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A PLEA FOR HELP: PLEADING PROBLEMS IN SECTION 1983 MUNICIPAL LIABILITY CLAIMS

INTRODUCTION

The lower federal courts have been involuntary hosts to an inordinate amount of civil rights litigation brought pursuant to 42 U.S.C. § 1983¹ ever since the United States Supreme Court decided *Monroe v. Pape*.² In *Monroe*, the Court held that section 1983 provides an independent federal remedy for constitutional deprivations, even when the alleged conduct also raises state law claims.³ This burden was intensified when Justice Brennan extended a mandatory federal court invitation to municipal entities in *Monell v. Department of Social Services*.⁴ The *Monell* Court overruled that part of *Monroe* that had immunized local governments from section 1983 liability. Municipalities now can be held liable under section 1983 if their officials acted pursuant to an official custom or policy that caused the deprivation of a constitutionally protected right.⁵ Today,

1. The statute 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

2. 365 U.S. 167 (1961). A more detailed discussion of the case can be found in Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1544 (1985).

3. *Monroe*, 365 U.S. at 183.

4. 436 U.S. 658 (1978) (discussed *infra* at notes 54-62 and accompanying text).

5. *Id.* at 690.

section 1983 claims are one of the most frequently litigated claims in federal practice.⁶

The Supreme Court, lacking any guidance from Congress, responded to the mounting civil rights claims burden that it had thrust upon both itself and lower federal courts. It employed various techniques to restrict the broad scope of potential civil rights plaintiffs, often focusing upon the section 1983 claimant.⁷

Eager to follow the trend of the United States Supreme Court, many lower federal courts have imposed their own limitations upon the civil rights claimant. One of the most popular techniques utilized is a heightened pleading standard, which the courts apply to almost all civil rights cases, especially section 1983 claims.⁸

Although some support can be found for the general application of a rule requiring something more than unsupported conclusions in a plaintiff's civil rights complaint, such support becomes much more suspect when a section 1983 suit is brought against a municipality. One of the principal rationales underlying the preservation of liberal pleading requirements of the Federal Rules of Civil Procedure⁹ when pleading a *Monell* claim is that a claimant's ability to specifically allege the requisite elements in a municipal liability claim often depends upon a certain amount of discovery.¹⁰

6. See Note, *supra* note 2, at 1544-45; Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-50 (1987).

7. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (attempting to resolve the question of qualified, good faith immunity as applied to federal, state, and local officials at the summary judgment stage); *Allen v. McCurry*, 449 U.S. 90 (1980) (claims raised by defendants in state criminal proceeding cannot be relitigated as section 1983 claims in federal court because they are barred by the full faith and credit clause, 28 U.S.C. § 1738); *Parratt v. Taylor*, 451 U.S. 527 (1981) (procedural due process claims for random and unauthorized negligent property deprivations not cognizable in federal court where state has provided adequate post-deprivation remedies). See generally Note, *supra* note 2, at 1545-46.

8. See M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.3A (Supp. 1989). See also *infra* note 26. Courts and commentators use the phrases "heightened pleading" and "fact pleading" interchangeably. This Comment does the same.

9. See *infra* notes 12-25 and accompanying text.

10. In *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), the Second Circuit stated:

This Comment examines the fact pleading requirement as applied to plaintiffs suing a municipal entity under section 1983. Part I includes a brief synopsis of the historical development of the present liberal federal pleading standards, followed by the unfolding of the civil rights exception to the general rules. Part II sketches the contours of municipal liability as developed by the United States Supreme Court since *Monell v. Department of Social Services*.¹¹ Part III examines problems with the heightened standard, focusing upon the municipal claims, and then suggests guidelines for pleading standards.

I. EVOLUTION OF NOTICE PLEADING AND ITS DETERIORATION IN THE CIVIL RIGHTS COMPLAINT

A. The Genesis and Establishment of Liberal Federal Pleading Policies

Rule 8 of the Federal Rules of Civil Procedure requires that the plaintiff set forth "a short and plain statement of the claim showing that the pleader is entitled to relief and . . . a demand for judgment for the relief the pleader seeks."¹² The rule was adopted in response to stringent state code and common law pleading standards, whereby parties had to use the pleadings not only to give notice of claims and defenses in order to weed out frivolous ones, but also to state specific facts and narrow the issues, thereby shaping them for trial.¹³ Such stringent

We recognize . . . that when commencing a suit of this type neither the plaintiff nor his attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers.

