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PLEADING CIVIL RIGHTS COMPLAINTS: WHEAT AND CHAFF

by

LAWRENCE W. MOORE, S.J.*

I have heard almost audible sighs of relief as I have traced the history of pleadings to first-year students in Civil Procedure. Most textbooks¹ give students an abbreviated sketch of the complications of common law pleadings followed by an indication of the problems that remained after the Field Code² reform. The call of the federal rules for “a short and plain statement of the claim showing that the pleader is entitled to relief”³ produces the sighs of relief. Although there are a few explicit exceptions⁴ to the “short and plain” standard in the federal rules, the students’ first impression is that modern pleading rules in federal courts are reasonable and simple.

It comes as a surprise⁵ that federal courts require that several types of complaints,⁶ including civil rights⁷ (encompassing employment discrimination⁸) complaints, must be pleaded with specificity and parti-

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¹ *E.g.*, J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, *CIVIL PROCEDURE CASES AND MATERIALS* 420-76 (5th ed. 1989) [hereinafter J. COUND]; J. LANDERS, J. MARTIN & S. YEAZELL, *CIVIL PROCEDURE* 347-94 (2d ed. 1988) [hereinafter J. LANDERS].

² Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of the State, ch. 379, 1848 N.Y. Laws 497. The key problem under code pleadings is to discover ultimate facts somewhere between the Scylla of legal conclusions and the Charybdis of mere evidence.

Before the era of modern pleading ushered in by the promulgation of the rules in 1938, a plaintiff to survive a motion to dismiss the complaint had to plead facts which if true showed that his legal rights had been invaded. The problem was that without pretrial discovery, which ordinarily could not be conducted before the complaint was filed, the plaintiff might not know enough facts to be able to make the required showing. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986).

³ Fed. R. Civ. P. 8(a)(2).

⁴ *E.g.*, *id.* 9(a) (fraud and mistake); *id.* 9(g) (special damages).

⁵ Student hornbooks relegate discussion of the civil rights pleadings requirement to footnotes. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 5.9, at 256 n.1 (1985); C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 68, at 447 n.41 (4th ed. 1983). The textbooks are a bit more forthcoming. J. COUND, *supra* note 1, at 493-95; J. LANDERS, *supra* note 1, at 415-21.

⁶ Federal courts commonly require that securities fraud and conspiracy also be pleaded with specificity. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447-50 (1986).

⁷ 42 U.S.C. § 1981-1986 (1982).

⁸ *Id.* § 2003-2 (1982).

cularity. Such a requirement is without basis in the federal rules⁹ or in Supreme Court decisions.¹⁰ Although a leading treatise denies the existence of such a requirement,¹¹ it is firmly embedded in the jurisprudence of the circuits.¹² The existence of such a gloss on the federal rules has received only sporadic comment.¹³ As one author commented, "[i]t is the utter silence in which the process is taking place."¹⁴

The purpose of this Article is two-fold. First, there will be a brief survey of the opinions that have required specificity in pleading civil rights complaints. Courts ought to speak for themselves before being criticized. The second part will evaluate the reasons federal courts provide for this requirement.

REASONS

From the hundreds of reported cases requiring specificity in pleading civil rights complaints, the surprising fact is that courts have rarely stated reasons for the requirement.¹⁵ Such paucity of reasoning or justification would not be surprising once a rule becomes well established, but the lack of reasoning is found even as the courts developed the rule.

The most quoted early justification for requiring specificity in pleading civil rights complaints is found in the district court opinion of *Valley v. Maule*.¹⁶

⁹ Only rarely do courts admit that they created the particularity requirement. "Defendant's counsel, like many similarly situated, pumps too much air into the *judicial requirement* that civil rights actions should be pleaded with particularity." *Bey v. Schneider Sheet Metal, Inc.*, 596 F. Supp. 319, 324 (W.D. Pa. 1984) (emphasis added).

¹⁰ "Santa Fe contends that petitioners were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson. This assertion, apparently not made below, too narrowly constricts the role of pleadings." *McDonald v. Santa Fe Trails Transp. Co.*, 427 U.S. 273, 283 n.11 (1976).

¹¹ "[N]ormal pleadings standards apply to civil rights actions." 5 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1230, at 49 (Supp. 1989). They do proceed to list cases taking the opposite view. For a rare recent case denying a specificity requirement, see *McNair v. McMickens*, 115 F.R.D. 196, 198 (S.D.N.Y. 1987) ("Claimed violations of civil rights, unlike claims of fraud, for example, are not subject to special pleading rules").

¹² See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 30 & n.87 (D.C. Cir. 1984) (11 circuits require specificity), *cert. denied*, 470 U.S. 1084 (1985). The remainder of this article cites numerous examples from all circuits except the Federal Circuit.

¹³ The major articles are: Marcus, *supra* note 6; Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 Mo. L. REV. 677 (1984). For a rare instance of a district court criticizing and reluctantly following the fact-pleading standard, see *Payne v. City of LaSalle*, 610 F. Supp. 606, 608-09 (N.D. Ill. 1985).

¹⁴ Roberts, *Fact Pleadings, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 420 (1980).

¹⁵ "There is no frontal challenge, for example, to the wisdom of rule 8(a)'s proscription of attempts to distinguish 'facts' from 'conclusions.' And it is almost as difficult to find any justification for the piecemeal dismantling of notice pleadings." *Id.* (footnotes omitted).

¹⁶ 297 F. Supp. 958 (D. Conn. 1968). Although *Valley* is not the first case to require specificity in civil rights cases, it quickly became the most cited.

As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts. 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 the litigation, and still keep the doors of the federal courts open to legitimate claims.¹⁷

Of the reasons enumerated in the *Valley* decision, the single most common explanation for requiring specificity is that such complaints are often frivolous and without merit. A couple of brief quotes give the flavor. "The purpose of the specificity requirement is to assure that civil rights actions are not frivolously brought and to enable the Court to assess whether the action may be meritorious."¹⁸ "The purpose of this rule is to permit the Court to dispose of frivolous cases prior to discovery and trial."¹⁹ This list of quotes could be multiplied a hundred-fold.²⁰

¹⁷ *Id.* at 960-61.

¹⁸ *Shirley v. Bensalem Township*, 501 F. Supp. 1138, 1141 (E.D. Pa. 1980) (footnote omitted). But when a plaintiff under 42 U.S.C. § 1983 supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one. We are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (citations omitted).

¹⁹ *Skomorucha v. Wilmington Housing Auth.*, 504 F. Supp. 831, 833 (D. Del. 1980).

²⁰ A couple outrageous examples of frivolousness are too good to pass up. The prisoner in *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984), had filed over 100 separate actions.

A large portion of his filings have been undeniably frivolous, such as claims that his civil rights were violated by: a television announcer calling an 18-wheel truck a 14-wheeler; a prison officer over-watering the lawn; the prison's use of aluminum pans for baking desserts; a federal regulation requiring seat-belts for automobiles but not for horses. The district court is understandably weary of Mr. Franklin.

