2)’s standard only applies to a subset of pleadings that set forth a claim for relief, thereby not encompassing Rule 7 replies. *Schultea*, 47 F.3d at 1433. Similarly, a Rule 7 reply has no relation to Rule 9(b) and its particularity requirement. *Id.* at 1434.

270. *Id.* at 1432.

271. *Id.* at 1433.

272. *Id.* at 1434.

273. The Circuit’s attachment to its heightened pleading requirement runs deep. In a special concurrence, four judges would have preferred retaining heightened pleading at the complaint stage, as originally formulated in *Elliott*. See *id.* at 1434–36 (Jones, J., specially concurring). Indeed, in a case decided after *Schultea*, a panel declared that “*Leatherman* does not preclude the heightened pleading requirement in actions against individual government defendants” and *Schultea* “does not establish any new law with respect to the applicability of the heightened pleading standard.” *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996). One commentator criticizes *Schultea* as raising more questions than answers and avoiding the critical issue of defendant-controlled facts unavailable through discovery. Gary T. Lester, Comment, *Schultea II—Fifth Circuit’s Answer to Leatherman—Rule 7 Reply: More Questions Than Answers in Civil Rights Cases?*, 37 S. TEX. L. REV. 413, 467–76 (1996). The Supreme Court, however, appears to endorse a Rule 7 approach to the qualified immunity issue under certain circumstances. In *Crawford-El*, the majority stated in dicta that when a plaintiff files a complaint against a public official requiring proof of wrongful intent, one of the “primary” options prior to discovery is to order a Rule 7(a) reply insisting that the plaintiff “put forward specific, nonconclusory factual allegations that establish improper motive.” *Crawford-El*, 523 U.S. at 598. The Court’s suggestion differs from *Schultea* in that the Fifth Circuit’s reply is not limited to claims involving intent, but applies to all qualified immunity situations. *Schultea*, 47 F.3d at 1433. Moreover, it is unclear how the Court’s suggested “specific, nonconclusory factual allegations” compare with *Schultea*’s “factual detail and particularity.” See *id.* at 1430. This is, of course, one of the inherent difficulties with deviation from the well-settled notice pleading standard.

274. See *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).

275. See *Ross v. Alabama*, 893 F. Supp. 1545, 1552–53 (M.D. Ala. 1995) (noting that *Leatherman* calls into question the Circuit’s heightened pleading requirement, but continuing to apply it until the Eleventh Circuit addressed the issue); *Malone v. Chambers County Bd. of Comm’rs*, 875 F. Supp. 773, 790 (M.D. Ala. 1994).

Eleventh Circuit ultimately did revisit the issue, holding that a heightened pleading requirement is still required where qualified immunity is implicated.²⁷⁶

3. *Heightened Pleading If Intent Is an Element of a Claim.*—A third approach involves continued application of heightened pleading, but only to a subset of qualified immunity cases where intent is an element of the constitutional tort. Recall that in *Harlow* the Court reformulated the qualified immunity defense into an objective one—whether an official violated clearly established statutory or constitutional rights of which a reasonable person would have known.²⁷⁷ This approach recognizes that the *Harlow* qualified immunity inquiry really involves three distinct questions: (1) does the plaintiff assert a violation of a constitutional right?; (2) was the right clearly established at the time of the alleged violation?; and (3) would a reasonable person in the official's position have known that his conduct violated that clearly established right?²⁷⁸ Depending upon the asserted constitutional right, subjective intent could be relevant to the first question of whether a plaintiff has stated a claim.²⁷⁹ In contrast, subjective intent plays no role in determining whether the right was clearly established or whether a

276. *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998). The district courts have complied. See *Taylor v. Alabama*, 95 F. Supp. 2d 1297, 1305 (M.D. Ala. 2000); *Sims v. Glover*, 84 F. Supp. 2d 1273, 1277 (M.D. Ala. 1999). Despite this commitment to heightened pleading, an Eleventh Circuit panel recently declared that notice pleading and Rule 8 apply under § 1983 cases—without reference to the Circuit's previous authority. See *Marsh v. Butler County*, 225 F.3d 1243, 1246 (11th Cir. 2000). The full court subsequently vacated the opinion and took the case en banc, further illustrating the unsettled nature of post-*Leatherman* jurisprudence. See *Marsh v. Butler County*, 234 F.3d 1231, 1231–32 (en banc court vacating and ordering full court review). This type of flip-flopping is extremely unsettling. After the panel decision in *Marsh*, at least one district court held that it had impliedly overruled the Circuit's heightened pleading requirement. See *Dorsey v. Wallace*, 134 F. Supp. 2d 1364, 1368–69 (N.D. Ga. 2000) (finding that *Marsh* overruled *GJR*). Ultimately, on en banc review, the majority avoided addressing the heightened pleading issue directly, but implied that greater factual particularity was necessary. See *Marsh v. Butler County*, 268 F.3d 1014, 1037 (11th Cir. 2001) (en banc). A four-judge dissent, led by Judge Barkett—author of the original panel decision—criticized the majority's failure to use a notice pleading standard, further illustrating the unsettled nature of heightened pleading at the highest levels of the judiciary. *Id.* at 1057, 1057–60 (Barkett, J., dissenting).

277. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); see also *supra* notes 236–38 and accompanying text.

278. *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992) (noting the three-part inquiry); see also Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U. L. REV. 59, 89 (1994) (describing the three-part test). The Supreme Court also recently recognized that inquiry into subjective intent as an element of a constitutional tort is separate from *Harlow* analysis and not foreclosed. See *Crawford-El*, 523 U.S. at 592–93 (distinguishing the subjective component of the immunity defense eliminated by *Harlow*).

279. For example, a Fourth Amendment claim of unlawful search and seizure based on judicial deception in obtaining warrants has an intent component—a knowing, false statement to the magistrate—as an essential element of the claim. In contrast, a claim of unlawful arrest focuses only on the objective reasonableness on the officer's probable cause determination, not the officer's intent. *Mendocino Env'tl. Ctr. v. Mendocino County*, 14 F.3d 457, 462 (9th Cir. 1994).

reasonable official would have known that his conduct violated the right.²⁸⁰ Because *Harlow* supposedly jettisoned subjectiveness in qualified immunity, courts have struggled with how appropriately to deal with issues of intent when they are part of the right asserted.

Prior to *Leatherman*, the District of Columbia and Ninth Circuits seized upon heightened pleading as an appropriate remedy. If subjective intent is an element of the constitutional tort action and qualified immunity was pleaded, these courts subjected a plaintiff to a heightened pleading standard requiring nonconclusory allegations setting forth specific evidence of unlawful intent.²⁸¹ This procedural tool was meant to protect the defendant-official's right to be free from disruptive discovery under *Harlow* while allowing a plaintiff's claim to go forward, provided it met the heightened burden.²⁸²

Leatherman itself appears to have had no effect on the use of heightened pleading in cases involving subjective intent. The Ninth Circuit repeatedly reaffirms its commitment to the use of heightened pleading in subjective intent cases because *Leatherman* expressly passed on the appropriateness of the device in the immunity context.²⁸³ Similarly, other circuits have also embraced the technique in subjective intent cases after *Leatherman*.²⁸⁴

280. Blum, *supra* note 278, at 90.

281. See *Siegert v. Gilley*, 895 F.2d 797, 801–02 (D.C. Cir. 1990) (requiring unconstitutional intent to be pleaded with specific discernible facts that constitute direct, rather than circumstantial evidence), *aff'd on other grounds*, 500 U.S. 226 (1991); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (adopting heightened pleading when subjective intent is an element of a constitutional tort and requiring nonconclusory allegations setting forth evidence of unlawful intent). The circuits, however, disagreed on whether a plaintiff could satisfy the heightened pleading standard only with direct, as opposed to circumstantial, evidence. Compare *Siegert*, 895 F.2d at 801–02 (requiring direct evidence), with *Branch*, 937 F.2d at 1386–87 (allowing direct or circumstantial evidence). Of course, in these circuits, heightened pleading does not apply at all in § 1983 cases that do not have an element of subjective intent. *Housley v. United States*, 35 F.3d 400, 401 (9th Cir. 1994); see *Atchison v. District of Columbia*, 73 F.3d 418, 420 (D.C. Cir. 1996) (“*Leatherman* thus makes clear that a complaint alleging municipal liability under section 1983 . . . is to be judged not by the standards that would govern a decision on the merits, but by the liberal standard of Rule 8.”).

282. See *Branch*, 937 F.2d at 1386 (concluding that “bare allegations of improper purpose are insufficient to subject government officials to discovery”).

283. See *Housley*, 35 F.3d at 401 (restating the validity of the heightened pleading requirement in subjective intent cases post-*Leatherman*); *Mendocino*, 14 F.3d at 461 (adhering to *Branch* post-*Leatherman*); *Branch v. Tunnell*, 14 F.3d 449, 451 (9th Cir. 1994) [hereinafter *Branch II*] (reconsidering *Branch I* in light of *Leatherman* and retaining a heightened pleading requirement).

284. The First and Second Circuits fall into this category. In the First Circuit, where the defendant's improper intent is an essential element of a plaintiff's claim, specific, nonconclusory factual allegations giving rise to a reasonable inference of discriminatory intent must be pleaded. See *Judge v. City of Lowell*, 160 F.3d 67, 72–73 (1st Cir. 1998) (finding that the requirement that an illegal motive must be pleaded with specific, nonconclusory facts survives *Leatherman*). Post-*Swierkiewicz*, one district court in the circuit refused to follow the circuit's rule, finding *Swierkiewicz* was intervening Supreme Court authority. See *Greenier v. Pace*, Local No. 1188, 201 F. Supp. 2d 172, 176–77 (D. Me. 2002) (finding *Swierkiewicz* requires more liberal treatment of complaints and refusing to follow First Circuit precedent). The First Circuit has now twice avoided addressing the issue post-*Swierkiewicz*. See *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002) (finding no need to decide whether the heightened standard applies because the

The District of Columbia Circuit's experience, however, is unique. Immediately following *Leatherman*, the D.C. Circuit refused to revisit its formulation of heightened pleading.²⁸⁵ Later in *Crawford-El v. Britton*,²⁸⁶ the en banc court reconsidered and abandoned the "direct evidence" component of its heightened pleading requirement, but then raised the burden of proof at summary judgment and trial to "clear and convincing evidence."²⁸⁷ In stating that "[t]he label of 'heightened pleading' for special requirements for constitutional torts involving improper motive was always a misnomer," the circuit court made clear that it was articulating a heightened standard of proof, not a pleading requirement per se.²⁸⁸ The Supreme Court found that this went too far. It reversed, holding the heightened burden of proof incompatible with the text of § 1983 and the Federal Rules.²⁸⁹ Recognizing the potential conflict between burdensome discovery and qualified immunity in subjective intent claims, the Court offered some procedural suggestions for trial courts in dicta. These include: ordering a Rule 7(a) reply, granting a Rule 12(e) motion for a more definite statement, tailoring discovery under Rule 26, weeding out insubstantial claims with Rule 56 summary judgment, or use of Rule 11 sanctions.²⁹⁰ Because the Court's holding concerns a heightened burden of proof at summary judgment, not a heightened burden at the pleading stage, *Crawford-El* has had little impact on the use of actual

complaint survived either standard); *Gorski v. New Hampshire Dep't of Corr.*, 290 F.3d 466, 473 (1st Cir. 2002) (noting that its cases suggested heightened pleading in certain civil rights cases, but recognizing no heightened pleading in employment discrimination cases post-*Swierkiewicz*). The Second Circuit also applies heightened pleading in subjective intent cases. See *Blue v. Koren*, 72 F.3d 1075, 1082 (2d Cir. 1995) (adopting a heightened standard for subjective intent post-*Leatherman*).

285. The en banc court refused to revisit the direct evidence rule in *Kimberlin v. Quinlan*, 17 F.3d 1525 (D.C. Cir. 1994), despite three dissenters' position that the panel opinion was inconsistent with *Leatherman*.

286. 93 F.3d 813, 821 (D.C. Cir. 1996), *rev'd*, 523 U.S. 574 (1998).

287. See *Crawford-El*, 93 F.3d at 819–23. While a majority of the court agreed on these propositions, the en banc court produced five separate opinions, further attesting to the uncertainty in this area of law.

288. See *id.* at 823 (discussing standard of proof requirements); see also *id.* at 819 ("Under the circumstances, we think it readily justifiable to overrule our precedents establishing the direct/circumstantial distinction, without even addressing the question whether formulation of the rule as a *pleading* requirement violates the liberal pleading concepts established by the Federal Rules of Civil Procedure.") (emphasis in original).

289. *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998).

290. *Id.* at 597–601. Conspicuously absent from this procedural list is the use of judicially imposed heightened pleading. However, the Court did state that under Rule 7(a) or 12(e) a court could insist that the plaintiff put forward "specific, nonconclusory factual allegations" that establish improper motive, citing Justice Kennedy's concurrence in *Siegert*. *Id.* at 598. In his *Siegert* concurrence, Justice Kennedy called for affirming the D.C. Circuit's heightened pleading requirement—articulated as requiring specific, nonconclusory factual allegations—as a necessary accommodation between subjective intent and objective qualified-immunity analysis, despite the fact that it would be a deviation from Rules 8 and 9(b). *Siegert v. Gilley*, 500 U.S. 226, 235–36 (1991) (Kennedy, J., concurring).

heightened pleading requirements in civil rights cases.²⁹¹ However, the Court's procedural suggestions once again instruct the lower courts to eschew non-Rule-based solutions to perceived problems in civil rights litigation.

D. Impropriety of Continued Use of Heightened Pleading

Continued use of a heightened pleading requirement in civil rights cases cannot be justified in light of the clarity of the Federal Rules and the Court's interpretation of liberalized notice pleading. The rubric of the Federal Rules could not be plainer. All Rule 8 requires is a "short and plain statement of a claim" sufficient to put the defendant on fair notice of the asserted claim.²⁹² By design, fair notice does not require the pleading of factual detail. This approach was specifically endorsed by the Supreme Court in *Conley*—itself a discrimination lawsuit.²⁹³ While an exception to liberalized pleading exists for fraud and mistake cases under Rule 9(b), pleading with particularity does not extend beyond this very short list, as *Leatherman* and *Swierkiewicz* clearly dictate.²⁹⁴ More importantly, the Rules and the Court reinforce an overriding procedural preference—merits determination. Access to one's day in court should not be restricted by pleading motions, as the Court reiterated this past term.²⁹⁵

1. Inherently Unworkable.—Heightened pleading, however, remains. As the post-*Leatherman* circuit split illustrates, some federal courts cling to the device—often at great lengths. This divergent treatment of civil rights cases at the pleading stage is in itself troubling. Given the federal statutory nature of civil rights claims, the inconsistency of treatment of civil rights

291. The Ninth Circuit's use of its heightened pleading requirement for subjective intent cases is unaffected by *Crawford-El*. See *Lee v. City of Los Angeles*, 250 F.3d 668, 679–80 n.6 (9th Cir. 2001) (reiterating the heightened pleading standard post-*Crawford-El*); *Carpa v. Smith*, No. 98-16442, 2000 WL 189678, at *1 (9th Cir. Feb. 15, 2000) (unpublished) (same); *Demello v. Ney*, No. 97-15205, 1999 WL 362906, at *1–2 (9th Cir. May 28, 1999) (unpublished) (same). In fact, *Crawford-El* has even been cited as support for heightened pleading in subjective intent cases. See *Judge v. City of Lowell*, 160 F.3d 67, 73–75 (1st Cir. 1998) (concluding that *Crawford-El* endorsed the First Circuit's requirement of pleading specific facts to support illegal motive); *Benge v. City of Pasadena*, No. 98-55417, 1999 WL 1072278, at *1 (9th Cir. Nov. 23, 1999) (unpublished) (citing *Crawford-El* as support for heightened pleading). *But see* *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002) (holding that *Crawford-El* invalidates the circuit's heightened pleading requirement); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) (finding, after lengthy discussion, no difference between the D.C. Circuit's heightened burden of proof on summary judgment and its own heightened pleading requirement and, therefore, abandoning heightened pleading based on *Crawford-El*).