Id. at 1279. See also Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 Mo. L. Rev. 677, 689-90 (1984).

11. 436 U.S. 658 (1978).

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

13. See 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202, at 59-60 (1969).

standards permitted courts to dismiss colorable claims simply for an inartful draft of the complaint.

Justice Peckham, then a judge on the New York Court of Appeals, argued, in a vigorous dissent, that code pleading worked terrible injustices upon parties, noting that "[t]his question of pleading has been a terror to suitors for many years."¹⁴ He continued: "Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried. But the cases of loss and damage to suitors *by some defect of pleading have been innumerable*."¹⁵ The frequent result of case dismissals on the basis of the pleadings, as complained of by Judge Peckham, was an unjust disposition of a cause without ever reaching the actual merits.¹⁶

A response to these inequities came with the adoption of the Federal Rules of Civil Procedure in 1938,¹⁷ which liberalized pleading policies with more than just the adoption of Rule 8. Additional promotion of the disposition of a plaintiff's complaint on the merits rather than on the pleadings was evidenced by the liberal stance taken in the Federal Rules regarding a motion to dismiss a complaint.¹⁸ Movement towards liberality was solidified by judicial interpretations of the rule, first by

14. *Degraw v. Elmore*, 50 N.Y. 1, 7 (1872) (Peckham, J., dissenting).

15. *Id.* (emphasis added). See also Moore, *The Place of the New Federal Rules in the Law School Curriculum*, 27 GEO. L.J. 884, 887-89 (1939) (using two cases to illustrate the injustices done to parties by strict code pleading requirements while advocating Justice Peckham's dissent in *Degraw*).

16. See Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437-38 (1986).

17. FED. R. CIV. P. 86. See generally 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3181 (1969).

18. FED. R. CIV. P. 12(b) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .

Id. The advisory committee note to the Federal Rules of Procedure cites to Judge Clark's liberal stance on pleading. See FED. R. CIV. P. 12 Note of Advisory Committee Rules, Note to Subdivisions (b) and (d) (citing C. CLARK, *CODE PLEADING* 371-81 (1st ed. 1928)).

Second Circuit Court of Appeals Judge Charles E. Clark¹⁹ and later by the United States Supreme Court.²⁰

In 1957, the United States Supreme Court decided a pair of cases that firmly entrenched the liberal pleading policies of the federal rules into modern jurisprudence. Determination of whether a complaint is factually insufficient is governed by *Conley v. Gibson*,²¹ which stated "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."²² Additionally, the Court, in *Radovich v. National Football League*,²³ held that, when a defendant makes a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint must be construed in a light most favorable to the plaintiff, and the allegations are to be taken as true.²⁴

19. Charles E. Clark served as Reporter of the Supreme Court's Committee on the Rules of Civil Procedure, which drafted the Federal Rules. He was appointed to the Second Circuit by President Roosevelt in 1939 and served as Chief Judge from 1954 to 1959. See 4 WHO WAS WHO IN AMERICA 174 (1968). One of Judge Clark's major goals in helping to draft the Federal Rules was the elimination of stringent common law pleading requirements. See Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917-18 (1976). He was the first judge to construe the newly enacted rules liberally. See *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). In *Dioguardi*, Judge Clark stated: "Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 775 (quoting FED. R. Civ. P. 8(a)).

20. See *infra* notes 21-24 and accompanying text.

21. 355 U.S. 41 (1957).

22. *Id.* at 45-46 (citing *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (3d Cir. 1942); *Leimer v. State Mutual Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940)). The Court recently paraphrased this language and cited to *Conley* as authority in a section 1983 wrongful death claim against a municipality in *Brower v. County of Inyo*, 109 S. Ct. 1378, 1382 (1989).

23. 352 U.S. 445 (1957).