Id. at 1231.

In *Whiteside v. Washington*, 534 F. Supp. 774 (E.D. Wash. 1982), the plaintiff objected to the lack of a jury trial in his state adjudication of a traffic offense. "The prayer for relief is 'one million troy ounces of silver' for each asserted right of which he was deprived. . . . Finally, he seeks expulsion of the defendant judges and attorneys from the American and Washington bars." *Id.* at 776.

The plaintiff in *Heimbaugh v. City of San Francisco*, 591 F. Supp. 1573 (N.D. Cal. 1984), was a recent law school graduate who wanted to play softball on a diamond the city had restricted to hardball. A 42 U.S.C. § 1983 (1982) suit was so "frivolous on its face," 591 F. Supp. at 1577, that the court imposed a sanction of \$50 on the impecunious graduate.

A representative sample of the cases requiring specificity to avoid frivolous suits include: *Fullman*

A second reason given for requiring specificity in civil rights complaints is "to prevent public officials from being subjected to vexatious actions."²¹ As one of the early opinions put it, "[f]urther the court believes that such officials should not be subjected to the inconvenience and unpleasantness of a civil suit on the basis of vague allegations of 'willfulness', 'malice', 'wantonness' and 'illegality' inserted in the pleadings."²² This solicitude for public officials is a continuing theme. "Our Court has recognized that certain claims are so easily made and can precipitate such protracted proceedings with such disruption of governmental functions that, despite the general rule of *Conley v. Gibson*, detailed fact pleadings is required to withstand a motion to dismiss."²³ This general concern for disruption of officials is heightened when an official claims absolute or qualified immunity.²⁴

v. Graddick, 739 F.2d 553 (11th Cir. 1984); Slotnick v. Staviskey, 560 F.2d 31, 33 & n.1 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978); Negrich v. Hohn, 379 F.2d 213, 215 (3d Cir. 1967); Dudosh v. City of Allentown, 629 F. Supp. 849, 852 (E.D. Pa. 1985); Howard v. Koch, 575 F. Supp. 1299, 1304 (E.D.N.Y. 1982); Martinez v. Winner, 548 F. Supp. 278, 287 n.10 (D. Colo. 1982), *aff'd in part and rev'd in part*, 771 F.2d 424 (10th Cir.), *modified*, 778 F.2d 553 (10th Cir. 1985), *vacated and remanded*, 475 U.S. 1138, *dismissed as moot*, 800 F.2d 230 (10th Cir. 1986); Schramm v. Krischell, 84 F.R.D. 294, 298-99 (D. Conn. 1979); Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n, 443 F. Supp. 1268, 1272 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.) cert. denied, 444 U.S. 843 (1979); Flesch v. Eastern Pa. Psychiatric Inst., 434 F. Supp. 963, 973 (E.D. Pa. 1977); MacMurry v. Board of Trustees, 428 F. Supp. 1171, 1175 (M.D. Pa. 1977); Pugliano v. Staziak, 231 F. Supp. 347, 355 (W.D. Pa. 1964), *aff'd per curiam*, 345 F.2d 797 (3d Cir. 1965).

²¹ Light v. Blackwell, 472 F. Supp. 333, 335 (E.D. Ark. 1979), *aff'd*, 620 F.2d 307 (8th Cir. 1980).

²² Selico v. Jackson, 201 F. Supp. 475, 478 (S.D. Cal. 1962) (citation omitted).

²³ Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981) (citation omitted). Although discussing the claim in the context of a private defendant, another court analogized civil rights charges to fraud in justifying specificity. "In fact, we think an allegation of racial discrimination, and the consequences attendant thereto, may be as serious as accusing someone of fraud." Pettman v. United States Chess Fed'n, 675 F. Supp. 175, 177 n.2 (S.D.N.Y. 1987). "In recent cases we have struck a balance between these conflicting rights by requiring plaintiffs to plead facts with particularity before they may subject public officials to trial or the vagaries of modern pretrial discovery." Jacques v. Procnier, 801 F.2d 789, 791 (5th Cir. 1986).

A sampling of cases requiring specificity to protect officials include: Freedman v. City of Allentown, 853 F.2d 1111, 1114 (3d Cir. 1988); Black v. United States, 534 F.2d 524, 527 (2d Cir. 1976); Farah v. Martin, 122 F.R.D. 24, 26 (E.D. Mich. 1988); Haas v. Berrien County Sheriff's Dept, 658 F. Supp. 877, 880 (W.D. Mich. 1987); Hodas v. Lindsay, 431 F. Supp. 637, 644 (S.D.N.Y. 1977); Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Cal. 1966); Bargainer v. Michal, 233 F. Supp. 270, 274 (N.D. Ohio 1964); Roberts v. Barbosa, 227 F. Supp. 20, 21 (S.D. Cal. 1964).

²⁴ Moreover, we have recently recognized a special tension in cases involving civil rights complaints against public officials for actions undertaken in their official capacities. In this context, liberal notions of notice pleading must ultimately give way to immunity doctrines that protect us from having the work of our public officials chilled or disrupted by participation in the trial or pretrial development of civil lawsuits. Thus, in *Elliot*, we held that, to commence a lawsuit against a public official for acts for which he is potentially immune, the complaint must allege "with particularity all material facts on which [the claimant] contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."

Morrison v. City of Baton Rouge, 761 F.2d 242, 244-45 (5th Cir. 1985) (per curiam) (quoting *Elliot v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985)) (emphasis and brackets by the court); *accord* Haas v. Berrien County Sheriff's Dept, 658 F. Supp. 877, 879 (W.D. Mich. 1987); Ginter v. Stallcup, 641 F. Supp. 938, 973 (E.D. Ark.) ("double standard is developing with respect to the degree of factual specificity which must be pled in civil cases against public officials who may be entitled to absolute or qualified immunity"); *appeal dismissed without written opinion*, 80-2 F.2d 462 (9th Cir. 1986).

A third reason courts give for holding civil rights complaints to a higher standard of pleading is the increase in the "untold number of claims in the federal courts, clogging the dockets and adding to an already frustrating backlog in many courts."²⁵ This increase has been cited periodically by the Supreme Court.²⁶ Particularly galling to courts are prisoners who file multiple claims. "Clovis Carl Green is in all likelihood the most prolific prisoner litigant in recorded history. In the last decade Green has filed between 600 and 700 complaints in federal and state courts."²⁷

A fourth reason federal courts frequently require specificity in civil rights complaints is because they do not want "the Civil Rights Act . . . misused as a device . . . for litigating state law claims cognizable only in the state courts."²⁸ "The specificity requirement finds particular justification in cases such as this, where plaintiff's constitutional claim stands as a slender basis for federal jurisdiction in an otherwise routine state court contract action."²⁹ Such comments echo the Supreme Court's position in *Paul v. Davis*,³⁰ where a majority of the Court refused to convert all torts the state commits into civil rights actions.³¹

Although the district court in *Valley v. Maule* did not list it, a fifth reason many courts have cited to justify specificity is lack of notice. One court in addressing the problem stated: "[h]ere again the pleading fails to give notice, much less fair notice. It is only possible to guess or surmise what plaintiffs' claims actually are in this pleading labelled

²⁵ *Easton v. City of Solon*, 598 F. Supp. 1505, 1509 (N.D. Ohio 1984).