292. FED. R. CIV. P. 8(a).

293. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); see also *supra* notes 79–89 and accompanying text (describing *Conley*).

294. See *supra* subparts II(C–D).

295. See *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 998–99 (2002).

plaintiffs, based solely on where the lawsuit is filed, is wrong. An identical lawsuit alleging a civil rights violation in bare bones fashion, yet sufficient to provide notice, would survive a Rule 12(b)(6) motion to dismiss if the complaint were filed in federal court in Illinois, but could face dismissal prediscovery if filed in California or Florida.²⁹⁶ The fact that the needed information to meet an elevated pleading standard may be in the hands of the defendant is deemed irrelevant.²⁹⁷

This inherent inequity is not limited to the fact that some courts use heightened pleading while others reject it. It also stems from the divergent meanings given to the very concept of heightened pleading. As the survey of both the advent of heightened pleading and its post-*Leatherman* use demonstrates, there is no consensus on the quantum of detail required to meet the standard. While pleading with particularity in the fraud context has a generally accepted meaning—the newspaper questions—no similar standard exists in the civil rights context.²⁹⁸ More often than not, courts imposing heightened pleading merely state that such a standard exists and the complaint at issue fails to meet it, leaving little in the way of guidance in constructing a meaningful test.²⁹⁹ Even when explanation is attempted, it often falls short.³⁰⁰ Given this inherent difficulty, it is not surprising that

296. A federal court in Illinois would follow the Seventh Circuit rule of no heightened pleading. In California, the Ninth Circuit rule of heightened pleading in subjective intent cases controls. Florida would apply the Eleventh Circuit rule of heightened pleading. *See supra* subpart III(C).

297. *See Siegert v. Gilley*, 500 U.S. 226, 246 (1991) (Marshall, J., dissenting) (finding no justification for heightened pleading as a matter of precedent or common sense when evidence was peculiarly in the hands of the defendant); *see also* *Montgomery v. Sheahan*, No. 96-C-230, 1997 WL 139470, at *3 (N.D. Ill. Mar. 21, 1997) (rejecting heightened pleading because it places an undue burden on plaintiffs when the defendant has exclusive control over evidentiary facts prior to discovery).

298. *See supra* notes 122–24 and accompanying text (describing application of the newspaper test to Rule 9(b) fraud cases). *But see* *Louis, supra* note 41, at 1038–41 (describing the application of the Rule 9(b) particularity requirement as difficult due to two competing approaches, one lenient and one strict).

299. *See, e.g., Collins v. Mullins*, No. CV-95-0150, 1996 WL 924766, at *1–2 (W.D. Va. May 17, 1996) (stating that the “Fourth Circuit adopted a heightened pleading requirement” and dismissing a complaint against a sheriff for lack of specificity where the complaint had “allegations” of misconduct instead of “proven instances”).

300. The Sixth Circuit has offered an illustration in an attempt to differentiate between notice and heightened pleading in a § 1983 case of excessive force. *See Kain v. Nesbitt*, 156 F.3d 669, 672 (6th Cir. 1998). To survive a notice pleading standard, a complainant must merely state that “she was the victim of the use of excessive force by the police.” *Id.* In contrast, such a claim would fail heightened pleading analysis. If the plaintiff amended to allege that the excessive force consisted of handcuffing during arrest, the complaint would be subject to Rule 12(b)(6) dismissal because it would be apparent on its face that no constitutional claim is stated because handcuffing incident to arrest does not equal excessive force as a matter of law. However, if the plaintiff amended to state that the excessive force consisted of “the defendant intentionally and maliciously handcuffing her so tightly that she lost circulation in both her wrists and suffered physical injury,” the complaint would survive the circuit’s heightened pleading rule and lead to qualified immunity analysis. *See id.* This illustration, however, is unsatisfying. As to the heightened standard, allegations of intentional or malicious handcuffing would not meet the heightened pleading standards in those circuits imposing

attempted articulations, such as “specific, nonconclusory factual allegations,” are unhelpful—being offered as both expressions of a heightened pleading requirement and as a rejection of it.³⁰¹ This type of quagmire and resulting confusion is precisely what was generated under the Field Codes, and it led to the reform of the Federal Rules in the first place.³⁰² The pleading stage is not the best place to perform the necessary tasks of factual development and winnowing of issues; these necessities are best left to be performed by other procedural devices. This requirement is especially clear given the consensus on the minimal quantum of detail necessary to meet the fair notice function of Rule 8.³⁰³

This inequity is magnified in subjective intent cases. By its very nature, proof of a defendant’s subjective intent is peculiarly in the defendant’s own hands. The Federal Rules recognize that pleading intent with specificity is both unworkable and undesirable and explicitly allow intent to be averred generally.³⁰⁴ Those circuits targeting subjective intent cases for heightened pleading ignore this central lesson. In so doing, an unreasonably high burden is placed on the plaintiff at the pleading stage,³⁰⁵ despite the availability of

greater specificity in subjective intent cases, such as the Ninth Circuit. Instead, the plaintiff would have to allege specific and concrete facts to support the intent allegation. *See supra* subpart III(C)(3) (discussing heightened pleading in intent cases).

301. For example, Justice Kennedy used the phrase in his *Siegert* concurrence in which he specifically endorsed the D.C. Circuit’s use of heightened pleading in the context of official immunity, calling the tool a workable solution to avoid disruptive discovery. *Siegert*, 500 U.S. at 235–36. The Ninth Circuit then justified its continued use of heightened pleading, relying in part on Kennedy’s support. *Branch II*, 14 F.3d 449, 456 n.5 (9th Cir. 1994). The Seventh Circuit did the same. *See Elliott v. Thomas*, 937 F.2d at 338, 344–45 (7th Cir. 1991). Justice Stevens subsequently used the same phrase in his *Crawford-El* dicta suggesting the propriety of the standard under Rules 7 and 12(e), but he was conspicuously silent as to a pleading standard under Rule 8. *See* 523 U.S. at 598. A panel of the Tenth Circuit recently held that its heightened pleading standard, defined as “specific and nonconclusory factual allegations in the complaint,” was now barred by *Crawford-El*. *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001). Surprisingly, the First Circuit seized upon the same *Crawford-El* dicta to *require* a heightened pleading requirement at the complaint stage, demanding that claimants plead specific, nonconclusory factual allegations. *Judge v. City of Lowell*, 160 F.3d 67, 74 (1st Cir. 1998). Similarly, in dicta in an unpublished Ninth Circuit opinion the court defined a heightened pleading standard with the same phrase. *Benge v. City of Pasadena*, No. 98-55417, 1999 WL 1072278, at *1 (9th Cir. Nov. 23, 1999) (unpublished table decision) (citing *Crawford-El* as support for heightened pleading). On the bright side, the *Benge* panel did note that allegations of excessive force were properly pleaded under any standard where the complaint stated that the police fired forty shots at Benge, hitting him 29 times.

302. *See supra* notes 34–38 and accompanying text.

303. Early resistance to the notice pleading concept of the Federal Rules culminated in the early 1950’s with *Dioguardi*, the Ninth Circuit’s challenge, and the Advisory Committee’s 1955 Report. *See supra* notes 58–77 and accompanying text. The Supreme Court effectively silenced dissent over the standard of simplified pleading in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Since then, controversy surrounding pleading standards has focused on when to deviate from the clearly articulated notice standard, as opposed to what notice pleading requires. *See supra* subparts II(C–D).

304. *See* FED. R. CIV. P. 9(b).

305. *See Siegert*, 500 U.S. at 246 (Marshall, J., dissenting) (noting that requiring specificity does not account for who controls the information); Blum, *supra* note 278, at 91–92 (criticizing the

alternative procedures that are both consistent with the Rules and despite the reality of who possesses the information.

2. *Procedural alternatives.*—The impropriety of continued use of heightened pleading in civil rights cases is underscored by the paucity of procedural alternatives better suited to address the perceived problems in civil rights litigation. The development and spread of heightened pleading was originally premised on the unfounded presumption of vast numbers of frivolous § 1983 cases.³⁰⁶ This fear, however, emerged from a flood of *pro se* prisoner lawsuits.³⁰⁷ Today, the federal courts are empowered with specific tools to manage this unique variant of civil rights cases. Federal courts must screen prisoner cases, before docketing if feasible, and dismiss the complaint if it is frivolous, malicious, fails to state a claim, or requests monetary relief from an immune defendant.³⁰⁸ Thus, if the concern generating heightened pleading is about frivolous prisoner suits, a streamlined procedure for screening and dismissal already exists, notably without a heightened pleading requirement.³⁰⁹

The frivolousness justification that was the crucible for heightened pleading has largely given way to concerns for protection of government defendants from disruptive litigation, especially in the immunity context.³¹⁰ This is a legitimate concern. However, the overriding preference for merits determination embodied in the Rules should not be ignored when alternative

use of heightened pleading in subjective intent cases). Of course, the same concerns over how much specificity is enough to meet the standard continues in state of mind cases. *See* Marcus, *supra* note 9, at 469.

306. *See supra* subpart III(A).

307. *See* Roberts, *supra* note 31, at 417–18 (characterizing the rise of heightened pleading as a reaction to *pro se* prisoner litigation).

308. *See* 28 U.S.C. § 1915A (2001). Additionally, regulations on proceeding as an indigent litigant exist to create further disincentives to baseless prisoner litigation. *See* 28 U.S.C. § 1915 (2001) (proceedings *in forma pauperis*).

309. These reforms embodied in the Prisoner Litigation Reform Act of 1996 created a 31% drop in prisoner suits in its first year. *See* Crawford-El v. Britton, 523 U.S. 574, 597 n.18 (1998). Even outside of the prisoner context, heightened pleading is not viewed as a panacea for frivolous lawsuits. Professor Bone's recent application of game theory models to frivolous litigation confirms that strict pleading is not a solution. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997). Considering the effect of heightened pleading in an informed-plaintiff model, he concludes that there is likely no effect whatsoever on the number of frivolous filings. *Id.* at 588–89. While the results were ambiguous, using an informed-defendant model, Professor Bone concludes that the case for strict pleading is weak and “[i]f the approach is used at all, it should be confined to those litigation settings involving informed defendants and moderate investigation costs.” *Id.* Subjective intent cases would thus call for heightened pleading only where the defendant knew he did not act with the requisite state of mind. *Id.* at 550.

310. But remnants of the frivolousness justification remain. *See* Crawford-El, 523 U.S. at 601 (Kennedy, J., concurring) (“[M]any [prisoner suits under § 1983] invoke our basic charter in support of claims which fall somewhere between the frivolous and the farcical and so foster disrespect for our laws.”).

procedural devices exist to address the need to protect defendants while maintaining merits determination.

The Supreme Court itself has suggested procedural alternatives that are consistent with the Federal Rules in *Leatherman*, *Crawford-El*, and *Swierkiewicz*.³¹¹ For example, the district court is vested with broad discretion to narrowly tailor discovery under Rule 26. It can *sua sponte* limit the frequency and extent of permissible discovery methods.³¹² Limitations can be placed on discovery's time, place, and manner to protect a party from undue burden or expense.³¹³ Timing and sequence can be controlled.³¹⁴ Consistent with these provisions, Justice Stevens's suggestion in *Crawford-El* that a trial court "first permit [a] plaintiff to take only a focused deposition of the defendant before allowing any additional discovery" makes sense.³¹⁵ A similar limiting approach would be postponing inquiry into the subjective intent issue until discovery on objective factual questions, such as the plaintiff's injury, was complete.³¹⁶ Either route could lead to factual development and winnowing of issues consistent with the Federal Rules, qualified immunity doctrine, and merits determination.³¹⁷

Of course, summary judgment exists as the "ultimate screen" for "insubstantial lawsuits."³¹⁸ Provided the defendant government official raises a properly supported motion, the plaintiff must respond with "affirmative evidence from which a jury could find that the plaintiff has carried his . . . burden."³¹⁹ Resolution on summary judgment is superior to a premature pleading determination because it can be focused to address narrow yet dispositive issues, such as qualified immunity, on the merits postdiscovery.³²⁰ This approach is also consistent with the Federal Rules'

311. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993); *Crawford-El*, 523 U.S. at 597–601; *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 998–99 (2002).

312. FED. R. CIV. P. 26(b)(2).

313. FED. R. CIV. P. 26(c).

314. FED. R. CIV. P. 26(d).

315. *Crawford-El*, 523 U.S. at 599. Of course, Justice Marshall made the same suggestion in his *Siegert* dissent years before. See *Siegert v. Gilley*, 500 U.S. 226, 246 (1991) (Marshall, J., dissenting) (advocating limited discovery).

316. See *Crawford-El*, 523 U.S. at 599 (noting alternatives for judges in managing the discovery process).

317. Professor Blaze suggested the discovery alternatives in the context of Rule 16 over a decade ago. See Blaze, *supra* note 9, at 985–87.

318. *Crawford-El*, 523 U.S. at 600; see also FED. R. CIV. P. 56; *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 998–99 (2002).

319. *Crawford-El*, 523 U.S. at 600.

320. As with the discovery alternative, summary judgment has long been touted as a superior tool in dealing with frivolous cases. Professor Marcus advocated the summary judgment route over heightened pleading in his first examination of the revival of fact pleading and continues to support the procedural alternative. Marcus, *supra* note 9, at 484–91; Marcus, *supra* note 17, at 1773–74. Others concur. See, e.g., Tobias, *supra* note 9, at 300 (suggesting Rule 56 as a better alternative); Louis, *supra* note 41, at 1041 (noting the superiority of summary judgment over heightened

preference for determination on the merits.³²¹ Moreover, the standards by which the trial court resolves summary judgment are clear and consistent in comparison to the confusion surrounding heightened pleading.³²²

These suggestions are not exhaustive.³²³ They do, however, reflect guideposts for any acceptable procedural solution to the challenges presented in civil rights cases. First, any procedural solution fashioned by the federal courts must be firmly grounded in the Federal Rules themselves.³²⁴ Second, the procedural solutions must not turn away from the touchstone principle of merits determination.³²⁵ Third, if there is a compelling need for a modification of pleading procedure, it is for the rulemaking process, not individual courts to decide.³²⁶ Continued use of heightened pleading in civil rights cases is inconsistent with all three premises.

The model of heightened pleading in civil rights litigation is extremely instructive for an understanding of the device as a whole. It documents the difficulty inherent in attempts to craft a pleading rule that is contrary to the rubric of the Federal Rules. The ensuing uncertainty generated a circuit split

pleading in handling frivolous cases); Blaze, *supra* note 9, at 980–83 (describing the superiority of the summary judgment alternative); Blum, *supra* note 278, at 93–94 (contending that summary judgment after limited discovery is superior to heightened pleading in subjective intent cases); Wingate, *supra* note 9, at 689–90 (suggesting Rule 56 as a superior alternative due to access to discovery); Lester, *supra* note 273, at 457 (arguing that summary judgment and discovery control are the best tools for resolving nonmeritorious immunity cases).

321. See *Swierkiewicz*, 122 S. Ct. at 999 (stating that the simplified pleading system “was adopted to focus litigation on the merits of the claim”).

322. See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 55–68 (1997) (describing the modern standards for summary judgment).