24. *Id.* at 448. See also *Jenkins v. McKeithen*, 395 U.S. 411 (1969). In *Jenkins*, Justice Marshall's opinion reversed the lower court's dismissal of a complaint brought pursuant to sections 1981, 1983, and 1988, saying:

For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. . . . [T]he complaint is to be liberally construed in favor of plaintiff. . . . [It] should not be dismissed unless it appears that

Today, the scheme of the Federal Rules of Civil Procedure eliminates the inherent dangers of injustice that the labyrinth of common law and code pleading worked upon parties, primarily by allowing relevant facts and issues to be narrowed by discovery, pretrial conferences, and by partial or full summary judgment. As stated aptly by two commentators:

The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules may simply be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance as to what was decided for purposes of *res judicata* and to indicate whether the case should be tried to the court or to the jury. No more is demanded of the pleadings than this; indeed, history shows that no more can successfully be performed by the pleadings.²⁵

B. *Fact Pleading Makes a Comeback*

Despite the liberal pleading policies, as adopted in the Federal Rules of Civil Procedure and expanded by the United States Supreme Court, lower federal courts have sought, and succeeded in, the re-imposition of more detailed fact pleading requirements for a number of claims, particularly those focusing upon civil rights plaintiffs.²⁶ This result has been achieved

appellant could "prove no set of facts in support of his claim which would entitle him to relief."

Id. at 421-22 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (citations omitted). See also *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (cited with approval in *Brower v. County of Inyo*, 109 S. Ct. 1378, 1382 (1989)).

25. 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202, at 60-61 (1969) (footnote omitted).

26. The following is a representative sample of such cases, listed in circuit order: *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987); *Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979); *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Freedman v. City of Allentown*, 853 F.2d 1111, 1114-15 (3d Cir. 1988); *Colburn v. Upper Darby Township*, 838 F.2d 663, 665-67 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); *Ogilbee v. Western Dist. Guidance Center*, 658 F.2d 257, 258 (4th Cir. 1981); *Smith v. International Longshoremen's Ass'n*, 592 F.2d 225, 226 (4th Cir. 1979); *Brown v. Glossip*, 878 F.2d 871, 875 (5th Cir. 1989); *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Rodgers v. Lincoln Towing Serv., Inc.*, 771

by implicit Supreme Court language²⁷ coupled with a liberal degree of self-help. To best illustrate the revival of fact pleading in civil rights claims, particularly those pursuant to section

F.2d 194, 198, 202 (7th Cir. 1985); *Strauss v. City of Chicago*, 760 F.2d 765, 767-69 (7th Cir. 1985); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); *Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983); *Eastwood v. Department of Corrections*, 846 F.2d 627, 629 (10th Cir. 1988); *Wise v. Bravo*, 666 F.2d 1328, 1332-33 (10th Cir. 1982); *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 309-10 (11th Cir. 1989); *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984).

The first case to articulate a heightened pleading standard applicable to all civil rights complaints was *Valley v. Maule*, 297 F. Supp. 958 (D. Conn. 1968). The court in *Valley* stated:

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.

Id. at 960-61. See Wingate, *supra* note 10, at 683. See generally M. SCHWARTZ & J. KIRKLIN, *supra* note 8.

27. For example, both the Fifth Circuit and the D.C. Circuit Courts of Appeal relied upon the Supreme Court's language in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as authority for the imposition of fact pleading in civil rights claims. See *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986); *Elliott v. Perez*, 751 F.2d 1472, 1477-79 (5th Cir. 1985). In *Harlow*, the Supreme Court redefined the good faith immunity doctrine in order to promote the resolution of suits against public officials prior to trial or lengthy discovery proceedings. The Court stated:

it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. . . . [There are] the general costs of subjecting officials to the risk of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Harlow, 457 U.S. at 816-17 (footnotes omitted) (quoted in *Elliott*, 751 F.2d at 1477-78); see also *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 309-10 n.2 (11th Cir. 1989). In *Arnold*, the Eleventh Circuit relied upon the Supreme Court's language in *Harlow* as well as that in *Butz v. Economou*, 438 U.S. 478, 508 (1978), stating that "[t]he Supreme Court has called for a firm application of the Federal Rules of Civil Procedure and the dismissal of insubstantial claims on summary judgment in civil rights cases apparently recognizing that public officials can become unduly enmeshed in burdensome litigation." *Arnold*, 880 F.2d at 309 n.2.