²⁶ *E.g.*, *Neitzke v. Williams*, 109 S. Ct. 1827, 1832 (1989) ("flood of frivolous litigation") (quoting Brief for Petitioners *Neitzke*); *Pulliam v. Allen*, 466 U.S. 522, 556 n.16 (1984) (Powell, J., dissenting); *Maine v. Thiboutot*, 448 U.S. 1, 27 n.16 (1980) (Powell, J., dissenting).

²⁷ *In re Green*, 669 F.2d 779, 781 (D.C. Cir. 1981) (per curiam). There are other examples of repeat filers. *Becker v. Adams Drug Co.*, 819 F.2d 32 (2d Cir. 1987) (per curiam) (10 frivolous appeals in less than two years), *cert. denied*, 485 U.S. 930 (1988); *Cotner v. Campbell*, 618 F. Supp. 1091 (E.D. Okla. 1985) (12 pro se in forma pauperis complaints in three years).

²⁸ *Rodes v. Municipal Auth.*, 409 F.2d 16, 17 (3d Cir.) (per curiam), *cert. denied*, 396 U.S. 861 (1969).

²⁹ *Skepton v. County of Bucks*, 613 F. Supp. 1013, 1020 (E.D. Pa. 1985).

³⁰ 424 U.S. 693 (1976).

³¹ Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should be *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Id. at 701.

There are large number of cases that require specificity to separate the federal from state claims. *Batista v. Rodriguez*, 702 F.2d 393, 398 (2d Cir. 1983); *Place v. Shepherd*, 446 F.2d 1239 (6th Cir. 1971); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971); *Gittlemacker v. Prasse*, 428 F.2d 1, 6 (3d Cir. 1970); *Powell v. Workmen's Compensation Bd.*, 327 F.2d 131 (2d Cir. 1964); *Yglesias v. Gulfstream Park Racing Ass'n*, 201 F.2d 817, 818 (5th Cir. 1953); *United States ex rel. Hoge v. Bolinger*, 211 F. Supp. 199, 201 (W.D. Pa.), *aff'd per curiam*, 311 F.2d 215 (3d Cir. 1962), *cert. denied*, 372 U.S. 931 (1963).

Amended Complaint.”³² The lack of notice comes in two forms: too much detail and too little detail. An example of the former is the following: “This is to avoid situations, such as is presented here, wherein the pleading is so verbose that the Court cannot identify with clarity the claim(s) and adjudicate such claim(s) understandingly on the merits.”³³ Too little detail led one court to complain that the complaint “does not specify who did what.”³⁴ Both kinds of detail problems lead to the same difficulty, the defendant is unable to fashion an answer.

To summarize, federal courts have offered five groups of reasons to justify specificity in pleading civil rights complaints: 1) to prevent frivolous cases, 2) to protect public officials, 3) to reduce the number of cases, 4) to detect mere state claims, and 5) to guarantee notice.

Before evaluating these five groups of reasons, it is logical to consult the position of the United States Supreme Court. The surprising conclusion is that the Supreme Court has not spoken to this issue directly, despite the thousands of lower court cases that require specificity.

The leading Supreme Court case on pleadings is *Conley v. Gibson*, which contains the oft-quoted standard that “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.”³⁵ The Court in the context of prisoner pro se civil rights complaints even suggested that the *Conley* standard be further liberalized,³⁶ and in a civil rights case reiterated its adherence to the *Conley* standard.³⁷ The

³² *Foreman v. General Motors Corp.*, 473 F. Supp. 166, 180 (E.D. Mich. 1979).

³³ *Harrell v. Directors of Bur. of Narcotics & Dangerous Drugs*, 70 F.R.D. 444, 446 (E.D. Tenn. 1975); *accord DeFina v. Latimer*, 79 F.R.D. 5, 7 (E.D.N.Y. 1977).

³⁴ *Miami Int’l Realty Co. v. Town of Mt. Crested Butte*, 579 F. Supp. 68, 76 (D. Colo. 1984); *accord Hanson v. Town of Flower Mound*, 679 F.2d 497, 504 (5th Cir. 1982); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977) (per curiam); *Waller v. Butkovich*, 584 F. Supp. 909, 933 (M.D.N.C. 1984) (preliminary motions), 605 F. Supp. 1137 (M.D.N.C. 1985) (counterclaim); *Harbert v. Rapp*, 415 F. Supp. 83, 86 (W.D. Okla. 1976).

³⁵ 355 U.S. 41, 47 (1957) (quoting FED. R. Civ. P. 8(a)).

³⁶ [A]llegations such as those asserted by petitioner, however, inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than form pleadings drafted by lawyers, it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam) (quoting *Conley*, 355 U.S. at 45-46). The Court continues to adhere to the *Haines* standard. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam); *Estelle v. Gamble*, 429 U.S. 97, 108 n.16 (1976) (“no retreat from *Haines v. Kerner*”).

³⁷ When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant

United States Supreme Court has not accepted the specificity requirement in civil rights cases.³⁸

There is even a more profound reason for rejecting the specificity requirement at the outset. The federal statutes do not vest any federal court with the power to alter unilaterally the Federal Rules of Civil Procedure. 28 U.S.C. Section 2072 expressly states that "[t]he Supreme Court shall have the power to prescribe by general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."³⁹ After recommendations from a committee,⁴⁰ even the changes the Supreme Court approves do not take effect until after Congress has had at least seven months to revise or to stay them.⁴¹ In other words, the inferior federal courts are without authority to revise the Federal Rules of Civil Procedure,⁴² and the Supreme Court has not approved amendments to rule

is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). This is still the Court's position. *Brower v. County of Inyo*, 109 S. Ct. 1378, 1382 (1989).

³⁸ "While there may be sound policy justifications for requiring additional factual specificity in the constitutional case, we must recognize that neither the Federal Rules nor the holdings of the Supreme Court interpreting those Rules provide for such a disparity of treatment." *Ripple & Saalman, Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 808 (1988). The closest that the Court has come to endorsing specificity is in asides. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), the Court found no security and so no security fraud. In a footnote it sustained the trial court's dismissal of a civil rights claim. "Besides the Securities Acts claims, respondents also included a vague and conclusory allegation under 42 U.S.C. § 1983 against petitioner New York State Housing Finance Agency. We agree with the District Court that this count must be dismissed." *Id.* at 860 n.27.

³⁹ 28 U.S.C.A. § 2072(a) (West Supp. 1989).

⁴⁰ *Id.* § 2073 (West Supp. 1989).

⁴¹ *Id.* § 2074(a) (West Supp. 1989). Professor Stempel has argued in an analogous situation that the Supreme Court ought not to change the standard for summary judgment and in effect amend the rule without going through the process of receiving a report from the advisory committee and submitting the amendment for congressional review. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 181-87 (1988).