323. Justice Stevens also suggests the use of Rule 11 sanctions. See *Crawford-El*, 523 U.S. at 600; see also Blaze, *supra* note 9, at 988 (noting that “Rule 11 can be an effective device to punish advancement of frivolous claims and to deter similar conduct by others,” but cautioning about the “potential chilling effect” of the nonjudicious use of sanctions); Louis, *supra* note 41, at 1041 (noting the superiority of Rule 11 sanctions to heightened pleading in dealing with frivolous cases).

324. See *Swierkiewicz*, 122 S. Ct. at 998–99 (noting procedural alternatives within the Rules); *Crawford-El*, 523 U.S. at 598–600 (basing all suggestions on the current Federal Rules); see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (concluding that the heightened pleading is outside of the Rules and urging reliance on summary judgment or discovery).

325. See *Swierkiewicz*, 122 S. Ct. at 999 (stating that notice pleading “was adopted to focus litigation on the merits of a claim”).

326. See *Crawford-El*, 523 U.S. at 595 (suggesting that “questions regarding pleading . . . are most frequently and most effectively resolved either by the rulemaking process or the legislative process”). Rehnquist made a similar suggestion in *Leatherman*. See *supra* note 173 and accompanying text. One commentator has specifically suggested amendment of Rule 9 to include a special provision, Rule 9(i), for qualified immunity cases requiring a reply “made with a particularity sufficient to rebut the claim of qualified immunity.” Eric Kugler, Note, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551, 564–65 (1996). While such an amendment would ground the particularity requirement in the Federal Rules, it does nothing to alleviate the inherent problems of defining sufficient particularity or in compelling plaintiffs to plead prediscovery evidence that is solely in the hands of the defendant. Moreover, it ignores the preference for merits determination.

pre-*Leatherman*; the post-*Leatherman* landscape is no different. Given the gyrations taken by the circuits to limit *Leatherman*, there is little reason to believe *Swierkiewicz* will reign in the use of heightened pleading, except in employment discrimination cases.³²⁷ If heightened pleading were an aberration limited to civil rights litigation, its mischief might be tolerated. However, particularized pleading has not only been judicially imposed in numerous other contexts—often premised on the civil rights experience—but is increasingly used as a statutory tool as well.³²⁸ Consequently, assessment of the device requires examination of the heightened pleading experience in the statutory context.

IV. Statutory Heightened Pleading: Securities Fraud & Y2K Litigation

While the bulk of experience with heightened pleading comes from judicial imposition, Congress has recently embraced heightened pleading, as well.³²⁹ Rather than target the Federal Rules for reform, Congress created special pleading rules for specific federal statutory causes of action.³³⁰ Given the difficulty experienced with judicially imposed heightened pleading, it is not surprising that congressional attempts have fared no better. Examination of heightened pleading in federal securities fraud litigation is a perfect bridge between the world of judicially imposed particularity and new statutorily mandated devices. The similarities to the civil rights framework are striking.

327. *But see supra* note 259 (discussing *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 762–65 (D.N.J. 2002)).

328. Heightened pleading has been used by various courts in an array of contexts. *See supra* note 6 (listing representative cases). *See infra* notes 366–70 and accompanying text.

329. In a sense, Congress has always played a role in heightened pleading because of its approval of the Federal Rules, including Rule 9(b). However, there was little, if any, congressional discussion on Rule 9(b) and the Federal Rules became effective in 1938 when Congress adjourned without taking any adverse action. Richman et al., *supra* note 104, at 965; WRIGHT, *supra* note 1, at 428. Consequently, Rule 9(b) and its particularity requirement is best viewed as a product of the rulemaking process, rather than congressional action. Indeed, Congress essentially stayed out of the rulemaking process for decades, accepting all proposed rules submitted to it by the Supreme Court. Congress eventually balked in 1973 with the proposed evidence privileges. Leslie M. Kelleher, *Taking 'Substantive Rights' (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 55 (1998).

330. Use of statutory heightened pleading requirements is not limited to Congress. State legislatures have also imposed similar requirements for various state-law causes of action. *See* Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 416–22 (1999) (identifying special state pleading rules in selected states for medical and professional malpractice claims, punitive damages, and childhood sexual abuse claims). Comprehensive examination of state-law pleading practice is beyond the scope of this Article, but undoubtedly provides another fertile ground for evaluating the relative merits of this procedural device.

A. *Judicially Imposed Heightened Pleading in Securities Fraud Litigation*

The New Deal was the crucible for reforming both federal court procedure with the Federal Rules³³¹ and the securities markets with the Securities Act of 1933³³² and Securities Exchange Act of 1934.³³³ In the aftermath of the stock market crash in 1929, Congress passed these Securities Acts³³⁴ to protect the investing public and restore confidence in the securities markets.³³⁵ The Securities Acts created express causes of action targeting specific types of behavior.³³⁶ Additional implied causes of action have been recognized under the Exchange Act and have been promulgated by Securities and Exchange Commission (SEC) rule.³³⁷ Chief among these are the general fraud liability provisions of section 10b and Rule 10b-5 (“10b/10b-5 Claims”).³³⁸

While some courts applied Rule 9(b) particularity to fraud-based claims under the Securities Acts in general,³³⁹ Rule 9(b) took center stage in its application to 10b/10b-5 Claims. Recall that Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity.”³⁴⁰ Courts routinely applied Rule

331. The Federal Rules were the result of the Rules Enabling Act of 1934. *See generally* Stephen P. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

332. 15 U.S.C. §§ 77a-77bbb.

333. 15 U.S.C. §§ 78a-78ll.

334. I refer to the two acts collectively as “Securities Acts.”

335. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194–95 (1976) (explaining that the Securities Acts were designed to protect the investing public from fraud and manipulation); 1 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 225–27 (3d ed. 1998) (describing the regulatory purpose of the Securities Acts); Richman et al., *supra* note 104, at 974–77 (describing the regulatory function of modern securities laws).

336. The express causes of action under the Securities Act impose liability for § 11 misrepresentations/omissions in registration statements (codified at 15 U.S.C. § 77k); § 12 misrepresentations/omissions in public prospectuses of unregistered securities (codified at 15 U.S.C. § 77l); and § 15 controlling persons (codified at 15 U.S.C. § 77o). The express actions under the Exchange Act are for § 9 stock exchange manipulation (codified at 15 U.S.C. § 78i); § 16 short-swing profit (codified at 15 U.S.C. § 78p); § 18 misleading statements in SEC reports (codified at 15 U.S.C. § 78r); and § 20 controlling persons (codified at 15 U.S.C. § 78t-1).

337. Four additional implied actions under the Exchange Act impose liability for § 10b & Rule 10b-5 general fraud (codified at 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5); § 14a & Rule 14a-9 proxy solicitation fraud (codified at 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9); § 14e & Rule 14e-3 tender offer fraud (codified at 15 U.S.C. § 78n(e); 17 C.F.R. § 240.14e-3); and § 13(e)(1) issuer’s repurchase fraud (codified at 15 U.S.C. § 78m(e)(1)).

338. Most securities fraud lawsuits allege 10b/10b-5 Claims. Richard L. Jacobson & Joshua R. Martin, *The Private Securities Litigation Reform Act of 1995: A Survey of the First Three Years*, 2 ALI-ABA COURSE OF STUDY, *SECURITIES LITIGATION: PLANNING AND STRATEGIES* 861, 868 (1999).

339. *See, e.g., Segal v. Gordon*, 467 F.2d 602, 605 & n.2, 608 (2d Cir. 1972) (applying Rule 9(b) where the plaintiff’s claims were based on a “plethora of specified sections of the Securities Acts”).

340. FED. R. CIV. P. 9(b).

9(b) particularity with varying degrees of strictness.³⁴¹ However, this application is troublesome given the obvious and inherent differences between common-law fraud and statutory 10b/10b-5 Claims.³⁴² For example, classic commercial transactions governed by common law are face-to-face transactions, whereas sales and purchases of securities lack direct and personal contact. Unlike a traditional fraud claim, securities fraud cases are often highly complex, involving multiple plaintiffs, defendants, acts, and misrepresentations, often over extended periods of time. Similarly, modern securities transactions are large scale, impersonal, and often conducted through intermediaries, leaving the defrauded without access to records necessary to detail the fraud.³⁴³ Nonetheless, use of Rule 9(b) was justified with the familiar rationales of protection of the defendant, prevention of strike suits, and adequate notice.³⁴⁴

In *Ernst & Ernst v. Hochfelder*,³⁴⁵ the Supreme Court fueled the use of Rule 9(b) by resolving a split between the circuits as to whether 10b/10b-5 Claims required proof of scienter by the defendants. The Court concluded it did, defining scienter as “a mental state embracing intent to deceive, manipulate, or defraud.”³⁴⁶ The Court did not, however, provide guidance on the level of culpability necessary to meet this substantive scienter requirement³⁴⁷ or the level of particularity with which it must be pleaded.³⁴⁸

341. See, e.g., *Schaefer v. First Nat'l Bank of Lincolnwood*, 509 F.2d 1287, 1297 (7th Cir. 1975) (requiring plaintiffs to comply with Rule 9(b) in a 10b/10-5 Claim); *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973) (same); *Kellman v. ICS, Inc.*, 447 F.2d 1305 (6th Cir. 1971) (dismissing 10b claim for noncompliance with Rule 9(b)). The Second Circuit applied a demanding version of Rule 9(b). See *Segal*, 467 F.2d at 607–10. Others applied a more lenient version, reading Rule 9 in light of the notice function of Rule 8. See *Walling*, 476 F.2d at 397 (holding that Rule 9(b) requires only the identification of the circumstances constituting fraud and not the pleading of detailed evidentiary matters); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (relaxing particularity when information is in the hands of the defendant). For additional explanation of the inconsistency of Rule 9 application in this context, see Richman et al., *supra* note 104, at 971–74, and Richard G. Himelrick, *Pleading Securities Fraud*, 43 MD. L. REV. 342, 348–52 (1984).

342. Of course, application of Rule 9(b) was not required in the first place, as the Tenth Circuit noted. See *Stevens v. Vowell*, 343 F.2d 374, 379 n.3 (10th Cir. 1965) (distinguishing between a statutory 10b claim and common-law fraud and declining to apply Rule 9(b)); *Rochambeau v. Brent Exploration, Inc.*, 79 F.R.D. 381, 388 (D. Colo. 1978) (noting that, in the Tenth Circuit, Rule 9(b) does not apply to a 10b-5 claim). But see *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545 n.3 (9th Cir. 1994) (en banc) (contending that Rule 9(b) must apply because it makes no distinction between common-law fraud and statutory causes of action based on fraud).

343. See Richman et al., *supra* note 104, at 977–79 (detailing these and other distinctions).

344. *Id.* at 979–84; *In re Burlington*, 114 F.3d at 1418.

345. 425 U.S. 185 (1976).

346. *Hochfelder*, 425 U.S. at 194 n.12.

347. The Court explicitly left open the question of whether, under certain circumstances, reckless behavior would be sufficient. *Id.* Mere negligence, however, is insufficient. See *id.* at 210 (concluding that extending the § 10(b) damages remedy to “actions premised on negligent wrongdoing” would run afoul of congressional intent).

Consequently, distinctly different standards ultimately emerged.³⁴⁹ The unclear substantive area of scienter spawned heightened pleading, just as the murky qualified immunity doctrine fueled heightened pleading in the civil rights context.

The major source of discord was the appropriate pleading standard for scienter. The Second Circuit espoused the most stringent pre-PSLRA standard.³⁵⁰ Focusing primarily on the state of mind requirement, the Second Circuit required that the “facts alleged in the complaint give rise to a ‘strong inference’ of fraudulent intent” in *In re Time Warner Litigation*.³⁵¹ The standard could be met by either allegation of facts “establishing a motive to commit fraud and the opportunity to do so” or “circumstantial evidence of either reckless or conscious behavior.”³⁵² The “motive-and-opportunity” test was typically met with factual allegations of suspicious insider trades gleaned from publicly filed documents.³⁵³ Circumstantial evidence of recklessness was met by allegations that the defendants knew or should have known that an alleged misstatement was misleading based on contemporaneous facts or statements found in internal company information.³⁵⁴ Meeting this standard obviously required information available through discovery. Still, discovery was possible pre-PSLRA.³⁵⁵ The Ninth Circuit took a different approach. Based upon its review of the text of Rule 9(b), the en banc court flatly rejected a heightened scienter pleading requirement in *In re GlenFed, Inc. Securities Litigation*.³⁵⁶ Because Rule 9(b) allows for general averments of intent, scienter could be pleaded simply by “saying that scienter existed.”³⁵⁷ Despite explicit rejection of the Second Circuit’s *Time*

348. See *Rochambeau*, 79 F.R.D. at 388–89 (noting that the *Hochfelder* Court did not require the pleadings in a 10b-5 claim to satisfy Rule 9(b)); see also William C. Baskin III, Note, *Using Rule 9(b) to Reduce Nuisance Securities Litigation*, 99 YALE L.J. 1591, 1593 (1990) (“The *Hochfelder* Court did not indicate the pleading standard to be applied to the new substantive scienter requirement.”).

349. See *In re Burlington*, 114 F.3d at 1418 (describing the debate and the split approach).

350. See H.R. CONF. REP. NO. 104-369, at 41 (1995) (acknowledging the Second Circuit’s standard as the most stringent), reprinted in 1995 U.S.C.C.A.N. 730.

351. 9 F.3d 259, 268 (2d Cir. 1993) (quoting *O’Brien v. Nat’l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991)). This requirement, of course, directly contravened Rule 9(b), which allows state of mind to be averred generally. See FED. R. CIV. P. 9(b).

352. *Time Warner*, 9 F.3d at 269.

353. See Sale, *supra* note 17, at 550–51 (describing how the standard was met and collecting supporting authority); Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675, 684–87 (1996) (explaining how the motive-and-opportunity test is met).

354. See Sale, *supra* note 17, at 551 (“In practice, this standard also usually required the plaintiffs to make allegations based on internal company information.”); Weiss, *supra* note 353, at 687–90 (explaining which “facts constitute strong circumstantial evidence that a defendant consciously or recklessly misrepresented material information”).

355. Sale, *supra* note 17, at 549, 551.

356. 42 F.3d 1541, 1545–47 (9th Cir. 1994) (en banc).

357. *Id.* at 1547.

Warner approach, the Ninth Circuit still imposed a particularity requirement: “Rule 9(b) requires particularized allegations of the circumstances constituting fraud.”³⁵⁸ Hence, plaintiffs were required to set forth specific descriptions of the allegedly false representations and the reasons for their falsity.³⁵⁹ The most direct way to meet this burden was through inconsistent contemporaneous statements available through internal reports.³⁶⁰ While the court recognized its break with the Second Circuit, it noted, on the strength of *Leatherman*, that adopting an alternative pleading standard outside of Rule 9 was a job for Congress, not the courts.³⁶¹ Congress accepted the challenge with the Private Securities Litigation Reform Act of 1995 (PSLRA).³⁶²

B. Congressional Reaction: the PSLRA

Congressional motivation for enacting the PSLRA was the same as judicial motivation for heightened pleading in civil rights cases—private securities fraud litigation was seen as largely frivolous.³⁶³ Industry groups argued that plaintiffs could easily file class action lawsuits, often the day a stock price dropped, and then use the Federal Rules to subject defendants to vast discovery requests.³⁶⁴ This “sue now, discover later” approach encouraged strike suits because of the time, expense, and delay associated with responding to discovery and litigating dismissal motions. The problem was magnified by targeting deep-pocket defendants without regard to actual culpability.³⁶⁵

To correct this inequity, Congress turned to procedural alternatives. In a striking break from the Federal Rules and notice-pleading doctrine,³⁶⁶ the PSLRA imposes heightened pleading requirements in Exchange Act claims

358. *Id.*

359. *Id.* at 1548.