1983, one can review case law developments in the Third Circuit Court of Appeals. There, judges have attempted²⁸ to discuss the bases and utility of this procedural reintroduction.²⁹

The Third Circuit's application of a heightened pleading requirement for all civil rights claims appeared in *Kauffman v. Moss*.³⁰ In dicta, the *Kauffman* court converted the 1967 decision of *Negrich v. Hohn*,³¹ which upheld dismissal of a state prisoner's pro se³² complaint as overly broad and conclusory, into a general "rule that complaints in civil rights case[s] must be specifically pleaded in order to avoid a motion to dismiss."³³ In addition to describing its newborn standard as the "*Negrich* exception to the general rule of 'notice pleading,'"³⁴ the *Kauffman* court adopted the fact pleading rationale as espoused in *Valley v. Maule*,³⁵ the first case to convert the *Negrich* court's holding into a fact pleading standard for all civil rights claims.³⁶

Subsequent to *Negrich* and *Kauffman*, the United States Supreme Court, in *Haines v. Kerner*,³⁷ explicitly lessened the pleading burden of a pro se complaint below that of the requirements set down in *Conley v. Gibson*.³⁸ The plaintiff in *Haines* was an Illinois state prison inmate who brought a section 1983 action against various state prison officials and the Governor of Illinois asserting "general allegations of physical injuries suffered while in disciplinary confinement and denial of

28. In contrast, the Second Circuit articulated the new fact pleading standard without espousing any rationale. See *infra* notes 104-15 and accompanying text. Originally, the Third Circuit simply adopted the rationale stated in *Valley v. Maule*, 297 F. Supp. 958 (D. Conn. 1968). See *infra* notes 30-36 and accompanying text.

29. See *infra* notes 48-51, 116-56 and accompanying text.

30. 420 F.2d 1270, 1275-76 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

31. 379 F.2d 213 (3d Cir. 1967).

32. Counsel was appointed shortly after the complaint was filed. *Id.* at 214 n.4.

33. *Kauffman*, 420 F.2d at 1275-76. For a more detailed discussion of *Kauffman* and some early Third Circuit decisions on point, see Wingate, *supra* note 10, at 683-89.

34. *Kauffman*, 420 F.2d at 1276 n.15.

35. 297 F. Supp. 958, 960-61 (D. Conn. 1968). See *supra* note 26.

36. See Wingate, *supra* note 10, at 683. The *Valley* court cited *Negrich* as authority for adopting the heightened pleading standard. *Valley*, 297 F. Supp. at 960.

37. 404 U.S. 519 (1972) (per curiam) (cited in *Neitzke v. Williams*, 109 S. Ct. 1827, 1834 n.9 (1989)).

38. 355 U.S. 41 (1957).

due process in the steps leading to that confinement.”³⁹ The district court dismissed the pro se complaint pursuant to Rule 12(b)(6) concluding, *inter alia*, that the complaint failed to allege “a deprivation of federally protected rights.”⁴⁰ In reversing the district court’s dismissal, the United States Supreme Court said:

allegations 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 formal 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.”⁴¹

Contrary to this mandate, the Third Circuit refused to divorce its dicta in *Kauffman* and reaffirmed its fact pleading requirement in *Rotolo v. Borough of Charleroi*.⁴² The court distinguished *Haines* without any analysis other than the adoption of an unsubstantiated suggestion in an earlier Third Circuit decision.⁴³ While again reiterating the rationale for a fact pleading requirement by reference to *Valley v. Maule*,⁴⁴ the court accepted the proposition that the general standard of *Haines* “would be applied to complaints in which ‘specific allegations of unconstitutional conduct’ were made, whereas *Negrich* would continue to serve as a barrier to complaints which ‘contain only vague and conclusory allegations.’”⁴⁵

There is no language in *Haines*, any other Supreme Court decision, or *Negrich* to support a heightened pleading requirement in all civil rights claims or to support the new set of fact

39. *Haines*, 404 U.S. at 520.