⁴² "Even if I shared that [negative] attitude [toward civil rights complaints] I could not find statutory authority for a departure from the Rule 8 pleading standard." *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 927 (3d Cir. 1976) (per curiam) (Gibbons, J., concurring and dissenting).

Once a court starts down the road of rule writing, it is forced to face a variety of new situations that call for further rules. Consider the inventiveness of the Second Circuit in *Flaherty v. Coughlin*, 713 F.2d 10 (2d Cir. 1983), in which a prisoner claimed that he was denied a temporary release to attend college because of his previous court victories. In reversing a summary judgment against the prisoner by the district court, the appellate court offered further refinements on the specificity requirement.

For example, a retaliation claim supported by specific and detailed factual allegations which amount to a persuasive case ought usually be pursued with full discovery. However, a complaint which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleadings alone. In such a case, the prisoner has no factual basis

8's pleading standard. However improper the specificity requirement in pleadings may be, the fact remains that it exists. The final portion of this article turns to evaluating the reasons offered by the federal courts which have so changed the federal rules.

EVALUATION

The first reason for requiring specificity was that many civil rights complaints are frivolous. Justice Blackmun responded to that argument as well as anyone in stating:

But I am aware of no statistics demonstrating what percentage of § 1983 actions are bound to be meritless. Prisoners, especially those who proceed *pro se*, are popular candidates for the group likely to present consistently frivolous claims. But ever since *Jackson v. Bishop*, a case in which I take pride in having participated on the Court of Appeals, despite improvements in state prison systems, I am not prepared to exclude the possibility that a particular prisoner will be subject to a serious deprivation that warrants the attention of a federal court.⁴³

The closest statistical evidence that civil rights complaints are more frivolous than other civil actions is that civil rights complaints are dismissed more often before trial than other types of actions.⁴⁴ Professors Eisenberg and Schwab in a detailed study of the Central District of California found that a lower percentage of civil rights complaints succeeded

for the claim other than an adverse administrative decision and the costs of discovery should not be imposed on the defendants. A third category of allegations also exists, namely a complaint which alleges facts giving rise to a colorable suspicion of retaliation. Such a claim will support at least documentary discovery.

Id. at 13.

⁴³ Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 21 (1985) (footnote omitted). Professor Eisenberg makes the same points. "The vast majority of non-prisoner section 1983 cases involve classic rights of obvious importance; the trivial claims are a sideshow." Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 537 (1982). "As is true of nonprisoner cases, most prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest. The largest and perhaps most controversial class of claims, that involving prison conditions, has generated too much serious litigation to dismiss as being of little federal interest." *Id.* at 538.

⁴⁴ Professor Turner found that "a large portion of the cases are screened out and summarily dismissed before they get under way." Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 637 (1979). His study of five federal district courts has some interesting results. "Hardly any of the cases went to trial. Only 18 of the 664 cases studied had either an evidentiary hearing or a trial. A grand total of forty-four court days over a two-and-one-half-year period were spent on the cases studied." *Id.* at 624 (footnote omitted).

than noncivil rights complaints.⁴⁵ The difficulty with such evidence is that it is tainted. Precisely because courts impose higher pleading requirements on civil rights complaints, fewer civil rights complaints survive to the trial stage.⁴⁶

But even if the observation that civil rights complaints are more likely to be frivolous than other types of litigation is correct, it is unclear how special pleading rules will allow the judge to distinguish between the worthy and the meritless complaint. Consider the typical civil rights complaint of an arrest without probable cause and with excessive force. A narrative recitation of the facts from the view of the plaintiff will rarely assist the court in reliably determining whether the plaintiff has an arguable civil rights claim. Factual disputes may even make the possibility of summary judgment unlikely.

There is one group of cases where sufficient factual details may help the court to resolve a case at the pleadings stage. Suppose that a security guard made the arrest. That raises the issue of state action. It is unlikely that the plaintiff will know whether the security guard is an off-duty police officer, or a special deputy, or has no connection with the state.⁴⁷ Yet unless there is state action, there can be no federal claim. Another example is the classic prisoner complaint of inadequate medical attention. Unless there is "deliberate indifference to serious medical needs,"⁴⁸ there is no constitutional violation. With the exception of where the omitted fact would show that the plaintiff lacks a federal claim,⁴⁹ it is hard to see how requiring greater specificity will root out the frivolous claims.

A further danger in requiring facts is that the complaint will be "argumentative, prolix, and verbose."⁵⁰ A court pointedly complained

⁴⁵ They found that plaintiffs succeeded 82% of the time in nondefault, noncivil rights cases but only 38% of the time in constitutional torts and 46% in nonprisoner constitutional torts. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 674 (1987) (table VIII). The prisoner constitutional tort success rate is 15%. *Id.* at 692 n.207. These number increase significantly when counseled constitutional torts are examined. The success rates for counseled non-prisoner constitutional torts is 56% and for counseled prisoner constitutional torts 53%. *Id.* at 693 (table XVIII).

⁴⁶ "In cases disposed of by motion before trial, constitutional tort plaintiffs prevailed in nine percent of the cases while non-civil rights plaintiffs prevailed 42% of the time." Eisenberg & Schwab, *supra* note 45, at 678 (footnotes omitted).

⁴⁷ The case of *Rodes v. Municipal Authority*, 409 F.2d 16 (3d Cir.) (per curiam), *cert. denied*, 396 U.S. 861 (1969), is an example of where the failure to provide factual data probably indicated a lack of a federal claim. The plaintiff claimed that the municipal water authority was denying her water rights. There had been previous litigation in state court which she had lost.

⁴⁸ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

⁴⁹ See Marcus, *supra* note 6, at 463.

⁵⁰ *Newman v. Massachusetts*, 115 F.R.D. 341, 343 (D. Mass. 1987).

about "garbage-can complaints with their appended scraps of newspaper clippings, magazine articles, correspondence, and an unbelievable variety of other unnecessary and irrelevant matters."⁵¹ Yet such pleadings are the result of requiring facts.

The position being defended here is not that facts need not be pleaded, but rather that no special standard should be applied to civil rights complaints. Just as it is insufficient to plead merely that the defendant "deprived the plaintiff of a legally protected right," so also is it insufficient to alleged merely that the defendant "deprived the plaintiff of a constitutionally protected right." In other words, the forms accompanying the Federal Rules of Civil Procedure should apply not only to negligence cases but also to civil rights cases.⁵²

The following two cases demonstrate the unfortunate impact of the specificity requirement in civil rights cases. The first case is *United States v. City of Philadelphia*⁵³ in which the United States Department of Justice accused the Philadelphia Police Department of widespread patterns of civil rights violations, sanctioned and even promoted by city officials. Although most of the dispute concerned whether Justice Department officials had standing to raise constitutional rights of private individuals, a significant portion of the trial and appellate opinions focused on the part of the complaint alleging racial discrimination in programs receiving federal funds. The United States' theory was basically that some unconstitutional practices had a disproportionate impact on blacks and Hispanics.⁵⁴ The Third Circuit affirmed the trial court's dismissal of the funding allegations because of a lack of specificity.