360. *Id.* at 1549. Professor Sale has noted the similarity in practice between the Second Circuit’s test for recklessness and the Ninth Circuit’s test. Both focus on the need for internal information available only through discovery. Sale, *supra* note 17, at 551.

361. *In re GlenFed*, 42 F.3d at 1546. It is interesting that the Ninth Circuit’s support for *Leatherman*’s restriction on judicially imposed heightened pleading in securities fraud does not influence its position in the civil rights context, where it continues to require heightened pleading in cases involving subjective intent. See *supra* subpart III(C)(3).

362. PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995).

363. Documenting “frivolousness,” however, is a virtually impossible task. Determining frivolousness empirically is hampered by the fact that very few private securities class actions proceed to trial. See Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and the Private Securities Litigation*, 94 NW. U. L. REV. 567, 572 (2000) (describing the impossibility of directly showing frivolous securities cases because so few proceed to trial); Todd S. Foster et al., *Trends in Securities Litigation and the Impact of PSLRA 6* (June 1, 1999) (finding that less than 2% of shareholder class action suits since 1991 have resulted in judgments) (unpublished), at <http://www.nera.com/nnt/publications/3835.pdf>.

364. See S. REP. NO. 104-98, at 4 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 683.

365. *Id.*; see Sale, *supra* note 17, at 552–57 (chronicling the rationale behind the PSLRA).

366. See Weiss & Moser, *supra* note 17, at 457 (characterizing the PSLRA’s rejection of notice pleading as its most striking aspect).

for securities fraud.³⁶⁷ First, there is a general particularity requirement for misleading statement and omission claims:

[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.³⁶⁸

Second, there is a heightened scienter requirement:

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind.³⁶⁹

Third, there is a mandatory discovery stay during the pendency of any motion to dismiss:

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of a motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.³⁷⁰

Understanding precisely what Congress had in mind with its new heightened pleading requirement—especially with regard to scienter—is hampered because of the muddled and contradictory legislative history leading up to adoption.³⁷¹

367. The PSLRA amended sections of both Securities Acts. However, the new pleading requirements only amended provisions of the Exchange Act. *See Giarraputo v. UNUMProvident Corp.*, No. Civ. 99-301-PC, 2000 WL 1701294, at *9 (D. Me. Nov. 8, 2000) (noting that the PSLRA heightened pleading requirement does not have a parallel provision in the Securities Act). Thus, the heightened pleading requirements of the PSLRA should not apply to Securities Act claims such as those arising under § 11 for misrepresentations in registration statements. *See Romine v. Axiom Corp.*, 296 F.3d 701, 704–05 (8th Cir. 2002) (holding that PSLRA particularity does not apply to Securities Act claims); Brian Murray & Donald J. Wallace, *You Shouldn't Be Required to Plead More Than You Have to Prove*, 53 BAYLOR L. REV. 783, 800–02 (2001) (arguing that “the particularity requirements of Rule 9(b) are ‘never appropriate’ in Securities Act litigation”); Sale, *supra* note 17, at 583–93 (stating that Securities Act claims meeting the strictures of 12(b)(6) withstood dismissal); *see* Krista L. Turnquist, Note, *Pleading Under Section 11 of the Securities Act of 1933*, 98 MICH. L. REV. 2395 (2000) (noting that courts have applied a liberal notice pleading standard to the Securities Act).

368. 15 U.S.C.A. § 78u-4(b)(1) (2001).

369. 15 U.S.C.A. § 78u-4(b)(2) (2001).

370. 15 U.S.C.A. § 78u-4(b)(3)(B) (2001). This discovery stay applies to Securities Act claims also.

371. In their recent empirical work, Professors Grundfest and Pritchard offer an interesting theory: that ambiguity is an inherent and intentional part of the legislative process. *See generally* Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002). Starting with the

Despite its recent enactment, the confusing and ambiguous legislative history of the PSLRA's heightened pleading requirement is already well chronicled by both courts³⁷² and commentators.³⁷³ Detailed repetition is not

premise that deliberate statutory ambiguity can be a legislative tool of policy compromise, Grundfest and Pritchard conclude that the legislative history of the PSLRA demonstrates that "Congress was content to enact an ambiguous statute." *Id.* at 640–42, 665–66. Indeed, they argue that but for the intentional ambiguity, the legislation would not have been enacted. *Id.* at 666.

372. *See, e.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 548–49 (6th Cir. 2001) (en banc) (pointing out that the conference committee dropped an amendment that clarified the pleading requirement); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 169–70 (2d Cir. 2000) (noting contradictions in the legislative history regarding the Second Circuit's distinct requirements for pleading intent); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 531–33 (3d Cir. 1999) (explaining that in "both the House and Senate floor debate on the Standards Act, legislators continued to disagree as to whether the Reform Act codified the Second Circuit standard"); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977–79 (9th Cir. 1999) (contending that Congress intended to raise the standard above that of the Second Circuit).

373. *See, e.g.*, Grundfest & Pritchard, *supra* note 371, at 650–66 (describing the "legislative saga" and Congress's contentment with enacting an ambiguous statute); Johnson et al., *supra* note 17, at 785–89 (noting the contentious and contradictory legislative history of the Reform Act); Sale, *supra* note 17, at 556–60 (chronicling the history from Congress's Contract With America through the veto override); William S. Lerach & Eric A. Isaacson, *Pleading Scienter Under Section 21D(B)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893, 930–56 (1996) (noting that the various legislative drafts differed significantly). Student commentary is especially widespread. *See, e.g.*, Daniel S. Boyce, Note, *Pleading Scienter Under the Private Securities Litigation Reform Act of 1995: A Legislative Attempt at Putting Teeth into the Required State of Mind*, 35 NEW ENG. L. REV. 761, 765 (2001) (pointing out that it is unclear how strict Congress intended the "strong reference standard to be"); Bruce C. Gibney, Comment, *The End of the Unbearable Lightness of Pleading: Scienter After Silicon Graphics*, 48 UCLA L. REV. 973, 980–82 (2001) (noting the difference in both the debated and the passed versions of the PSLRA in the House and Senate); Aron Hansen, Comment, *The Aftermath of Silicon Graphics: Pleading Scienter in Securities Fraud Litigation*, 34 U.C. DAVIS L. REV. 769, 782–84 (2001) (outlining the PSLRA's legislative history); Bradley R. Aronstam, Note, *The Private Securities Litigation Reform Act of 1995's Paradigm of Ambiguity: A Circuit Split Ripe for Certiorari*, 28 HOFSTRA L. REV. 1061, 1085–91 (2000) (presenting the legislative history of the PSLRA to determine congressional intent); Nicole M. Briski, Comment, *Pleading Scienter Under the Private Securities Litigation Reform Act of 1995: Did Congress Eliminate Recklessness, Motive, and Opportunity?*, 32 LOY. U. CHI. L.J. 155, 165–70 (2000) (noting the intense debate and numerous modifications of the pleading standards); Eugene P. Caiola, Comment, *Retroactive Legislative History: Scienter Under the Uniform Security Litigation Standards Act of 1998*, 64 ALB. L. REV. 309, 320–27 (2000) (commenting on the lack of clarity in the PSLRA's legislative history); Kim Ferchau, Comment, *The Circuits Divide: Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 31 U. TOL. L. REV. 449, 452–53 (2000) (noting the lack of specificity in the mental state pleading requirement); Janine C. Guido, Note, *Seeking Enlightenment from Above: Circuit Courts Split on the Interpretation of the Reform Act's Heightened Pleading Requirement*, 66 BROOK. L. REV. 510, 536–38 (2000); Scott H. Moss, Comment, *The Private Securities Litigation Reform Act: The Scienter Debacle*, 30 SETON HALL L. REV. 1279, 1303–11 (2000) (discussing the different conclusions reached by courts in reviewing the PSLRA's legislative history); Laura R. Smith, Comment, *The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After the Private Securities Litigation Reform Act of 1995?*, 39 SANTA CLARA L. REV. 577, 580–84 (1999) (pointing out that Congress never declared how stringent the pleading requirement should be); Michael B. Dunn, Note, *Pleading Scienter After the Private Securities Litigation Reform Act: or, A Textualist Revenge*, 84 CORNELL L. REV. 193, 207–21 (1998) (explaining that the PSLRA went through several versions in both houses, that numerous amendments were rejected, and that significant additional debate was needed to override Clinton's

necessary here, yet some background is useful in understanding the courts of appeals' frustration in interpreting the statute. The current debate centers around whether the PSLRA's heightened scienter requirement codifying the language of the Second Circuit's "facts that give rise to a strong inference of fraudulent intent" standard also includes the Second Circuit's methods of meeting the requirement: the motive-and-opportunity and recklessness tests. All sides of the debate have a virtual cafeteria line of legislative indicators to choose from.³⁷⁴

C. *A New Scienter Circuit Split*

Congress's attempt at heightened pleading has been described best by the en banc Sixth Circuit: "The fruit of their efforts has been a statute containing general language at a high level of abstraction, an ambiguous

veto); Patricia J. Meyer, Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517, 2526-35 (1998) (reviewing the history of the PSLRA).

374. The original House bill eliminated recklessness, but it was revised to reinclude it. Compare H.R. 10, 104th Cong. § 204 (1995) (original bill) with H.R. 1058, 104th Cong. § 4 (1995) (bill as revised by the House Subcommittee on Telecommunications and Finance). The Senate bill included the Second Circuit's "strong inference" standard, but not the motive-and-opportunity or recklessness tests. S. 240, 104th Cong. § 104 (1995). The Senate committee report explicitly stated it was adopting a uniform standard modeled after the Second Circuit, but did not intend to codify the Second Circuit's "instructive" case law interpreting the pleading standard. S. REP. NO. 98, 104th Cong., 1st Sess., at 15 (1995). Senator Specter then offered an amendment specifically tracking the Second Circuit standard and case law. 141 CONG. REC. S9170 (daily ed. June 27, 1995). The full Senate accepted it. 141 CONG. REC. S9290 (passing the Specter amendment 57-42); S9219 (passing the Senate Bill 240). The differing bills went to conference committee. The Conference Committee Report, commenting on the heightened standard of the PSLRA, stated that the statutory language was based "in part on the pleading standard of the Second Circuit" then recognized as the "most stringent." H.R. CONF. REP. NO. 104-369, at 41 (1995). However, "because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard." *Id.* The Conference Report also contained the infamous footnote 23 stating: "For this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness." *Id.* at 41 n.23. Footnote 23 has since been denounced as having been inserted at the last minute by a committee staffer without the committee's knowledge. 141 CONG. REC. H10782 (daily ed. Oct. 13, 1998) (statement of Rep. Markey); see also *Ganino*, 228 F.3d at 170 n.11. President Clinton vetoed the PSLRA because he viewed it as creating an unacceptable procedural burden by raising the pleading standard above the Second Circuit's. 141 CONG. REC. H15214 (daily ed. Dec. 20, 1995) (Clinton's veto message). Congress overrode the President's veto, giving us the current language of the statute. 141 CONG. REC. S19,060 (daily ed. Dec. 22, 1995). Adding further complication, Congress revisited the issue when it considered the Securities Litigation Uniform Reform Act of 1998 (SLUSA). Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in part at 15 U.S.C. §§ 77p & 78bb(f)). The Conference Committee Report of SLUSA stated that Congress "did not, in adopting the Reform Act, intend to alter the standards of liability under the Exchange Act." H.R. CONF. REP. NO. 105-803, at 13 (1998). The Senate Report for SLUSA similarly reiterated that the PSLRA did not alter the scienter requirement and merely codified the Second Circuit's standard. S. REP. NO. 105-182, at 11 (1998). However, House and Senate debate on SLUSA illustrated continuing disagreement. See *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 533 n.7 (3d Cir. 1999) (quoting the Federal Securities Law Reports for the proposition that uncertainty remained). Given all of this, what is a court to do?

legislative history, and a tripartite split among the circuit courts.”³⁷⁵ Not surprisingly, the Second Circuit clings to its previous interpretations retaining both the motive-and-opportunity and recklessness tests. In sharp contrast, the Ninth Circuit, firm in its conviction that the PSLRA was intended to create a standard tougher than the Second Circuit, has fashioned a new “deliberate recklessness” standard. Other circuits have sought an interpretive middle ground employing a fact-based approach that typically rejects motive-and-opportunity per se, yet retains recklessness.³⁷⁶

1. *Pre-PSLRA Second Circuit approach codified.*—The Second Circuit became the first of the courts of appeals to address the implications of the PSLRA in *Press v. Chemical Investment Services Corporation*.³⁷⁷ Quoting the statutory language requiring plaintiffs to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind,” the court found that the PSLRA heightened the pleading requirement to the “level used by the Second Circuit.”³⁷⁸ Analyzing neither the statutory language nor the legislative history, *Press* further concluded that the heightened pleading requirement could be met either through facts showing “defendants had both motive and opportunity to commit fraud” or facts constituting “strong circumstantial evidence of conscious misbehavior or recklessness.”³⁷⁹ More recently, the Second Circuit responded to the ongoing debate and concluded once again that the PSLRA adopted its strong inference standard.³⁸⁰ It noted, however, that litigants and lower courts need not be wed to the “magic words” of motive and opportunity, but prior Second Circuit case law remains helpful guidance as to how the strong inference standard is met.³⁸¹ The Third Circuit also concludes that the PSLRA adopts the Second Circuit pre-PSLRA standard, including its motive-and-

375. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 544 (6th Cir. 2001) (en banc).

376. Of course, not every circuit has entered the fray. The Fourth Circuit has chronicled the debate, but avoided resolving the issue. See *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 620–21 (4th Cir. 1999) (discussing the issue but not reaching it in the disposition of this case); see also *In re E.Spire Communications, Inc. Sec. Litig.*, 127 F. Supp. 2d 734, 741 (D. Md. 2001) (same); *In re Criimi Mae, Inc. Sec. Litig.*, 94 F. Supp. 2d 652, 658–59 (D. Md. 2000) (same). Similarly, neither the Seventh nor the D.C. Circuit has staked out a position. See *Tricontinental Indus. Ltd. v. Anixter*, No. 01 C 5526, 2002 WL 1818277, at *5 (N.D. Ill. July 19, 2002) (noting that the Seventh Circuit has not ruled on the strong inference issue); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 19 (D.D.C. 2000) (noting that the D.C. Circuit has not yet ruled on the strong inference issue).

377. 166 F.3d 529 (2d Cir. 1999).

378. *Id.* at 537–38.

379. *Id.* at 538 (quoting *Shields v. Cititrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

380. *Novak v. Kasaks*, 216 F.3d 300, 310–11 (2d Cir. 2000); *Kalnit v. Eichler*, 264 F.3d 131, 138–39 (2d Cir. 2001); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 74 (2d Cir. 2001).