40. *Id.*

41. *Id.* at 520-21 (emphasis added) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

42. 532 F.2d 920, 922-23 (3d Cir. 1976).

43. *Id.* at 922. See *Gray v. Creamer*, 465 F.2d 179, 182 n.2 (3d Cir. 1972) (court suggested *Haines* requirement of liberally construing pro se complaints would apply to complaints containing “specific allegations of unconstitutional conduct,” whereas *Negrich* still would bar complaints which allege “only vague and conclusory allegations”).

44. 297 F. Supp. 958 (D. Conn. 1968). See *supra* note 26.

45. *Rotolo*, 532 F.2d at 922 (quoting *Gray v. Creamer*, 465 F.2d 179, 182 n.2 (3d Cir. 1972)). See *supra* note 43.

pleading rules articulated by the *Rotolo* court. Indeed, as persuasively argued by Judge Gibbons in his concurring and dissenting opinion in *Rotolo*, even though the *Negrich* decision failed to provide any principled analysis or support for a heightened pleading standard in all civil rights claims, the majority, in one broad sweep of the precedential paintbrush, had used *Negrich* as a basis to disregard the plain language of the Federal Rules of Civil Procedure and Supreme Court case law.⁴⁶ After refuting what he deemed the apparent rationale for the majority's imposition of a fact pleading requirement, Judge Gibbons concluded that the only explanation for the majority's position "must be found in the attitude of the court toward the rights being asserted."⁴⁷

More recent case law evidences the Third Circuit's continued adherence to a requirement of specificity in pleading civil rights claims.⁴⁸ However, the rigid application of the rule was mitigated somewhat in *Frazier v. Southeastern Pennsylvania Transportation Authority*.⁴⁹ In reversing some and affirming other parts of plaintiff's employment discrimination and sexual harassment claims, the *Frazier* court stated that prior Third Circuit decisions "provide useful guidance, but they do not set out a bright-line rule governing the application of the specificity requirement in civil rights cases. Inevitably, the sufficiency of a complaint must be determined on a case by case basis."⁵⁰ Unable to extract real guidance from any prior decision, the court formulated its own standard, partially retreating towards the liberality mandated by the Federal Rules of Civil Proce-

46. *Id.* at 926-27 (Gibbons, J., concurring and dissenting).

47. *Id.* at 927.

48. *See, e.g.*, *Freedman v. City of Allentown*, 853 F.2d 1111 (3d Cir. 1988) (discussed *infra* notes 132-56 and accompanying text); *Colburn v. Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989) (discussed *infra* notes 116-31 and accompanying text); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1035 (3d Cir. 1987) (civil rights claim alleged taking of plaintiff's property without due process); *Darr v. Wolfe*, 767 F.2d 79, 81 (3d Cir. 1985) (prisoner's conspiracy allegations); *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981) (prisoners' conspiracy allegations); *United States v. Philadelphia*, 644 F.2d 187, 204-05 (3d Cir. 1980) (allegations of unconstitutional policies and practices of the Philadelphia Police Department).

49. 785 F.2d 65 (3d Cir. 1986).

50. *Id.* at 68.

dures and their subsequent interpretations by the United States Supreme Court:

The crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer. At the same time, however, a court cannot expect a complaint to provide proof of plaintiffs' claims, nor a proffer of all available evidence. In civil rights cases . . . much of the evidence can be developed only through discovery. While plaintiffs may be expected to know the injuries they allegedly have suffered, *it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendants' practices under challenge.*⁵¹

The *Frazier* decision, which facially appears like an adherence to notice pleading standards, has met with limited success as both precedent and policy in the Third Circuit. Indeed, whether or not a district court dismissal of a complaint survives review by a panel in the Third Circuit often depends more upon the composition of the panel than upon the precedential weight or persuasiveness of any prior decisions.⁵²

II. CONTOURS OF MUNICIPAL LIABILITY UNDER SECTION 1983⁵³

The first case to expose local governments to liability under section 1983 was *Monell v. Department of Social Servi-*

51. *Id.* (emphasis added). This decision was attacked vigorously by Chief Judge Aldisert in *District Council 47, Amer. Fed'n v. Bradley*, 795 F.2d 310, 316-22 (3d Cir. 1986) (Aldisert, C.J., dissenting).