Unlike many pro se civil rights complaints, this thirty five-page complaint was signed by the Attorney General and five other officials of the Justice Department. At the time the trial court dismissed the suit on the pleadings, the United States had already filed 836 pages of answers

⁵¹ *Bey v. Schneider Sheet Metal, Inc.*, 596 F. Supp. 319, 324 (W.D. Pa. 1984).

⁵² Form 9 is typical. After an allegation of jurisdiction, only the following is required:
2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

FED. R. CIV. P. form 9. The final paragraph is the demand.

⁵³ 482 F. Supp. 1248, 1274 (E.D. Pa. 1979), *aff'd*, 644 F.2d 187 (3d Cir. 1980), *reh'g denied*, 644 F.2d 206 (3d Cir. 1981).

⁵⁴ 482 F. Supp. at 1277.

to interrogatories, but the court of appeals explicitly refused to consider the government's submission.⁵⁵ Instead the original panel found the complaint deficient because it "provides an inadequate basis for us to determine whether its allegations were frivolous or serious."⁵⁶ In other words, this court would require that the plaintiff not only avoid frivolousness in the complaint but also negate the possibility of frivolousness. Such reasoning led the dissent to accuse the majority of "a barely-masked contempt for the civil rights guarantees."⁵⁷

The more recent case of *Patton v. Przybylski*⁵⁸ again had the appellate court sustaining a trial court's dismissal on the pleadings. Here Alexander Patton was arrested and held eight days before being presented to a magistrate when a mistake in identity was discovered. There was a valid arrest warrant for an Alexander Patton of the same race and age but with a different date of birth and state of residence. Patton brought a civil rights action against the sheriff of Cook County, where he was confined most of the eight days, and against three individual police officers. The clearest disagreement between the majority and the dissent was over the liability of the sheriff. The majority found that "[t]he problem in this case is that the complaint fails to connect these problems with Sheriff Elrod . . . Patton must find out who was actually responsible for the delay in bringing him before Judge Crilly or some other magistrate, and sue that person, and he hasn't done this."⁵⁹ The dissent, after adding a few humanizing facts (Patton was beaten severely and lost his job), would apply the usual notice pleading standard of *Conley v. Gibson*.

Despite these well-settled principles, the majority—with only the complaint before it—determines the reasonableness of the particular arresting officer's conduct, the credibility of the allegation that the arresting officer caused the plaintiff's further detention, and the reasonableness of the conduct of the officers who held the plaintiff for *eight days* without justifying their actions to a magistrate. It dismisses, by pure *ipse dixit*, the complaint's allegation that this lengthy detention was part of a "custom, practice and policy," of the Cook County Sheriff's Office. Further proceedings may well establish that the plaintiff cannot maintain this cause of action. Perhaps there was no willful violation of his federal rights, no racial animus, no

⁵⁵ 644 F.2d at 206. The dissent found this refusal to consider post-pleading submissions contrary to Third Circuit precedent. *Id.* at 210-11 (Gibbons, J., dissenting from denial of rehearing).

⁵⁶ *Id.* at 205 n.28 (original panel opinion). To which the dissent answers, "the federal government cannot be denominated an irresponsible, unstable, frivolous or over litigious plaintiff." *Id.* at 212 (Gibbons, J., dissenting from denial of rehearing).

⁵⁷ *Id.* at 211 (Gibbons, J., dissenting from denial of rehearing).

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⁵⁸ 822 F.2d 697 (7th Cir. 1987).

⁵⁹ *Id.* at 701.

federally-forbidden pattern, practice or policy. Perhaps the same procedures would have been followed if a Northbrook housewife had been traveling on that road that night. Perhaps.⁶⁰

The majority in *Patton* disposed of the entire case against both the officers and superior. In *City of Philadelphia* the entire case only involved the governmental entity and superiors. The more common situation in such cases is to dismiss the governmental entity or superior and leave the individual officers in the action. But consider the Catch 22 situation. Assume a plaintiff has been subjected to a wanton beating by the police. Until the victim has obtained, through discovery, the official disciplinary file of the officer or officers involved, how is the victim able to allege in his or her complaint *evidentiary* facts (as contrasted with *ultimate* or *conclusory* facts) to support a charge of knowing acquiescence against the employing city?⁶¹ The action against the individuals continues, so the court has often not even disposed of the entire case by imposing this heavy pleading burden.

The second reason the court in *Valley* gave for requiring specificity was to prevent burdening public officials. This reason properly understood does not bring anything new to pleading analysis as it is hornbook law that a complaint which on its face has a defect is subject to a motion to dismiss. "[M]ost courts have ruled that if a pleading contains a defect and fails to go on to show how the defect is avoided, the pleading is subject to a challenge for failure to state a claim or defense."⁶² Consider a

⁶⁰ *Id.* at 702 (Ripple, J., dissenting). Judge Ripple has been more sympathetic to the specificity requirement in an article. Ripple & Saalman, *supra* note 38, at 807-09, 817.

⁶¹ *Payne v. City of LaSalle*, 610 F. Supp. 606, 607-08 (N.D. Ill. 1985) (footnote omitted). The Third Circuit varies the specificity depending on "whether the plaintiff is in a position to know or acquire the relevant factual details" before discovery. *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989). Because there is no respondeat superior liability under section 1983, a plaintiff must prove policy or custom to justify holding the governmental entity or superior liable. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

A more poetic court discussed this problem of specificity in the employment discrimination context.

Standard's real argument is that the complaint asks the company to investigate a wide range of employment practices and to evaluate discrimination on every conceivable basis, with few guideposts to help it pinpoint exactly which policies or procedures are under attack. In short the complaint resembles "a shotgun blast fired while leaning out a window." Nevertheless, to complete this metaphor, we believe Rule 8 only requires the complaint to describe the direction in which the gun is pointed, and not to detail the area of impact. The pleadings are not designed to carry the burden of formulating the issues and advising the adverse party of the facts involved. Depositions and discovery procedures perform that function.

McCray v. Standard Oil Co., 76 F.R.D. 490, 496 (N.D. Ill. 1977) (quoting *EEOC v. D.H. Holmes Co.*, 556 F.2d 787, 796 n.14 (5th Cir. 1977)).

⁶² J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 5, § 5.15, at 276 (footnote omitted).

suit against a judge or prosecutor who enjoys immunity in his official capacity. "I would conclude that no claim is stated against officials who hold positions which enjoy absolute immunity absent a statement of sufficient facts which, if true, would demonstrate the absence of immunity."⁶³ This is no different from a complaint which on its face shows that the statute of limitations has run out. When the defendant moves to dismiss for failure to state a claim, the plaintiff must produce sufficient facts to show that the time limit does not apply to his claim. For absolute immunity there should not be a need for a special rule.