381. *Novak*, 216 F.3d at 311. However, in a post-*Novak* opinion, the court seems to be at least engaged, if not wed, to the motive-and-opportunity test. See *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 169 (2d Cir. 2000) (concluding that the PSLRA did not eliminate the option of pleading scienter by alleging that a defendant had the motive and opportunity to commit fraud).

opportunity and recklessness tests.³⁸² The most recent circuit to address the issue—the Eighth Circuit—is in accord.³⁸³

2. *Ninth Circuit “deliberate recklessness.”*—The Ninth Circuit, which once held that scienter could be pleaded simply by saying “scienter exists,”³⁸⁴ took a 180-degree turn and fashioned the most stringent pleading standard extant in *In re Silicon Graphics, Inc. Securities Litigation*.³⁸⁵ Relying heavily on its review of the legislative history of the PSLRA, especially the Conference Committee Report, the *Silicon Graphics* panel concluded that the PSLRA pleading standard must be higher than the Second Circuit standard.³⁸⁶ The court further concluded that this standard included rejection of the Second Circuit’s motive-and-opportunity and recklessness tests. Having rejected all previous interpretations, the court fashioned a new standard—“deliberate recklessness.”³⁸⁷ The panel grounded its new standard on a reading of *Hochfelder*³⁸⁸ and held that recklessness in a Section 10b context requires “some degree of intentional or conscious misconduct.”³⁸⁹

In a persuasive separate opinion, Judge Browning dissented from abandonment of motive-and-opportunity and recklessness tests and creation of a new untested, standard.³⁹⁰ First, he found no textual support for the conclusion that proof of recklessness or motive and opportunity was insufficient to meet the PSLRA standard.³⁹¹ Second, conducting his own legislative history analysis, Browning concluded that, taken as a whole, the history did not suggest rejection of the Second Circuit’s tests.³⁹² Third, Browning recognized the substantive mischief caused by the new standard. The substantive law of securities fraud allows for liability based on recklessness. The new pleading standard, however, is set higher, effectively

382. *See Advanta*, 180 F.3d at 533–34 (finding that the language of the Act “closely mirrors” that of the Second Circuit); *see also Oran v. Stafford*, 226 F.3d 275, 288–89 (3d Cir. 2000).

383. *See* *Fl. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 659–60 (8th Cir. 2001) (“The Reform Act itself adopted only the strong-inference-of-scienter standard . . .”).

384. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994).

385. 183 F.3d 970 (9th Cir. 1999).

386. *Id.* at 977–79.

387. *Id.*

388. *See supra* notes 345–48 and accompanying text (discussing *Hochfelder*).

389. *In re Silicon Graphics*, 183 F.3d at 977. The court also relied on the Seventh Circuit’s definition of recklessness, articulated in *Sunstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977). *Sunstrand* defined recklessness as “a highly unreasonable omission, involving not merely simple, or even excusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Sunstrand*, 553 F.2d at 1045. The *Silicon Graphics* panel adopted this definition. *In re Silicon Graphics*, 183 F.3d at 976.

390. *In re Silicon Graphics*, 183 F.3d at 991–96 (Browning, J., concurring in part and dissenting in part).

391. *Id.* at 991–92.

392. *Id.* at 992–96.

eliminating recklessness as a basis for liability.³⁹³ These criticisms, however, convinced neither the panel majority nor the full court, both of which rejected rehearing.³⁹⁴ Consequently, like the cheese, the Ninth Circuit stands alone with its new “deliberate recklessness” standard.³⁹⁵

3. *Interpretive middle ground.*—To the extent there is a trend,³⁹⁶ it is toward an interpretive middle ground first articulated by the Sixth Circuit in *In re Comshare, Inc. Securities Litigation*.³⁹⁷ The Sixth Circuit holds that the PSLRA heightened the pleading requirement for scienter (requiring facts that give rise to a strong inference), but did not disturb the well-settled understanding of scienter for a 10b/10b-5 Claim.³⁹⁸ Consequently, because almost every circuit, including the Sixth Circuit, found that scienter could be satisfied with recklessness pre-PSLRA, recklessness is still viable.³⁹⁹ However, the court concluded that evidence of motive and opportunity did not constitute scienter.⁴⁰⁰ Thus, “plaintiffs may meet the PSLRA pleading requirements by alleging facts that give rise to a strong inference of reckless behavior but not by alleging facts that illustrate nothing more than a defendant’s motive and opportunity to commit fraud.”⁴⁰¹ The en banc Sixth Circuit most recently explained in *Helwig v. Vencor, Inc.*⁴⁰² that its approach is really more fact-specific and stressed that while motive and opportunity

393. *Id.* at 995–96.

394. Judge Sneed wrote the majority opinion. He was joined by District Judge John Rhoades, sitting by designation. Given the panel composition and split on such a controversial issue, it is surprising that the full court did not grant en banc review. See *In re Silicon Graphics, Inc. Sec. Litig.*, 195 F.3d 521, 523–24 (9th Cir. 1999) (Reinhardt, J., dissenting from the denial of rehearing en banc). For a discussion of potential problems presented by district court judges sitting by designation, see Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351 (1995). However, more recent empirical scholarship suggests that district judge participation on appellate panels poses little threat to consistency of the law or the legitimacy of appellate decisions. James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC’Y REV. 565, 567 (2001).

395. *In re Silicon Graphics*, 195 F.3d at 522–23 (noting that the panel is the first and only to use the deliberate recklessness standard). The Ninth Circuit has recently reiterated its commitment to the standard, with a twist. *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). It now views the general particularity requirement and scienter issue as one, applying the strong inference standard to both. *Id.* This approach is particularly troubling given the absence of a strong inference standard in the general particularity requirement. 15 U.S.C. §§ 78u-4(b)(1)–(2) (2002); see also *infra* notes 424–31 and accompanying text (criticizing this approach).

396. See Grundfest & Pritchard, *supra* note 371, at 671 (noting the trend toward an “intermediate” standard).

397. 183 F.3d 542 (6th Cir. 1999).

398. *Id.* at 549–50.

399. *Id.* at 550.

400. *Id.* at 551.

401. *Id.* This statement does not mean that proof of motive and opportunity is irrelevant. It could rise to a level creating a strong inference of reckless or knowing conduct.

402. 251 F.3d 540 (6th Cir. 2001) (en banc).

are not substitutes for a showing of recklessness, they can be catalysts for fraud and so serve as “external markers to the required state of mind.”⁴⁰³ The First Circuit similarly endorses a fact-specific approach “close to that articulated by the Sixth Circuit.”⁴⁰⁴ It recognizes a heightened “strong inference” standard, retains recklessness as scienter, but rejects mere motive and opportunity as per se proof of scienter, opting instead for a fact-sensitive inquiry.⁴⁰⁵ The Eleventh Circuit also finds itself “in basic agreement with the Sixth Circuit” and holds that the PSLRA does not prohibit alleging scienter by pleading facts denoting severe recklessness, but rejects mere motive and opportunity as proof of scienter.⁴⁰⁶ Similarly, the Fifth Circuit embraces the Sixth Circuit’s approach as “most sensible”⁴⁰⁷ and the Tenth Circuit finds it “the most reasonable reading of the PSLRA.”⁴⁰⁸

D. PSLRA’s Problematic Pleading Standard

1. *Inherently unworkable.*—It is certainly ironic that Congress’s first attempt at crafting a heightened pleading requirement to establish uniformity in treatment of securities fraud cases has yielded such fractured interpretations. The lack of uniformity is even more profound than the tripartite split suggests when both intracircuit and intercircuit confusion over the use of the same standard is considered.⁴⁰⁹ However, it is not surprising when viewed through the experience of heightened pleading in other areas. Rule 9(b) particularity was designed to cover common-law fraud claims that differ significantly from modern statutory securities actions.⁴¹⁰ More importantly, particularity was never imposed by rule to state of mind. Precisely the opposite approach controls. Because of the inherent difficulties

403. *Helwig*, 251 F.3d at 550–51.

404. *See* *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196–97 (1st Cir. 1999) (holding that the facts alleged must strongly imply scienter).

405. *See id.* at 198–200 (holding that the PSLRA did not change the substantive definition of scienter). More recently, the First Circuit has reiterated its support for this standard and applied it to summary judgment on the scienter issue. *See* *Geffon v. Micrion Corp.*, 249 F.3d 29, 36 (1st Cir. 2001).

406. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1283 (11th Cir. 1999); *see also* *Theoharous v. Fong*, 256 F.3d 1219, 1224–25 (11th Cir. 2001) (reiterating the standard). The Sixth Circuit recently took issue with this “basic agreement” and found *Bryant* “unduly rigid” because it appears to foreclose motive and opportunity as ever sustaining a fraud complaint. *Helwig*, 251 F.3d at 550. This sort of intercircuit dispute over the application of the middle standard further reflects confusion at the appellate level. *See* *Grundfest & Pritchard*, *supra* note 371, at 674–75 (noting this confusion).

407. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 410 (5th Cir. 2001).

408. *See* *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1261–63 (10th Cir. 2001) (adopting the Sixth Circuit standard).

409. *See supra* notes 380–81 and accompanying text (discussing the Second Circuit intracircuit dispute); *supra* note 406 (describing the intercircuit dispute on a middle standard); *see also* *Grundfest & Pritchard*, *supra* note 371, at 672–75 (describing the complexity of intra- and intercircuit confusion).

410. *See supra* notes 342–43 and accompanying text.

in alleging intent with particularity,⁴¹¹ Rule 9(b) allows it to be inferred generally.⁴¹² The PSLRA takes Rule 9(b) particularity and attempts to apply it exactly where it is least likely to work—scienter.⁴¹³

The current split in interpretation of the PSLRA's scienter requirement, in itself undesirable,⁴¹⁴ is a natural byproduct of this tension. Facts supporting allegations of the state of mind of a defendant are often peculiarly in the hands of the defendant. Pleading with particularity is difficult, if not impossible, without discovery. This problem is the same as that faced by civil rights plaintiffs in the immunity context. The pre-PSLRA judicially imposed pleading requirements recognized this problem and either allowed for intent to be averred generally⁴¹⁵ or allowed the scienter requirement to be met by facts readily available to plaintiffs from publicly filed documents.⁴¹⁶ Procedurally, even when a higher threshold was imposed, discovery was ongoing.⁴¹⁷ Because the PSLRA now imposes a mandatory discovery stay, it is easy to see why some courts cling to motive-and-opportunity in an attempt to strike a balance between plaintiffs' rights to proceed on the merits and defendants' protection. Imposition of a higher scienter requirement risks cutting off legitimate plaintiffs' claims prematurely⁴¹⁸ and may result in increased fraud.⁴¹⁹

411. *See supra* notes 128–31 and accompanying text.

412. FED. R. CIV. P. 9(b).

413. Because the heightened pleading requirements of the PSLRA apply on their face only to Exchange Act claims, this Article does not consider their application to Securities Act claims. I agree, however, with other commentators who conclude that they should have no vitality outside of the Exchange Act context. *See Sale, supra* note 17, at 583–94 (arguing that courts should not apply heightened pleading standards to Securities Act claims); *see generally* Turnquist, *supra* note 367 (exploring in detail pleading practice under § 11 of the Securities Act and concluding that Rule 8 notice pleading should apply).

414. A uniform standard in interpreting the Exchange Act and its PSLRA components is desirable, as Congress noted in enacting the PSLRA. *See* S. REP. NO. 105-182, at 6 (1998) (“It was the intent of Congress . . . that the PSLRA establish a uniform federal standard on pleading requirements . . .”); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 549 (6th Cir. 2001) (noting the intent of Congress to create a uniform federal standard of pleading); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001) (noting that Congress passed the PSLRA “to provide uniform standards for class actions and other suits alleging fraud in the securities markets”); *Ganino v. Citizens Util. Co.*, 228 F.3d 154, 169 (2d Cir. 2000) (concluding that it was the intent of Congress to establish a uniform pleading standard); Mark R. Kravitz, *Developments in the Second Circuit: 1998–1999*, 74 CONN. B.J. 1, 36 (2000) (“Congress passed the PLSRA to create uniformity in pleading requirements among the circuits . . .”).

415. This was the Ninth Circuit's pre-PSLRA approach. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994).

416. The Second Circuit's motive-and-opportunity test allowed for this type of allegation. *See In re Time Warner*, 9 F.3d 259, 269–71 (2d Cir. 1993) (describing the motive-and-opportunity test); *see also supra* notes 350–55 and accompanying text.

417. *See Sale, supra* note 17, at 549, 551 (stating that discovery continued through the pleading process).

418. Grundfest and Pritchard's empirical study supports the conclusion that choice of a standard influences the outcome of dismissal motions and that plaintiffs fare better in circuits using the Second Circuit standard rather than the other alternatives. Grundfest & Pritchard, *supra* note

There is another inherent problem with Congress's rejection of notice pleading in this context. While there has been little dispute that the PSLRA adopts a "strong inference" standard for pleading scienter, what quantum of proof pushes an allegation from an inference to a "strong inference"? In a typical motion to dismiss context under Rule 12(b)(6), all inferences are drawn in the plaintiff's favor.⁴²⁰ This procedure is not followed under the PSLRA, in which a motion to dismiss on scienter must be judged in light of the strong inference standard. To survive, the inferences of scienter must be both reasonable and strong. How is this to be shown? The First Circuit in *Greebel* suggests that this requirement can be met only with admissible evidence.⁴²¹ Such a standard foreshadows great difficulty in application, as the lessons under fact pleading with the Field Codes suggest.⁴²² The Second Circuit offers a different approach in *Ganino*. After reciting Rule 9(b)'s standard that intent can be averred generally, the court stated that "[a]lthough speculation and conclusory allegations will not suffice, neither do we require 'great specificity' provided the plaintiff alleges enough facts to support a strong inference of fraudulent intent."⁴²³ These two approaches seem hard to reconcile. This new dissention over what level of details, facts, or admissible evidence comports with the new pleading standard mirrors the old Field Code experience. There is little reason to believe that the ultimate outcome will not be the same.

This inherent problem is not limited to just the scienter pleading requirement, but extends to the general particularity requirement⁴²⁴ of the

371, at 674. See also Sale, *supra* note 17, at 579 (describing the difficulties plaintiffs face as a result of a stringent scienter requirement); Weiss & Moser, *supra* note 17, at 498.

419. See Yablon, *supra* note 363, at 594 (describing the powerful deterrent effect of longshot securities claims and how restricting such claims and discovery creates incentives for defendants to shield fraudulent conduct).

420. See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (drawing inferences in favor of the plaintiff); see also *supra* notes 86–87 and accompanying text (describing the *Conley* standard on motions to dismiss).

421. When considering direct evidence of scienter, the court discounted "white-out" allegations (a claim of deliberate alteration of company records from auditors) because "plaintiffs could not produce admissible evidence to support the white-out allegation." *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 201–02 (1st Cir. 1990). Even though the district court had ruled on the white-out claim in the context of a Rule 56 partial summary judgment, it is included as part of the First Circuit's discussion on the standards to apply to the plaintiffs' complaint. *Id.* Additionally, when considering warehousing allegations that the company made phony sales, the court again failed to credit allegations that a former employee complained about the practice and was fired because the plaintiffs did not identify when the event took place. See *id.* at 202.

422. See *supra* notes 32–38 and accompanying text (describing the experience under the Field Codes).

423. *Ganino v. Citizens Util. Co.*, 228 F.3d 154, 168–69 (2d Cir. 2000). The Rule 9(b) reference is particularly interesting in the context of the heightened scienter pleading requirement. The court appears to be saying that the heightened requirement does not significantly raise the threshold above Rule 9(b).

424. Professor Weiss refers to the general particularity requirement as the "Basis Requirement." Elliott J. Weiss, *Pleading Securities Fraud*, 64 LAW & CONTEMP. PROBS. 5, 7 (2001).

PSLRA as well. Recall that the general particularity requirement for misleading statement and omission claims provides that a complaint shall “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”⁴²⁵ This provision has been described as simple codification of the Rule 9(b) particularity requirement.⁴²⁶ What level of particularity, however, satisfies this standard? While little judicial or scholarly attention has yet been brought to bear on this issue,⁴²⁷ the conflicting approaches advocated by the majority and dissent in *Silicon Graphics* illustrate the potential problem. The *Silicon Graphics* plaintiffs alleged that internal reports, including a “Stop Ship” report, placed senior management on notice of problems with a computer chip the company was bringing to market.⁴²⁸ The majority held that in the absence of great detail and specificity, such as the authors of the reports and which officers received them, the allegations were insufficient to support the plaintiffs’ claims that management knew statements they made were false.⁴²⁹ Judge Browning disagreed, arguing that such precise details were unnecessary at the pleading stage.⁴³⁰ Instead, all that was required was adequate notice of specific instances of the fraud sufficient to permit the defendants to respond.⁴³¹ This type of difficulty is bound to occur in deviations from notice pleading to pleading particularity.