52. A motion to dismiss has survived appellate review in the Third Circuit where the panel consisted of two out of three of the following combination of judges: Sloviter, Garth, Higginbotham, and Mansmann. *See, e.g., Colburn v. Upper Darby Township*, 838 F.2d 663, 664 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989) (Judges Sloviter and Garth); *District Council 47, Amer. Fed'n v. Bradley*, 795 F.2d 310, 311 (3d Cir. 1986) (Judges Sloviter and Garth); *Frazier v. Southeastern Pa. Transp. Auth.*, 785 F.2d 65, 66 (3d Cir. 1986) (Judges Sloviter and Mansmann); *Bartholomew v. Fischl*, 782 F.2d 1148, 1149 (3d Cir. 1986) (Judges Sloviter and Mansmann); *Estate of Bailey v. County of York*, 768 F.2d 503, 505 (3d Cir. 1985) (Judges Sloviter and Higginbotham).

53. What follows is a brief sketch of *Monell* and its progeny. For a more detailed discussion, see Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989). *See also* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, §§ 4.6-4.12 (1986 & Supp. 1989); Schnapper, *A Monell Update: Clarity, Conflict, And Complications*, reprinted in G. PRATT & M. SCHWARTZ, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTOR-

ces,⁵⁴ a case in which a class of female employees at the New York City Department of Social Services successfully challenged an official policy requiring pregnant employees to take unpaid leaves of absence before medically necessary. Overruling part of *Monroe v. Pape*,⁵⁵ Justice Brennan's majority opinion reinterpreted the word "person" in section 1983 to include municipalities as well as individuals.⁵⁶

Specifically, the Court held that local governments can be sued directly under section 1983 where municipal officers implement or execute an official policy that becomes the moving force behind the complained of constitutional violation.⁵⁷ Additionally, the Court stated that a municipality exposes itself to liability where its officers, through custom and usage, engage in "persistent and widespread discriminatory practices" that acquire the force of law.⁵⁸ However, the Court also concluded that municipalities could not be held liable, via the theory of *respondeat superior*, under section 1983 solely for employing a tortfeasor.⁵⁹ In sum, a local government can be sued under section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."⁶⁰

Since *Monell*, the Supreme Court has struggled with the definitions of official policy and official policymakers, while dealing decisively with other municipal liability issues.⁶¹ Indeed, the Court left the job of defining the contours of municipal liability under *Monell* entirely to the federal circuits for

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54. 436 U.S. 658 (1978).

55. 365 U.S. 167 (1961) (discussed *supra* notes 4, 5 and accompanying text).

56. See *supra* notes 2, 3 and accompanying text.

57. *Monell*, 436 U.S. at 694.

58. *Id.* at 691.

59. *Id.*

60. *Id.* at 694.

61. See, e.g., *Owen v. City of Independence*, 445 U.S. 622 (1980) (no qualified immunity for municipalities); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages against municipalities barred).

seven years.⁶² But, starting in 1985, the Supreme Court acted, deciding a number of cases in an attempt to assist the lower federal courts by clarifying the meaning of *Monell*.

First, the Court held, in *Oklahoma City v. Tuttle*,⁶³ that a single incident of police officer misconduct is insufficient to establish that a municipality maintained a policy of inadequate training of its officers "unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."⁶⁴ Although Justice Rehnquist's plurality opinion declined to address whether allegations of inadequate training could ever constitute a policy within the meaning of *Monell*,⁶⁵ the decision indicated that perhaps not even gross negligence in a policymaker's selection of police training procedures would be sufficient to establish a *Monell* policy.⁶⁶

One year later, in the plurality opinion of *Pembaur v. Cincinnati*,⁶⁷ written by Justice Brennan, the Court further defined the *Tuttle* "single incidence" standard, finding that the district court improperly dismissed a section 1983 action against the City of Cincinnati where evidence consisted of allegations that county deputy sheriffs broke down plaintiff's door to serve *capias* on the advice of the county prosecutor's office in violation of his fourth amendment rights.⁶⁸ The plurality held that "municipal liability under section 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."⁶⁹ Applying this standard, the plu-

62. The majority in *Monell* said: "We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day." *Monell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978).