There is also the qualified or good faith immunity the Supreme Court has given to most executive officials. Furthermore, the Court has spoken clearly about how to handle the pleading problem in stating: "[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."⁶⁴ The executive defendant should raise this affirmative defense in a motion for summary judgment. "Until this threshold immunity question is resolved, discovery should not be allowed."⁶⁵ An alert plaintiff may want to plead the violation of an objective standard, but there is nothing in the Court's analysis requiring particularity⁶⁶ in the original complaint to withstand a motion to dismiss. Therefore, a plaintiff only must present sufficient evidence that the defendant violated a known constitutional standard to avoid summary judgment. Ultimately the Supreme Court's position is to defer to Congress. "It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate."⁶⁷

Even if the Supreme Court had not spoken on how to proceed with absolute and qualified immunities, the requirement of specificity in

⁶³ *Elliott v. Perez*, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring specially). Judge Higginbotham was unable to join the majority's theory of particularity. "I do not know where we find the authority to add the requirement that claims against officials who enjoy immunity from suit shall be pled with particularity" *Id.*

⁶⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁶⁵ *Id.*

⁶⁶ The Court indirectly admitted that its solution may still impose a considerable burden on officials. "Many [§ 1983 suits] are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial." *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (plurality opinion of Powell, J.). In *Rumery* the Court went on to uphold an agreement between the prosecutor not to prosecute and the defendant not to file a section 1983 action. *Id.* at 387.

⁶⁷ *Tower v. Glover*, 467 U.S. 914, 923 (1984). The quote refers to immunity, but the same logic ought to apply to pleadings requirements.

pleadings against officials is hardly compelled by inner logic. First, illegal and unconstitutional actions by executives did not cease when George III's rule was removed from the United States. Second, this writer is unaware of any systematic survey indicating that large numbers of qualified people avoid public office because of fear of being sued. Third, governmental units which often pay the legal expenses of their officials are hardly being driven to bankruptcy in defending these actions. Even if significant resources are expended in defending such suits, would the nation be better off with meritorious civil rights complaints against officials being dismissed?

The third reason justifying specificity in pleading civil rights complaints was the increase in the number of cases. A superficial view of the numbers does bear this out. Since 1970 the number of prisoner and nonprisoner civil rights cases has increased dramatically. The number of prisoner civil rights cases filed annually in the United States district courts has grown from 2793 in 1970 to 24,421 in 1988.⁶⁸ There has been a similar growth in nonprisoner filings from 3985 in 1970 to 19,323 in 1988.⁶⁹ For the most recent year only the prisoner civil rights filings are up over the previous year. While the overall number of filings in the federal district courts was nearly constant (up 0.2% from 1987 to 1988), the number of prisoner civil rights filings was up 3% while nonprisoner filings were down 2.4% in the same period.⁷⁰ A wide variety of actions are classified by the Administrative Office as civil rights. Nearly one-half are employment discrimination cases. "[A]n educated guess would be that section 1983 cases constitute only about one-third, and certainly not more than one-half of the cases the Administrative Office classifies as civil

⁶⁸ The actual numbers are:

1970	1975	1980	1985	1986	1987	1988
2793	6606	13,000	19,488	20,842	23,716	24,421

Source: ADMINISTRATIVE OFF. U.S. CTS., 1971 ANNUAL REPORT OF THE DIRECTOR 263 (table C2); 1977 *id.* at 189 (table 11); 1982 *id.* at 99 (table 17); 1988 *id.* at 185 (table C-2A).

⁶⁹ The complete figures are:

1970	1975	1980	1985	1986	1987	1988
3985	10,392	12,944	19,553	20,128	19,805	19,323

Source: same as previous footnote.

⁷⁰ ADMINISTRATIVE OFF. U.S. CTS., 1988 ANNUAL REPORT OF THE DIRECTOR 185 (table C-2A). Another explanation for the increase in the number of prisoner cases is the dramatic increase in the number of prisoners in the United States. See Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1033 (1984) (app. C). But the increase in the number of filings outstrips the increased prison population. *Id.* at 1034 (app. D).

rights cases.”⁷¹ If federal courts feel overwhelmed by civil rights cases, they should direct their criticism at Congress which created the new civil rights actions in the 1960’s, rather than at the plaintiffs who are utilizing the tools Congress gave them. The rate of increase in nonprisoner constitutional torts actually has been less than the overall rate of increase of civil cases in the federal district courts since 1975.⁷²

Despite the absolute increase in the number of prisoner civil rights cases filed, a detailed study comparing prisoner civil rights complaints with the number of prisoners and the general increase in litigation yields a very different result. “Taken together, prison population growth and the national growth in litigiousness might explain all the growth in prisoner civil rights filings over the ten years covered.”⁷³

Congress has responded in several ways to this increase. Beyond the increase in the number of federal judges which is helpful for the general increase in case loads, there are two specific statutes that assist the district courts in dealing with prisoner civil rights complaints. The more important is the provision allowing the judge to assign most prisoner civil rights cases to magistrates. “[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of prisoner petitions challenging conditions of confinement.”⁷⁴ The district courts have used this provision extensively. In the report for fiscal 1988, there were 15,819 referrals to magistrates of prisoner condition of confinement cases.⁷⁵ The second statute allows the judge to stay a prisoner civil rights complaint for ninety days, during which time the prisoner must utilize the administrative procedures available in the prison.⁷⁶ In addition to the two prisoner-oriented

⁷¹ Eisenberg, *supra* note 43, at 533. The actual numbers for nonprisoner filings by categories for the last four years are:

	1985	1986	1987	1988
voting	281	194	214	347
employment	8,082	9,174	8,986	8,563
accommodations	253	230	322	322
welfare	180	184	158	129
other	10,757	10,366	10,105	9,962

ADMINISTRATIVE OFF. U.S. CTS., 1988 ANNUAL REPORT OF THE DIRECTOR 185 (table C-2A).

⁷² Eisenberg & Schwab, *supra* note 45, at 666 (table III).

⁷³ *Id.* at 667.

⁷⁴ 28 U.S.C. § 636(b)(1)(B) (1982).

⁷⁵ ADMINISTRATIVE OFF. U.S. CTS., 1988 ANNUAL REPORT OF THE DIRECTOR 34 (table 11).

⁷⁶ 42 U.S.C. § 1977e (1982). See generally Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986).

statutes, many in forma pauperis civil rights complaints are dismissed quickly, even before any process is served on the defendant, "if [the court is] satisfied that the action is frivolous or malicious."⁷⁷

Whatever the speed of resolution and burden of civil rights cases under the current pleading standards,⁷⁸ if judges were no longer able to require specificity in pleading civil rights complaints⁷⁹ because of the

⁷⁷ 28 U.S.C. § 1915(d) (1982). The Supreme Court has recently held "that a complaint filed in *forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim." *Neitzke v. Williams*, 109 S. Ct. 1827, 1834 (1989). Only when the complaint "lacks even an arguable basis in law," *id.* at 1833, should the court dismiss under § 1915(d).