2. *Procedural alternatives.*—Unlike judicially imposed heightened pleading that can be tempered or reversed by the courts themselves, the PSLRA will not perish of itself.⁴³² Nonetheless, there are ways to interpret

425. 15 U.S.C. § 78u-4(b)(1) (2001).

426. *Greebel*, 194 F.3d at 194; Lerach & Isaacson, *supra* note 373, at 900 (noting that the general particularity requirement is not new but merely restates Rule 9(b)); David C. Mahaffey, *Pleading Standards and Discovery Stays Under the Private Securities Litigation Reform Act: An End to Fishing Expeditions?*, INSIGHTS, Feb. 1996, at 9, 10 (noting that the general particularity requirement codifies the “universal interpretation of Rule 9(b)” — the newspaper questions).

427. The exception is Professor Weiss’s article, *supra* note 424. See also HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 3C SECURITIES AND FEDERAL CORPORATE LAW § 16:68 (3d ed. 2000) (noting uncertainty as to the requirements of the standard).

428. *In re Silicon Graphics, Inc., Sec. Litig.*, 183 F.3d 970, 984–85 (9th Cir. 1999).

429. *Id.* at 985.

430. *Id.* at 996–97 (Browning, J., dissenting).

431. *Id.* at 997. This interpretation of Rule 9 is, of course, the proper one, particularly when read in context with Rule 8 notice pleading. See *supra* notes 125–27 and accompanying text (describing Rule 9); *infra* notes 440–43 and accompanying text promoting this approach as the proper interpretation in the securities fraud context as well.

432. The courts have already played a major role in the fate of the PSLRA through their varying interpretations. Uniformity of interpretation on the scienter issue, for example, might be achieved by Supreme Court intervention, as some commentators have suggested. See Aronstam, *supra* note 373, at 1091–94 (arguing for the middle ground of the First, Sixth, and Eleventh Circuits); Ferchau, *supra* note 373, at 468 (arguing that the Supreme Court should adopt the Sixth

the PSLRA requirements to minimize the problems associated with them and maintain the preference for merits determination. As to the scienter pleading requirement, the procedural Catch-22⁴³³ is imposing a standard that requires pleading facts relating to intent that are in the hands of the defendant without the benefit of discovery.⁴³⁴ The procedural solution that strikes a better balance between protection of defendants from strike suits and protection of the investors from fraud is the use of limited discovery.⁴³⁵ Despite the mandatory nature of the discovery stay provision of the PSLRA, it is tempered by an exception: “unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”⁴³⁶ This “undue prejudice” exception provides a solution.⁴³⁷

A plaintiff’s motion for limited discovery should be granted under this exception if the original complaint alleges details sufficient to make out most elements of a securities fraud claim, but the additional information necessary to flesh out the complaint is in the hands of the defendant. The plaintiff should be able to demonstrate both diligence in trying to uncover the information prediscovery and to articulate a reasonable belief that limited discovery will uncover the support required.⁴³⁸ Thus, discovery is limited solely to narrowly drawn issues and is available only when the plaintiff shows both prediscovery diligence and a reasonable likelihood of uncovering support.⁴³⁹

Circuit standard). The Court, however, has so far shown no interest. *See, e.g.,* Scholastic Corp. v. Truncellito, 534 U.S. 1071 (2001); Desai v. Meyercord, 532 U.S. 1021 (2001); Kasaks v. Novak, 531 U.S. 1012 (2000) (all denying certiorari).

433. Weiss and Moser applied the Catch-22 label in this context. *See* Weiss & Moser, *supra* note 17, at 457 (titling their piece appropriately). Others have noted the Catch-22 nature in the civil rights context. Marcus, *supra* note 9, at 465 n.195; Tobias, *supra* note 9, at 305, 307; Blaze, *supra* note 9, at 962.

434. Such a situation exists if pleading based solely on publicly available information (such as insider trades with the motive-and-opportunity test) is precluded. Sale, *supra* note 17, at 578–79.

435. *See* Weiss & Moser, *supra* note 17, at 497–501 (advocating limited discovery); Sale, *supra* note 17, at 579–83 (advocating a managed-discovery program); Baskin, *supra* note 348, at 1603–04 (advocating limited discovery as a key to eliminating pre-PSLRA problems with meeting the heightened scienter requirement of the Second Circuit).

436. 15 U.S.C. § 78u-4(b)(3)(B) (2001).

437. The legislative history behind the exception is scant. There is reference to its use in the context of a terminally ill witness, but this example is unhelpful in evaluating use of the undue prejudice clause. H.R. CONF. REP. NO. 104-369, at 37 (1995); *see also* Weiss & Moser, *supra* note 17, at 501 (highlighting the lack of legislative guidance); Mahaffey, *supra* note 426, at 9 (noting absence of legislative history on exception).

438. *See* Weiss & Moser, *supra* note 17, at 501 (suggesting such use of the discovery stay exception).

439. In this manner, risk of the discovery stay exception swallowing the rule is lessened. *See id.* at 506. Professor Sale has suggested a similar winnowing device but does not base it on the discovery stay exception. Rather, her recommendation would be by statutory amendment. The process, however, would be similar. Following the filing of a complaint, a motion to dismiss would eliminate all alleged misstatements not pleaded with specificity from publicly available sources.

As for potential problems under the general particularity requirement, the procedural solution is presented by the Rules themselves. The general particularity requirement of the PSLRA was designed to codify Rule 9(b)'s application to securities fraud cases.⁴⁴⁰ The provision, therefore, should be read in light of Rule 9(b)'s purpose and experience. Suppose that the Rule 9 short list now included securities fraud along with fraud and mistake. Traditional interpretation of Rule 9(b) would require greater specificity, but only to the extent necessary to put the defendant on notice of the fraud.⁴⁴¹ The general particularity requirement should be read the same way.⁴⁴² Unlike the scienter requirement, there is no "strong inference" standard to contend with and no reason to ignore the lessons of *Conley* and the notice pleading doctrine. Therefore, a complaint should meet the standard, provided it has details sufficient to put the defendant on notice of the allegations of fraud.⁴⁴³

E. Why Y2K?

While securities fraud cases are a predictable source of statutory heightened pleading requirements given the earlier judicial use, Y2K litigation has no such pedigree. The prediction of doom surrounding the calendar change from 1999 to 2000 is common knowledge. The doomsday scenario was simple. The Y2K problem, or "Millennium Bug," was a technical problem caused by computer software and computer chips that designated the year as a two-digit number. When the clock struck midnight on December 31, 1999, computers and dependent technology would cease to work properly because they would recognize "00" as the year 1900 instead of 2000.⁴⁴⁴ The specter of Armageddon loomed as everything from bank ATMs

Once the complaint's contour has been limited to only those misstatements pleaded with some particularity, a discovery program would be crafted. According to Sale, such a system would decrease the amount of discovery available, and accordingly, the costs to the defendant, thereby reducing settlement pressure. Sale, *supra* note 17, at 579–82.

440. See *supra* note 426.

441. See *supra* notes 125–27 and accompanying text.

442. See Judge Browning's dissent in *Silicon Graphics* for application of this type of reading. *In re Silicon Graphics, Inc., Sec. Litig.*, 183 F.3d 970, 996–98 (9th Cir. 1999) (Browning, J., dissenting). The Second Circuit also reads the general particularity requirement in light of Rule 9(b) notice rationale. See *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (rejecting a blanket rule on disclosure of confidential sources, provided there is sufficient specificity to provide notice).

443. For a contrary view, see Weiss, *supra* note 424, at 15 (arguing that *Silicon Graphics* is correct in requiring testimonial or documentary sources, or "sufficient particularity" in the complaint to allow courts to assess credibility and merits). The Ninth Circuit recently reiterated its commitment to applying a "strong inference" test to the basic particularity requirement. *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). The court noted: "Because falsity and scienter in private securities fraud cases are generally strongly inferred from the same set of facts, we have incorporated the dual pleading requirements of 15 U.S.C. §§ 78u-4(b)(1) and (2) into a single inquiry." *Id.* The court then ordered dismissal under Rule 12(b)(6) if the pleadings as a whole did not raise a strong inference that the statements were made knowingly or with deliberate recklessness. *Id.*

444. See 15 U.S.C. § 6601(a)(1) (2002).

to traffic lights malfunctioned.⁴⁴⁵ Fear that the incapacitation would cripple not only economic markets, but also governmental services (including defense systems), led Congress to act.⁴⁴⁶

Senator John McCain introduced Senate Bill 96, the Y2K Act, on January 19, 1999.⁴⁴⁷ His motivation was clear: “Opportunistic lawyers are already filing suits to reap the benefits of this issue, and the calendar still reads February, 1999. These lawsuits are sheer craziness and represent ambulance chasing at its worst.”⁴⁴⁸ Thus, the Y2K Act was forged out of antipathy for these claims and with a presumption of frivolousness identical to that expressed about civil rights and securities fraud cases. In the hearings that followed,⁴⁴⁹ senators repeatedly declared that frivolous Y2K lawsuits would flood the courts and that litigation costs would top one trillion dollars.⁴⁵⁰ Despite the absence of factual proof of a litigation explosion or that it would be fueled by frivolous cases,⁴⁵¹ Congress proceeded with regulation designed to thwart the impending tidal wave.⁴⁵² Procedural restrictions were a tool of choice.

Senator McCain’s original bill included no special procedural provisions for Y2K actions.⁴⁵³ However, following the initial hearing on Senate

445. See Shawn E. Tuma, *It Ain’t Over ‘Til . . . A Post-Y2K Analysis of Y2K Litigation & Legislation*, 31 TEX. TECH. L. REV. 1195, 1196, 1199–1200 (2000); Holly M. Barbera, Note, *The Y2K Problem and Breaks in the Supply Chain: Can the Wrath of the Bug be Squashed?*, 24 DEL. J. CORP. L. 565, 565 (1999); Andrew S. Crouch, Comment, *When the Millennium Bug Bites: Business Liability in the Wake of the Y2K Problem*, 22 HAMLINE L. REV. 797, 797 (1999).

446. See 15 U.S.C. § 6601(a)(1)(B) (finding that the Y2K computer problem, if not corrected, could incapacitate commerce and government and negatively impact safety).

447. See S. 96, 106th Cong. (1999).

448. Statement of Sen. John McCain, Chairman, Senate Comm. on Commerce, Science and Transp. Full Comm. Hearing on S. 96–Y2K Act, at 2 (Feb. 9, 1999), <http://www.senate.gov/~commerce/hearings/0209jsm.pdf>.

449. *Id.*

450. See, e.g., *id.* (citing the \$1 trillion figure and discussing frivolousness); Statement of Sen. Robert F. Bennett, Senate Comm. on Commerce, Science and Transp. Hearings on S. 96, at 3 (Feb. 9, 1999) (estimating litigation costs at \$1 trillion), <http://www.senate.gov/~commerce/hearings/0209ben.pdf> (last visited Nov. 5, 2002); Statement of Sen. Christopher Dodd, Senate Comm. on Commerce, Science and Transp. Hearings on S. 96, at 2 (Feb. 9, 1999) (describing the risk of “litigious bloodletting”), available at <http://www.senate.gov/~commerce/hearings/0209dod.pdf> (last visited Nov. 5, 2002).

451. See S. REP. NO. 106-10, at *8 (1999), reprinted in 1999 U.S.C.C.A.N. 65, 1999 WL 126006 (setting forth Senator Hollings’s minority view that there was no factual proof that there would be unnecessary or frivolous Y2K claims); H.R. REP. NO. 106-131, pt. 1, at *38, 1999 WL 283976 (1999) (describing the absence of factual proof as to the litigation explosion or a significant number of frivolous cases and challenging the estimate of the \$1 trillion cost as a myth based on guesswork backed by no scientific study).

452. The findings and purposes section of the Y2K Act is explicit. Congress perceived a likelihood of “a significant volume of litigation, much of it insubstantial” and cites the risk of a “proliferation of frivolous lawsuits.” 15 U.S.C. § 6601(a)(3)(A), (a)(7) (2002).

453. Senate Bill 96 did include a pre-suit notice provision requiring written notification describing the failure “with particularity.” See S. 96, 106th Cong. § 4(b)(1) (1999), available at <http://www.techlawjournal.com/cong106/y2k-liab/s96is.htm> (last visited Nov. 4, 2002).

Bill 96, the bill was replaced with a substitute that included many significant procedural restrictions, including heightened pleading.⁴⁵⁴ Amazingly, heightened pleading found its way into the Y2K Act with virtually no discussion of its necessity or efficacy in the legislative history of Senate Bill 96.⁴⁵⁵ On March 3, 1999, the Senate Commerce Committee approved Senate Bill 96 along strict party lines.⁴⁵⁶

While the Senate considered S. 96, the House was also at work. On February 23, 1999, Virginia Representative Thomas Davis introduced H.R. 775, Year 2000 Readiness and Responsibility Act, the House's response to the perceived Y2K problem.⁴⁵⁷ As with the Senate's effort, this bill also included heightened pleading.⁴⁵⁸ H.R. 775 also introduces a PSLRA-like discovery stay while motions to dismiss based upon the heightened pleading requirement were pending.⁴⁵⁹

It is in the House hearings on H.R. 775 that the only meaningful—albeit brief—attention to the heightened pleading requirement appears in the legislative history. Third Circuit Judge Walter Stapleton testified on behalf of the Judicial Conference of the United States opposing H.R. 775's pleading requirements for three significant reasons. First, requiring particularity in a

454. The heightened pleading provision required that a complaint shall: (1) provide specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation, (2) contain specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material, and (3) in any Y2K action requiring proof that the defendant acted with a particular state of mind, with respect to each element of that claim, state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind. *See* S. 96, 106th Cong. § 102 (McCain-Gorton substitute), WL 145 Cong. Rec. S4218-04.

455. None of the testimony presented at the February 9, 1999, Senate committee hearing directly addressed the merits of heightened pleading. Only one witness, Robert Holleyman, II, CEO of Business Software Alliance, touched on the issue: “[L]egislation should require that all Y2K suits spell out with specificity the material problem at issue.” Written statement of Robert Holleyman, Senate Comm. on Commerce, Science and Transp. Hearings on S. 96, at 11 (Feb. 9, 1999), available at <http://www.techlawjournal.com/cong106/y2k-liab/19990209bsa.htm>.

456. *See Senate Commerce Committee Passes the McCain Y2K Litigation Bill*, TECH L.J. (Mar. 4, 1999), at <http://www.techlawjournal.com/y2k/19990304.htm> (reporting that all eleven committee Republicans voted for the bill, and all nine Democrats opposed it). In an effort to build bipartisan support for the Y2K Act, the Commerce Committee replaced Senate Bill 96 with a substitute supported by Democratic Senator Ron Wyden before full Senate consideration. *See* Press Release, McCain, Wyden Unveil Revised Y2K Bill, (Apr. 19, 1999), <http://www.techlawjournal.com/cong106/y2k-liab/19990419pr.htm> (last visited Nov. 4, 2002) (describing the substitute as a compromise reached after the Committee voted on the bill on March 3). Procedurally, the McCain-Wyden substitute made a significant change in the heightened pleading requirement. Whereas the previous incarnation of S. 96 applied heightened pleading to the complaint, the new substitute required the same specificity for damages, material defects, and state of mind, but also required a separate statement of the specific information to be filed with the complaint. *See* S. 96, 106th Cong. § 8 (McCain-Wyden substitute) (1999), WL 145 Cong. Rec. S4287.