There is considerable criticism of the quality of this evaluation. This screening is done often by a writ clerk "directly out of law school and without guidance or training." Turner, *supra* note 44, at 620 (1979). "[M]any of the court personnel who read, screen, and recommend rulings on prisoner complaints are quite cynical about the cases. It is not an exaggeration to say that they do not always give the benefit of the doubt to an unclear prisoner allegation." *Id.* at 649 n.186. "The judges usually follow the clerk's recommendations." *Id.* at 621.

⁷⁸ The scholars are in disagreement about the burden civil rights cases impose on trial courts.

The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the number might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because court appearances and trials are rare, and because prisoner cases not particularly complex as compared to other types of federal litigation.

Id. at 637 (footnote omitted). Although the Turner quote is directed to prisoner section 1983 cases, the same logic applies to all civil rights cases where the courts impose heavier pleading burdens.

But Professor Turner then goes on to observe:

On the other hand, pro se litigation is undoubtedly a problem for judicial administration. The burden on the court is mainly in screening such pro se cases, not in trying them. Relatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible. Thus, unlike other civil litigation, some court action is required on almost all the cases.

Id.

Eisenberg and Schwab's careful study of an individual federal district court suggest that constitutional tort cases survive longer than nonconstitutional cases. The median survival time for constitutional torts was 10.8 months and for nonconstitutional torts 8.2 months. What is even more striking is that 10% of the constitutional torts remained after 36 months, while 10% of the non-constitutional torts remained for 25 months. Eisenberg & Schwab, *supra* note 45, at 673 (table VI). They also discovered that constitutional tort cases had higher percentage of interrogatories, hearings, pretrial conferences and depositions than nondefault, nonconstitutional cases. *Id.* at 674 (table VIII). "We conclude that the average constitutional tort case is more burdensome than the average non-civil rights case." *Id.* at 675.

⁷⁹ Another indication of the preference for factual specificity is found in the form suggested by a committee of the United States Judicial Conference. The committee suggested that prisoners be required to use the following form.

IV. Statement of Claim

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal argument or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.

PRISONER CIVIL RIGHTS COMMITTEE, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 92 (1980) (form 1)

number of such claims, then the real (and often unarticulated) reason could emerge. "Procedural rules are not crafted in a vacuum. Decisions about procedure are influenced by judgments about the disputants, the dispute, and the proper role of government in responding to conflicts."⁸⁰ Professor Marcus has speculated that the deeper reason for specificity in civil rights complaints is judicial hostility to the claim or the litigant.⁸¹ His direct words about the nature of civil rights claims speak clearly. "The most common focus for disapproval are civil rights cases, but such claims should not be disfavored. To the contrary, they are central to our concept of liberty."⁸² To articulate this "reason" is to see immediately its emptiness.

More difficult to discuss is the concern about the nature of the litigant. There is a small number of litigants who repeatedly file meritless cases.⁸³ Since courts usually exclude evidence of prior acts to prove character,⁸⁴ is it logical to exclude the history of previous pleadings? Does that mean that a court is helpless to stem the "torrential stream of written verbiage"?⁸⁵ The correct approach is to impose monetary sanctions on the plaintiffs able to pay⁸⁶ and other restrictions on those unable to pay⁸⁷ who repeatedly file complaints found to be meritless.

The fourth justification for requiring specificity in pleading civil rights claims was to distinguish between federal constitutional claims and non-

⁸⁰ Resnik, *supra* note 70, at 842.

⁸¹ Marcus, *supra* note 6, at 471-79.

⁸² *Id.* at 471.

⁸³ See *supra* note 27 and accompanying text.

⁸⁴ FED. R. EVID. 404(a).

⁸⁵ *Cotner v. Campbell*, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985), *modified*, 795 F.2d 900 (10th Cir. 1986). Cotner had already filed 12 unsuccessful pro se suits for which the court had imposed stricter pleadings requirements for him. Cotner's latest effort was to enlist seven fellow prisoners to file identical complaints about prison conditions. These complaints on their faces alleged serious violations at least worthy of further investigation. Nonetheless, the trial court dismissed them also. In doing so the court seemed to fulfill its own warning. "He must hope that in that sea of frivolous prisoner complaints, his lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity." *Id.* The judge here imposed a fine of \$1000 and barred Cotner from filing further suits until he had paid the fine. *Id.* at 1099.

⁸⁶ Accordingly, appellant is ordered to pay appellees double costs and the amount of \$500 as "just damages" on this appeal. Furthermore, the clerk of this court is directed to accept no further papers from appellant, who does not have in forma pauperis status in this court, on any matter until appellant provides the court with adequate proof of compliance with the sanctions imposed in this case and in prior cases cited above. *Becker v. Adams Drug Co.*, 819 F.2d 32, 33 (2d Cir. 1987) (per curiam) (citing FED. R. APP. P. 38), *cert. denied*, 485 U.S. 930 (1988).

⁸⁷ Petitioner may not file any civil action without leave of court. In seeking leave of court, petitioner must certify that the claims he wishes to present are new claims never before raised and disposed of on the merits by any federal court. Upon a failure to certify or upon a false certification, petitioner may be found in contempt of court and punished accordingly.

federal question state claims. This line of analysis is really not any different from the frivolousness worry. Another way of saying that a claim is frivolous is to say that it ought to be brought in state court and not in federal court as a civil rights complaint. So there is no need for separate discussion of this justification.

The fifth justification for requiring specificity is lack of notice, that the complaint fails to provide the defendant with a clear notion of the nature of the complaint. Such criticism goes to the heart of *Conley's* so-called notice pleading requirement. A complaint that fails to provide enough information to enable the defendant to draft an answer is defective. However, the correct remedy is a motion for a more definite statement rather than dismissal.⁸⁸ If the plaintiff is unable to comply with such a motion, then the court is justified in dismissing the action. If the defendant is able to frame an intelligent answer, then the complaint has fulfilled its function in the federal system, and nothing more should be demanded of it. Further information should be found through discovery.⁸⁹

Although not necessarily part of the specificity requirement, there is one final aspect to be considered—sanctions under rule 11.⁹⁰ Rule 11 sanctions are imposed on civil rights complaints more frequently than on other types of litigation, with the possible exception of income tax litigation.⁹¹ A major study offers a revealing theory to explain the disparity.

⁸⁸ FED. R. CIV. P. 12(e).

⁸⁹ Paragraph 14, though skeletal, is pleaded so as reasonably to allow defendant Proulx to respond, knowing whether or not he was involved in any or none of the incidents there charged. Under federal notice pleading no greater detail seems to be required, and the parties must be left to other pretrial devices to expedite and simplify the proceedings.

Cox v. Maine Maritime Academy, 122 F.R.D. 115, 117 (D. Me. 1988) (footnote omitted; citations omitted).

⁹⁰ FED. R. CIV. P. 11

⁹¹ "Although almost every major lawsuit now includes at least the threat of a rule 11 motion, sanctions are more likely to be imposed in public interest litigation, such as civil rights and employment discrimination cases, than in other types of federal litigation." Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987) (footnotes omitted). "The only cases in which sanctions are more frequently imposed than in civil rights cases are those challenging federal income taxation." *Id.* at 631 n.7. "[R]eported cases suggest that amended rule 11 is being used disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies." Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). One study even found "that the decisional differences between relatively frequent and infrequent sanctioners appeared primarily in their reactions to the civil rights claims. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 39 (1985). "[J]udges who have faced a large number of claims arising under the civil rights statutes are among the more active users of rule 11." *Id.* at x.

However, a considerably different picture emerges when the study includes all cases (not just reported or electronically available ones), precisely what was attempted for one year in the district courts of Third Circuit. AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION: THE REPORT OF THE*

One possible explanation is that perhaps a good deal of the in-court rule 11 experience that distinguishes the frequent sanctioners from the infrequent sanctioners is in the area of civil rights litigation; indeed, Medina et al.'s review indicates that 21 percent of all sanctions motions filed since August 1983 were in civil rights cases. If so, then perhaps judges who have been confronted with a sizable number of civil rights suits, many of which are pro se, have developed, as a result of that experience a generally negative expectation concerning the merit of these actions.⁹²

It is hard to quarrel with the "reasonable inquiry" and "not . . . improper purpose" requirements of rule 11. It is the synergistic combination of rule 11 and the specificity requirement that is troubling. Consider a court which requires specificity in pleading civil rights complaints and then imposes rule 11 sanctions after dismissing the complaint.⁹³ If re-

THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 56-57 (1989). That study found that sanctioning activity for civil rights cases involved "only two thirds of one percent of such cases." *Id.* at 61. This rate of activity was not much different from other civil cases. "Requests for sanctions in civil rights cases constituted only a slightly larger slice of our pie (24/132 or 18.2%) than one would expect on the basis of civil filings in this circuit (16% of civil filings in the period ending June 30, 1988)." *Id.* at 69 (citation omitted). But sanctions were imposed on civil rights plaintiffs at a much higher rate than on other plaintiffs.

Yet, plaintiffs (and/or their counsel) were sanctioned on motion in civil rights (including employment discrimination) cases in our survey at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases.

This finding is statistically significant at a level of less than 1%. *Id.* & n.19.

See Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 490-92 (1988-89) (exhaustive summary of books and articles finding rule 11 applied to civil rights litigation).

⁹² S. KASSIN, *supra* note 91, at 39. Example of civil rights cases in which sanctions were imposed include: *Woods v. Princeton Packaging, Inc.*, 655 F. Supp. 215 (W.D. Wash. 1987); *Martin v. Supreme Court*, 644 F. Supp. 1537 (N.D.N.Y. 1986); *Rodgers v. Lincoln Towing Servs., Inc.*, 596 F. Supp. 13 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

⁹³ A recent, thoughtful opinion explores this very issue.

In reviewing the sufficiency of civil rights complaints, we cannot avoid noting the difficulty plaintiffs and their counsel may have in attempting to accommodate this court's requirement of factual specificity with amended Fed.R.Civ.P. 11. That rule equates the signature of an attorney or party signing a pleading with a certificate that the pleading "is well grounded in fact," and requires plaintiffs to make "some prefilings inquiring into both the facts and the law to satisfy the affirmative duty imposed by the law." Fed.R.Civ.P.11 Advisory Committee's Notes concerning 1983 Amendment. However, the Advisory Committee has explained that, "[t]he standard is one of reasonableness under the circumstances." *Id.* One of the circumstances to be considered is whether the plaintiff is in a position to know or acquire the relevant factual details. The administratrix in this action is in a particularly difficult position because Stierheim is dead and the results of defendants' investigations into the incident are apparently not a matter of public record. Defendants have not yet responded to plaintiff's interrogatories and her requests for production of documents. We must take these factors in consideration in determining whether, at this preliminary stage, we can hold as a matter of law that plaintiff's allegations cannot reasonably be read to state a claim under section 1983.

quiring specificity is improper, then adding rule 11 sanctions is adding insult to injury.⁹⁴

FINAL THOUGHTS

Ultimately, the validity of the five reasons federal courts have offered to justify specificity in pleadings civil rights complaints rests on how the tension between speed of resolution (efficiency) and accuracy of resolution (truth) is resolved. No system can opt for either value exclusively. But a judgment after only a complaint has been filed is a significant tilt to efficiency at the expense of truth. The further worry is that "the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic."⁹⁵

Even if the judges who dismiss civil rights complaints for lack of specificity are not unsympathetic to such claims, they may have adopted the attitude of the life-wearied Qoheleth who concludes, "What now is has already been; what is to be, already is."⁹⁶ They would do well to meditate on the words of Judge Goldberg of the Fifth Circuit.

We recognize that prisoner complaints often seem annoying and insubstantial, and that the volume of such complaints faced by most district courts would try the patience of Job. Job-like patience, however, should be the judicial benchmark in this area. Technical rigidity in reviewing pleadings must be eschewed, and we must remain extremely tolerant of the juristically unlearned as they seek to articulate their belief that they have suffered deprivations of constitutional rights.⁹⁷

Judge Jack Weinstein, long-time chief judge of the Eastern District of New York, in an address cast the specificity problem in a larger context.

In more recent years the slackened growth in our productivity and the relative weakening of our economic power vis-a-vis that of other nations has lent weight to the increasing pressure of

⁹⁴ There are special problems with imposing sanctions on pro se, in forma pauperis, incarcerated plaintiffs. Often the ordinary monetary sanction is ineffective. "Other sanctions, such as refusing to accept further filings, must be considered." *Patterson v. Patterson*, 808 F.2d 357, 358 (5th Cir. 1986) (per curiam).

⁹⁵ Stempel, *supra* note 41, at 166. Professor Stempel's observation was in criticizing the trilogy of summary judgment decisions of the Supreme Court: *Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁹⁶ *Ecclesiastes* 3:5.

⁹⁷ *Covington v. Cole*, 528 F.2d 1365, 1373 (5th Cir. 1976).

conservatives to reduce access to our courts with the argument that the transactional costs are too heavy to bear. Increasing disparity of income has coincided with greater reluctance to continue the struggle for equality in the courthouse. The slowed growth in the economy coupled with the increasing amount of litigation has caused problems since the early 1970s, and one remedy for these problems has been to restrict access to the courts. Belief in broad pleadings has declined. Special or more rigid rules of pleading have been developed for certain types of cases, such as civil rights, antitrust, securities litigation, and now RICO claims. It is believed by some that specificity in pleadings helps reduce the costs of discovery and trial.⁹⁸

Although Judge Weinstein seems to be distancing himself from these sentiments, he nonetheless gives voice to the concerns of some proponents of specificity. But this rationale does not withstand analysis. The transactional costs of several thousand civil rights cases annually hardly make the United States noncompetitive in the world markets. Not even the most troglodytic judge would argue that there is too much equality and too little inequality in the United States today.

I ultimately conclude that requiring specificity is not a very good way to distinguish wheat from chaff as both are likely to be blown away in the hurricane of supposed efficiency.

⁹⁸ Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1, 25-26 (1988) (footnote omitted).