457. H.R. 775, 106th Cong. (1999), WL 145 Cong. Rec. H3013-02.

458. H.R. 775, § 103 (pleading requirements).

459. *Id.*

complaint regarding damages, material defects, and the defendant's state of mind is inconsistent with notice pleading under Rule 8.⁴⁶⁰ Second, inclusion of these provisions bypasses the Rules Enabling Act (REA) and avoids the scrutiny of comment by the bench, bar, and public inherent in the formal rulemaking process.⁴⁶¹ Finally, H.R. 775 bypasses the REA in a particularly offensive way: it creates stand-alone statutory provisions related to pleading outside of the Federal Rules. Confusion and traps for the unwary are created, undermining the uniformity of national procedural rules.⁴⁶²

Judge Stapleton's thoughtful analysis went unheeded, as both the House Judiciary Committee and full House ultimately approved H.R. 775 with the heightened pleading requirements unchanged.⁴⁶³ After striking all but the enacting clause of H.R. 775 and reinserting the text of S. 96, the Senate also passed the bill, setting the stage for a Conference Committee compromise.⁴⁶⁴ As to heightened pleading, the Senate's version triumphed with the elimination of the House's proposed discovery stay.⁴⁶⁵ On July 1, 1999, both Houses of Congress agreed to the conference report.⁴⁶⁶ President Clinton signed the Y2K Act on July 20, 1999. In his signing statement, the President reiterated the legislative concern for screening out frivolous claims.⁴⁶⁷ Heightened pleading under the Y2K Act became law.⁴⁶⁸

The Y2K Act imposes heightened pleading burdens in three areas: damages, defects, and state of mind.⁴⁶⁹ Specifically, a Y2K plaintiff must file with the complaint a statement with specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation.⁴⁷⁰ Similarly, a plaintiff must file with the complaint a statement of specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.⁴⁷¹

460. Statement of Judge Walter K. Stapleton on Behalf of the Judicial Conference of the United States, 1999 WL 16945862 (Apr. 13, 1999) [hereinafter Stapleton Statement].

461. *Id.*

462. *Id.*

463. The House Judiciary Committee reported the bill out on May 4, 1999. *See* 145 CONG. REC. D480 (daily ed. May 4, 1999). The House passed H.R. 775 by a vote of 236 to 190 on May 12, 1999. *See* 145 CONG. REC. D517 (daily ed. May 12, 1999), 1999 WL 296270.

464. On June 15, 1999, the Senate reinserted its version of the Y2K Act and passed the bill by a vote of 62 to 37. 145 CONG. REC. S6998 (daily ed. June 15, 1999).

465. *See* H.R. CONF. REP. NO. 106-212, § 8 (1999) (pleading requirements), 1999 WL 446069.

466. The House vote was 404 to 24. 145 CONG. REC. H5205 (daily ed. July 1, 1999). The Senate vote was 81 to 18. 145 CONG. REC. S8035.

467. Statement on Signing the Y2K Act, July 20, 1999, Administration of William J. Clinton, 1999, 35 Compilation of Presidential Documents, No. 26, at 1431.

468. Y2K Act, 15 U.S.C. §§ 6601-6617 (2001).

469. The pleading requirements apply exclusively to Y2K actions and, except to the extent that they require additional information to be contained in or attached to pleadings, are not intended to amend or otherwise supersede applicable rules of federal or state civil procedure. 15 U.S.C. § 6607 (a).

470. 15 U.S.C. § 6607(b).

471. 15 U.S.C. § 6607(c).

Finally, if the Y2K action requires a particular state of mind, a plaintiff must file with the complaint, with respect to each element of that claim, a statement of the facts giving rise to a strong inference that the defendant acted with the required state of mind.⁴⁷²

Despite the deluge predictions, Y2K litigation has been a trickle. With regard to the pleading requirements, only a drop. Only two reported cases emerge: *Lewis Tree Service, Inc. v. Lucent Technologies, Inc.*⁴⁷³ and *Medimatch, Inc. v. Lucent Technologies, Inc.*⁴⁷⁴ Based on this pool of authority, it is premature to draw conclusions as to the usefulness of heightened pleading in this area. However, neither *Lewis*⁴⁷⁵ nor *Medimatch*⁴⁷⁶ reflect favorably on the need for heightened pleading in this context.

472. 15 U.S.C. § 6607(d).

473. No. 99 CIV. 8556 JGK, 2000 WL 1277303 (S.D.N.Y. Sept. 8, 2000).

474. 120 F. Supp. 2d 842 (N.D. Cal. 2000).

475. *Lewis* illustrates the superfluosity of additional Y2K pleading requirements. *Lewis Tree Service* and others sued Lucent and AT&T for violation of the New Jersey Consumer Fraud Act and common-law fraud, as well as for breach of contract and warranty. The claims stemmed from problems associated with a telecommunications system. *Lewis*, 2000 WL 1277303, at *1–2. The district court dismissed the complaint for failure to meet both the damages and material defect pleading requirements of the Y2K Act. *Id.* at *2. As to damages, the plaintiffs failed to allege specific amounts. *Id.* As to materiality, the complaint alleged that the Y2K defect “will” cause the plaintiffs’ telecommunications system to fail, instead of that the “Y2K defect has in fact caused the plaintiffs’ products to shut down.” *Id.* at *3. Alternatively, the district court dismissed the statutory and common-law fraud claims for failure to meet Rule 9(b)’s particularity requirement. *Id.* at *4. The plaintiffs were, however, given leave to replead. *Id.* at *5. *Lewis* therefore reflects just how little the Y2K Act’s pleading requirement adds to the Federal Rules pleading rubric. In an amended complaint, the plaintiffs should be able to articulate easily both a damage amount and Y2K failure, if applicable. To the extent a pleading hurdle exists, it is Rule 9(b)’s particularity requirement requiring the “who, what, when, where, and why” of the alleged fraudulent statements. The district court articulated Rule 9(b)’s particularity requirement in terms of these “newspaper” questions. *Id.* at *4. Hence, any real increased pleading burden on the plaintiffs comes from the structure of the Rules themselves, not the Y2K Act.

476. *Medimatch* involves similar allegations against Lucent and AT&T, regarding allegedly Y2K-noncompliant business telephone systems. Applying the Y2K Act’s heightened pleading requirement, the court dismissed the complaint with leave to amend on the damage requirement, finding ambiguous the actual amount of damages claimed. *Medimatch*, 120 F. Supp. 2d at 849. However, as with *Lewis*, the court granted leave to amend. *Id.* As to the materiality requirement, the district court found sufficient specific information to meet the burden. *Id.* at 850. The court held that the complaint “provided specific information as to how the Y2K defects would affect their equipment, and that plaintiffs have shown materiality by clearly describing the importance of the equipment to their particular business operations.” *Id.*

The court’s analysis of the state of mind pleading requirement is most interesting. Only the statutory consumer fraud claim contained a state of mind element—knowledge or intent. *Id.* at 850, 856. The court applied both Rule 9(b)’s particularity requirement and the Y2K Act’s state of mind requirement to conclude that the plaintiff “must state the circumstances of the fraud with particularity, and must allege facts sufficient to create a strong inference that each defendant acted with an intent to defraud.” *Id.* at 856. In the court’s own words, “this is a rather high pleading standard.” *Id.* Nonetheless, the court found the complaint satisfied it. *Id.* at 857. As to the circumstances of the fraud, the complaint identified that the defendants had knowledge of the Y2K problem and the noncompliant status of their equipment prior to sales to the plaintiffs, based upon employee statements, public filings, and advertisements. *Id.* According to the court, this was sufficient particularity on circumstances. *Id.* at 857. Intent, however, was more complex. The

Despite the lack of Y2K cases, Y2K Act heightened pleading is instructive. The inclusion of heightened pleading in the Y2K Act further documents the fact that heightened pleading attaches to categories of cases that are presumed to be frivolous. The legislative history of the Act is clear. From its introduction in the Senate, through congressional hearings, and culminating in its signing by the president, Y2K actions were predicted to be meritless.⁴⁷⁷ This prediction is consistent with the application of heightened pleading in the civil rights and securities fraud contexts, where a presumption of frivolousness has also been inappropriately applied. However, the Y2K situation is even more problematic. Unlike civil rights and securities fraud, where there is no question of an increase in litigation, all Y2K concern was speculation. Confronted with this absence of information, it is all the more interesting that Congress would so quickly embrace the procedural device. The explanation is the uncertainty itself. It is a similar, yet broader uncertainty that was at work with the Y2K Act, as compared to civil rights and securities fraud. The uncertainty operates at an even more basic level—whether the problem itself will occur and, if so, whether it will engender lawsuits. Faced with such an enveloping cloud, Congress explicitly avoided a substantive answer—creation and limitation of a substantive cause of action⁴⁷⁸—instead opting for procedural mechanisms to curb potential cases.⁴⁷⁹

V. Legitimacy and Vitality of Heightened Pleading

Without question, heightened pleading survives post-*Leatherman*. As this systematic examination of pleading in civil rights cases, the PSLRA, and the Y2K Act reflect, courts and Congress continue to turn to the procedural device. Whatever their legitimate concerns for protection of defendants may

court recognized that under notice pleading, the defendants clearly had fair notice. *Id.* However, the Y2K Act required facts creating a strong inference of intent. After lamenting the dearth of authority from both courts and Congress on the strong inference standard, the district court found heightened pleading satisfied. *Id.* at 857–58. In essence, the plaintiffs pleaded specific facts of defendants’ knowledge, defendants’ continued sale of the products, the materiality of defendants’ knowledge, and plaintiffs’ injury. *Id.* at 858. Therefore, “[a] reasonable person could find that this sequence of events creates a strong inference of intent to defraud.” *Id.*

Based upon *Medimatch*, the Y2K Act’s heightened pleading requirement is essentially illusory. It leads to dismissal only for more concrete damages allegations—a burden easy to meet in the amended complaint. The materiality requirement was easily satisfied with allegations that the voicemail system was going to have problems. *Id.* at 850. A “strong inference” of intent was inferred from prior statements of noncompliance, coupled with subsequent sales. *Id.* at 858. This is a far cry from even the most lenient interpretation of what constitutes an inference of intent under the PSLRA—the motive and opportunity test—much less whether the allegations rise to the level of a strong inference.

477. See *supra* notes 448–51, 467 and accompanying text.

478. See 15 U.S.C. § 6603(b) (noting that no new cause of action was created).

479. See *Mineral Area Osteopathic Hosp., Inc. v. Keane, Inc.*, 192 F.R.D. 589, 590 (N.D. Iowa 2000) (describing the Y2K Act as creating procedural mechanisms to limit “insubstantial” litigation).

be, heightened pleading is a poor procedural solution. As both the civil rights and the PSLRA experiences document, heightened pleading is unworkable because of an inherent inability to articulate the applicable standard.⁴⁸⁰ The circuit splits in both areas are symptoms of this underlying unworkability. The problem is exacerbated when heightened pleading is applied to intent cases (both subjective intent civil rights claims and 10b/10b-5 Claims). These plaintiffs are compelled to do the impossible: plead facts regarding the defendants' state of mind without the benefit of discovery. However the standard is articulated, heightened pleading runs afoul of the preference for merits determination embodied in the federal procedural system. Such infringement is unwarranted, given the myriad of procedural alternatives available that preserve merits determination while balancing defendant's interests.⁴⁸¹ In addition, the parallel problems embodied in these areas document three significant trends: a procedural-substantive dichotomy, transsubstantive erosion, and the importance of the procedure of procedure.

A. Procedural-Substantive Dichotomy

The development of heightened pleading in civil rights, securities fraud, and Y2K cases illustrates a procedural-substantive dichotomy. The first part of the dichotomy is that when the underlying substantive law is unclear, courts reach out to procedural alternatives as salves for the substantive tension. In the context of civil rights litigation, the qualified immunity doctrine has been the murky substantive area.⁴⁸² As the Supreme Court struggled to define the precise contours of the doctrine, the lower courts were essentially forced to "read the tea leaves."⁴⁸³ It is therefore not surprising that federal courts turned to a procedural aberration—heightened pleading—as a solution. Even after the Court abandoned the subjective prong of the qualified immunity test in *Harlow*,⁴⁸⁴ heightened pleading requirements remained, justified either as enforcing the spirit of *Harlow*⁴⁸⁵ or resolving the new problem area of subjective intent cases.⁴⁸⁶ Thus, the substantive

480. See *supra* subparts III(D)(1) & IV(D)(1).

481. See *supra* subparts III(D)(2) & IV(D)(2).

482. See *supra* notes 232–44 and accompanying text.

483. See *Stokes v. Bullins*, 844 F.2d 269, 272–73 (5th Cir. 1988) (noting the confusion and colorfully drawing the tea leaf analogy). Qualified immunity jurisprudence continues to be characterized in vivid and unflattering terms. Judge Williams of the Western District of Virginia laments: "The jurisprudence of § 1983 is a wonderland of strange creations of the judicial imagination, of bizarre and confusing immunities . . ." *Collins v. Mullins*, 1996 WL 924766, at *2 (W.D. Va. May 17, 1996).

484. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982); see also *supra* notes 236–38 and accompanying text.

485. See, e.g., *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985) (relying upon an extensive discussion of *Harlow* to justify heightened pleading).

486. See, e.g., *Branch v. Tunnell*, 937 F.2d 1382, 1385–86 (9th Cir. 1991) (adopting heightened pleading in subjective intent cases on the strength of *Harlow*).

uncertainty continued to compel courts to reach out to procedural quick-fixes in civil rights cases.⁴⁸⁷

Securities fraud litigation contains similar uncertainty. Scierter is to securities fraud litigation what qualified immunity is to civil rights cases—the uncertain substantive area fueling the procedural solution. With the Court's imposition of a scierter requirement for 10b/10b-5 claims in *Hochfelder*, without guidance on how the standard was to be pleaded, the courts of appeals ultimately embraced heightened pleading, albeit in significantly different variants.⁴⁸⁸ This uncertainty in turn led Congress to react with the PSLRA. The congressional attempt at uniformity, however, falls woefully short as the tripartite circuit split interpreting the statutory scierter requirement illustrates.

Congressional uncertainty of a different vein created the Y2K Act and its heightened pleading requirement. Panic over computer Armageddon produced a false fear of a flood of lawsuits. These misperceptions and the ensuing uncertainty led Congress to choose a procedural solution. Rather than limit substantive rights to sue for Y2K defects, Congress imposed added procedural burdens, including heightened pleading. While the congressional rhetoric of frivolousness is similar to that put forward in discussions of civil rights and securities fraud, the absolute lack of experience with Y2K lawsuits—frivolous or not—makes the imposition of heightened pleading in this context all the more dramatic. Nonetheless, the uncertainty was real. Struggling with it, Congress chose a procedural out, just as it did with the PSLRA; just as the courts did with civil rights cases. This is half of the dichotomy.

The procedural solution then generates real substantive effects—the other half of the dichotomy. Judicial and statutory heightened pleading requirements yield profound substantive effects. Entire classes of cases are inappropriately presumed frivolous.⁴⁸⁹ This presumption of frivolousness transforms civil rights claims, securities fraud actions, and Y2K lawsuits into disfavored cases.⁴⁹⁰ Indeed, the very purpose of erecting a higher pleading

487. The same concern for following the principles of *Harlow* led the D.C. Circuit to adopt its now ill-fated heightened burden of proof in *Crawford-El*. *Crawford-El v. Britton*, 93 F.3d 813, 823 (D.C. Cir. 1996), *rev'd*, 523 U.S. 547 (1998).

488. The Second Circuit adopted a heightened scierter standard requiring a strong inference of fraudulent intent. In contrast, the Ninth Circuit held scierter could be properly alleged generally, but imposed a Rule 9(b)-type particularity to the allegations constituting the fraud. *See supra* subpart IV(A) (describing judicially imposed heightened pleading in securities fraud cases).

489. There is no basis for the presumption of frivolousness in any of the examined contexts. *See Wingate, supra* note 9, at 688 (arguing that there is no hard evidence of frivolousness of civil rights suits); *Brooks, supra* note 202, at 109 (same); *Yablon, supra* note 363, at 572 (describing the impossibility of directly showing frivolousness in securities cases); H.R. REP. NO. 106-131, pt. 1, at 38, 1999 WL 283976 (1999) (describing the absence of factual proof as to the potential litigation explosion or significant number of frivolous Y2K cases).

490. *See Tobias, supra* note 9, at 300 (noting the substantive effect of disfavored-claim status in civil rights cases); *Johnson et al., supra* note 17, at 785 (noting that motions to dismiss become

burden in the first place is to either discourage filing lawsuits or to prematurely terminate them. The courts and Congress are effecting substantive change under the guise of procedural tinkering.

The substantive effect is more than just a label. Where courts require civil rights plaintiffs to plead facts concerning the state of mind of the defendant, a new substantive burden is created. Civil rights plaintiffs must either plead with particularity—pre-discovery—or risk dismissal. Given that this information is squarely in the hands of the defendant, the procedural shift has a prodefendant substantive effect.⁴⁹¹

The PSLRA has a similar effect. While Congress expressly purported to leave the substantive law of scienter unchanged,⁴⁹² its procedural manipulation had the opposite effect. The particularization requirement raises the scienter pleading standard to a “strong inference” one. This has the substantive effect of making it harder to bring securities fraud cases, even if scienter itself continues to be defined in pre-PSLRA terms.⁴⁹³ Moreover, in enacting a statute with such unclear text and ambiguous legislative history, even more substantive disruption is possible as courts both fashion and apply new tests for meeting the “strong inference” standard. The most dramatic example is the Ninth Circuit’s creation of a new scienter standard of “deliberate recklessness.”⁴⁹⁴ This change is unquestionably a substantive alteration of securities fraud law by raising the scienter level above any pre-PSLRA articulation.⁴⁹⁵

Indeed, the recent empirical work of Professors Grundfest and Pritchard documents the effect of heightened pleading on securities fraud plaintiffs.⁴⁹⁶

substantive challenges to merits by requiring plaintiffs to plead facts demonstrating scienter in securities fraud cases).

491. See Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 330 (2001) (explaining how heightened pleading has uniquely significant substantive effects in civil rights cases because of defendants’ control of information); Marcus, *supra* note 9, at 467–68 (arguing that requiring the pleading of details concerning state of mind creates a real shift in the substantive law).

492. See *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) (stressing the uncontradicted legislative history that Congress intended strictly procedural, not substantive changes); *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999) (“By its own terms, the PSLRA pleading standard does not purport to change the substantive law of scienter, or the required state of mind, for securities fraud actions.”).

493. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 n.9 (1st Cir. 1999) (recognizing that procedural tinkering of the strong inference standard is a substantive change); Olazabal, *supra* note 17, at 196 (concluding PSLRA’s pleading requirement clearly makes it substantively more difficult for a plaintiff).

494. See *In re Silicon Graphics, Inc., Sec. Litig.*, 183 F.3d 970, 988 (9th Cir. 1999) (holding that the plaintiff’s allegations did not meet the deliberate-recklessness standard).

495. See *id.* at 995–96 (Browning, J., dissenting) (arguing that the majority’s formulation expanded existing law); see also *supra* notes 393–94 and accompanying text.

496. Their study analyzes 33 appellate decisions interpreting the PSLRA’s strong inference standard and reports on an empirical analysis of 167 district court decisions resolving motions to dismiss on the basis of this standard. Grundfest & Pritchard, *supra* note 371, at 634.

At the appellate level, they conclude that both the choice of standard influences the outcome of motions to dismiss and that plaintiffs fare better under the Second Circuit's formulation.⁴⁹⁷ Additionally, analysis of district court behavior under the PSLRA reflects the same sort of antiplaintiff mindset seen in civil rights litigation. Describing the pattern as "familiarity breeds skepticism," they contend that district courts with an intensity of class action securities fraud litigation and litigation against technology issuers are correlated with prodefendant interpretations of strong inference and prodefendant rulings on motions to dismiss.⁴⁹⁸ Similarly, district court judges with more than one decision in the database were more likely to rule in favor of defendants on motions to dismiss.⁴⁹⁹ They conclude that judges who are frequently exposed to securities fraud litigation are more skeptical of plaintiffs' claims on the merits.⁵⁰⁰ This antiplaintiff "skepticism" is tantamount to a substantive change facilitated by the PSLRA's heightened pleading standards.

The PSLRA's substantive effect certainly runs deep. By making it more difficult for defrauded investors to pursue their claims on the merits, the PSLRA may actually encourage more securities fraud.⁵⁰¹ Indeed, the PSLRA's "procedural" heightened pleading requirement is one of the chief causes of creating an atmosphere of laxity leading to the recent Enron scandal.⁵⁰² As Professor John Coffee contends, the PSLRA essentially laid the groundwork for the debacle.⁵⁰³ The particularity requirement, pleading facts without discovery, is far more protective of auditors than other defendants.⁵⁰⁴ An Enron plaintiff might be able to plead insider sales to satisfy the heightened burden for corporate officers, but the same pleading allegation cannot be made with respect to auditors, who by definition do not

497. See *id.* at 677–78 (noting that the adoption of the Second Circuit standard "appears to be correlated with" more favorable outcomes).

498. *Id.* at 679–80.

499. *Id.* at 679.

500. See *id.* at 680 (setting forth the "familiarity breeds skepticism" hypothesis). Grundfest and Pritchard do note that their result might be explained by a docket-control hypothesis, but view the data as more consistent with their skepticism hypothesis, based on other variables. *Id.*

501. See, e.g., Yablon, *supra* note 363, at 594 (describing the deterrent effect of securities claims and how procedural restrictions create incentives for fraud); Don Bauder, *Congress Can't Complain About Securities Laws it Spawned*, SAN DIEGO UNION-TRIBUNE (Feb. 22, 2002) ("Both PSLRA and SLUSA were meant to curb abusive plaintiffs' suits. But the laws were massive overkill. In essence, they gave auditors and companies a license to steal."); Hill Eyes *Reform of 1995 "Reform" Law*, CONGRESS DAILY (Feb. 27, 2002) (noting that the PSLRA encouraged securities fraud by making it more difficult for defrauded investors to hold perpetrators responsible).

502. Steve Berman, *Murray and Cantwell Share Responsibility for Enron Meltdown*, SEATTLE POST-INTELLIGENCER, Feb. 22, 2002, at B4 ("PSLRA laid the groundwork for financial debacles such as Enron.").

503. See *Enron Bankruptcy: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong. (2001) (statement of John C. Coffee, Colum. Univ. L. Sch.), 2001 WL 1727278, at *5.

504. *Id.*

own stock in an audit client.⁵⁰⁵ Moreover, Enron is not an exceptional case in this regard; it is different only in scale.⁵⁰⁶ The end result is substantive: it is much more difficult for defrauded investors to hold perpetrators accountable.

B. Transsubstantive Erosion

The continuing and expanding use of heightened pleading by courts and Congress sounds an alarm. The transsubstantive nature of the Federal Rules is in jeopardy. One of the chief departures of the Federal Rules from common-law pleading is their embodiment of the principle that a simple, uniform system should control, regardless of the substantive claim asserted.⁵⁰⁷ This uniformity in pleading practice is undermined by judicially imposed heightened pleading requirements, as in civil rights cases.⁵⁰⁸ Congress further diluted transsubstantiveness with the PSLRA and Y2K Act.⁵⁰⁹

Congressional use presents the most glaring risk. Post-*Leatherman*, Congress twice has carved out specific types of cases for special procedural treatment inconsistent with the principle of notice pleading and the rubric of the Federal Rules. In both the PSLRA and Y2K Act, Congress created stand-alone statutory provisions related to pleading outside of the Federal Rules. This enactment not only dissects notice pleading, but also sets traps for the unwary while undermining the uniformity of our national procedural rules.⁵¹⁰

Uniformity, however, is desirable. Notice pleading is a clearly understood standard. Heightened pleading is not. While the bench and bar are at ease with notice pleading, heightened pleading introduces a litany of new struggles. It is mercurial in definition, as both the civil rights and securities fraud experiences illustrate. It is applied inconsistently, as the circuit splits in both areas show. Even when applied, more uncertainty as to the quantum of pleading proof necessarily ensues. The benefits of a uniform standard are lost.⁵¹¹ Confusion results. If unchecked, this erosion threatens to return us to

505. *Id.*

506. *See id.* at *3.

507. The heightened notice standard for fraud in Rule 9 is chiefly the result of historical accident. *See supra* notes 104–07 and accompanying text.

508. *See* Marcus, *supra* note 17, at 1777 (recognizing problems with substance-specific rulemaking).

509. *See* Tobias, *supra* note 40, at 624 (recognizing erosion of the transsubstantivity of the Federal Rules by the PSLRA heightened pleading requirements); Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 551 (1998) (same).

510. *See* Stapleton Statement, *supra* note 460, at *4 (describing traps for the unwary in the context of the Y2K heightened pleading requirements).

511. Uniformity also makes sense in the context of protecting the federally created rights in § 1983, securities fraud, and Y2K cases. Plaintiffs should be treated procedurally the same throughout the federal courts when redressing such claims.

the “wonderfully slow, expensive, and unworkable”⁵¹² common-law pleading regime. By design, the uniformity of liberal notice pleading avoids this cumbersome system of specialized pleading.

The transsubstantivity of the Federal Rules is further desirable because it fosters greater social justice.⁵¹³ Rule 8 and notice pleading allow for easy access to the federal courthouse. By reducing the barriers to entry, the creation of new theories of legal rights is easier and simpler than it was under the former code or common-law pleading regimes.⁵¹⁴ Creating such a procedural system that provides greater access to the courts certainly motivated the drafters of the Rules.⁵¹⁵ Heightened pleading, however, threatens this important purpose. By restricting entry, the use of heightened pleading jeopardizes the social justice advantage. Thus, transsubstantivity promotes social justice; erosion threatens it.

Unfortunately, greater transsubstantive erosion is likely. Despite the poor record of the particularity requirements in the PSLRA, Congress used the PSLRA model when it drafted the Y2K Act.⁵¹⁶ Congress is poised to do it again. Legislation targeting class action lawsuits for reform is currently pending.⁵¹⁷ It includes a now familiar device—heightened pleading.⁵¹⁸ Obviously modeled off the PSLRA and the Y2K Act, the proposed “Class Action Fairness Act” includes a general particularity requirement applied to the “nature and amount of all relief sought” and the “nature of the injury [alleged].”⁵¹⁹ Similarly, it includes state-of-mind particularity.⁵²⁰ These heightened pleading requirements are reinforced with a PSLRA-like discovery stay.⁵²¹ Expect Congress to continue to use this model, furthering the transsubstantive erosion of the Federal Rules.

C. *The Procedure of Procedure*

Given this Article’s assessment, it is hard to make a case for heightened pleading’s retention. However, if there are areas where extension of heightened pleading might be useful, there is a better way to do it. Use the rulemaking process.

512. WRIGHT, *supra* note 1, at 468.

513. See Geoffrey C. Hazard Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246–47 (1989) (describing the social justice benefits of transsubstantivity).

514. See *id.* at 2246.

515. See *supra* note 51 (describing the drafters’ commitment to court access).

516. The similarity is clear from direct comparison of the texts of the two statutes. Compare Y2K Act, 15 U.S.C. § 6607(d) (required state of mind), with PSLRA, 15 U.S.C. § 78u-4(b)(2) (required state of mind).

517. Class Action Fairness Act of 2001, H.R. 2341, 107th Cong. (2001).

518. *Id.* § 1716 (pleading requirements for class actions).

519. *Id.* § 1716(a).

520. *Id.* § 1716(b).

521. *Id.* § 1716(c)(2).

In *Leatherman*, the Court reminded us that incorporating heightened pleading requires revision to Rules 8 and 9, “which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”⁵²² The Court repeated the explicit instruction in *Swierkiewicz*.⁵²³ The REA provides the procedure.⁵²⁴ The reason for its use is simple: “Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress.”⁵²⁵ Consequently, “[c]ourts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure ‘shall not abridge . . . any substantive right.’”⁵²⁶ Unfortunately, the Court’s message has not been heard.

The congressional bypass of the REA presents a slightly different set of problems. Congress can impose heightened pleading, but it should not. By eschewing the formal rulemaking process, congressional heightened pleading escapes scrutiny by the bench, bar, and public in the same way as the judicially imposed standards do.⁵²⁷ Theoretically, Congress could provide an appropriate level of debate and commentary, yet the virtual absence of such in the legislative history of the Y2K Act points in the opposite direction.⁵²⁸ This paucity comes as no surprise. Congress may well lack institutional competence when it tries to change procedure.⁵²⁹ Thus, heightened pleading in the PSLRA and the Y2K Act takes its proper place alongside the botched supplemental jurisdiction statute⁵³⁰ and the problematic Civil Justice Reform Act of 1990.⁵³¹ Interesting company.

522. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

523. See *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992, 999 (2002) (quoting *Leatherman* and requiring specificity in pleading to be the result of rule amendment). The Court also reiterated in *Crawford-El* that if there is a compelling need for modification of pleading procedure, it is for the rulemaking process, not the courts to decide. *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

524. 28 U.S.C. §§ 2071–2077 (2001).

525. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

526. *Id.*

527. Stapleton Statement, *supra* note 460, at *5.

528. The rulemaking process is superior to piecemeal congressional adoption because it protects both the transsubstantive nature of the rules and their interrelatedness.

529. See Tobias, *supra* note 40, at 624 (suggesting Congress assume a more limited role as a procedural policymaker); Grundfest & Pritchard, *supra* note 371, at 640–42, 665–66 (suggesting Congress intentionally uses statutory ambiguity as a compromise tool and arguing PSLRA heightened pleading is a prime example).

530. See generally Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 28 U.S.C. § 1367, 19 SETON HALL LEGIS. J. 157 (1994).

531. See Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 568–69 (1997) (describing various ways the CJRA failed to meet its goals and created new problems); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 800–05 (1993) (discussing the development of and troubles with the CJRA); see generally Tobias, *supra* note 40.

VI. Conclusion

In 1938, the drafters got it right. Reacting to the complexity and uncertainty of the common-law and code pleading regimes, they made rules that were simple, uniform, and transsubstantive. Rule 8 is the centerpiece. Provided the complaint puts the defendant on notice, a plaintiff easily enters the federal courthouse. This ease of entry reflects a procedural preference for merits determination. Despite strong words from the Supreme Court expressing its continued commitment to this rubric, heightened pleading thrives post-*Leatherman*. Courts cling to it in civil rights cases. Congress imposes it with the PSLRA and the Y2K Act. Both ignore the drafters' vision, with predictable consequences. The simple notice pleading standard is replaced with an uncertain one. Uniform application of pleading practice is eroded by splits in the courts of appeals applying heightened pleading. Transsubstantivity gives way to different pleading standards for different substantive claims. In essence, the result is common-law pleading revisited. The consequences are not surprising. Whole categories of cases are deemed frivolous. Plaintiffs suffer prediscovery dismissal, often for failure to plead facts relating to the defendant's state of mind. The Court has not once, but twice, tried to establish limits to heightened pleading in civil rights cases. In this context, two rights don't make a wrong. However, given the post-*Leatherman* experience, it is unlikely that those courts that embrace heightened pleading will abandon it on the strength of *Swierkiewicz*. As for Congress, it should retreat from its unilateral creation of heightened pleading and leave the rulemaking to the REA process.