63. 471 U.S. 808 (1985).

64. *Id.* at 824.

65. *Id.* at 824 n.7.

66. *See id.*

67. 475 U.S. 469 (1986).

68. *See id.* at 484-85.

69. *Id.* at 483-84.

rality interpreted Ohio state law to find that the single act of the county prosecutor, in ordering the deputy sheriffs to make a forced entry, was the action of a "final decision maker for the county."⁷⁰

A more recent Supreme Court pronouncement on municipal liability came in *City of St. Louis v. Praprotnik*.⁷¹ Writing for the plurality, Justice O'Connor first gleaned four principles from *Pembaur*:

First, . . . municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. Third, whether a particular official has "final policymaking authority" is a question of *state law*. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business.⁷²

In trying to reconcile these principles, the plurality held that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than subordinate's departure from them, are the act of the municipality."⁷³ Therefore, the Court found that subordinates cannot act as policymakers if their decisions are subject to review by official policymakers⁷⁴ as defined by state law,⁷⁵ unless "the authorized policymakers approve a subordinate's decision and the basis for it."⁷⁶

Finally, the plurality said that a local government's attempt to insulate itself from exposure to liability for unconstitutional conduct by maintaining unwritten policies can be prevented by the existence of *Monell's* "custom and usage" doctrine.⁷⁷

Most recently, the Supreme Court returned to the issue of inadequate training serving as a basis for municipality liability

70. *Id.* at 485.

71. 485 U.S. 112 (1988).

72. *Id.* at 123 (citations omitted).

73. *Id.* at 127.

74. *Id.*

75. *Id.* at 123.

76. *Id.* at 127.

77. *Id.* at 126-27. See *supra* note 58 and accompanying text.

that it had left open in *Oklahoma City v. Tuttle*.⁷⁸ The Court held, in *City of Canton v. Harris*,⁷⁹ “that the inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”⁸⁰ In so doing, the Court said that “the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform,”⁸¹ and “the identified deficiency in a city’s training program must be closely related to the ultimate injury.”⁸²

In reading *Monell* and its progeny, a civil rights plaintiff suing a municipality now can find a significant amount of guidance as to how the complaint should be drafted. If the plaintiff complains of an unconstitutional policy, then the allegations must include that the policy was affirmatively adopted, authorized, and/or promulgated by the municipality’s official policymaker(s) as dictated by state law and that the policy itself proximately caused or was the moving force behind the federally protected deprivation of rights. If the policy complained of involves a claim of inadequate training or supervision, then the plaintiff must also allege that a specific inadequacy, amounting to deliberate indifference, proximately caused the deprivation of the plaintiff’s rights. And, if the plaintiff complains of an unconstitutional custom or practice, the allegations should include facts indicating that the conduct complained of is widespread and repetitive.

78. 471 U.S. 808 (1985); *see also* *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (writ of certiorari dismissed as improvidently granted). In *Kibbe*, four dissenting justices took the position that section 1983 liability could be imposed for inadequate police training policies only if the failure to train constituted a deliberate indifference to the rights of those deprived. *Kibbe*, 480 U.S. at 268-69 (O’Connor, J., dissenting).

79. 109 S. Ct. 1197 (1989).

80. *Id.* at 1204.

81. *Id.* at 1205-06.

82. *Id.* at 1206.

III. PROBLEMS WITH SPECIFICITY REQUIREMENTS IN PLEADING MUNICIPAL LIABILITY CLAIMS

A. Access to Discovery

[Where] the court requires detailed support for a legal conclusion, analysis of the details may permit the court to conclude confidently that the plaintiff has no case. But where the plaintiff is unable to provide details because only the defendant possesses such information, no such confidence is possible. To the contrary, it may be that the defendant has so effectively concealed his wrongdoing that the plaintiff can unearth it only with discovery. To insist on details as a prerequisite to discovery is putting the cart before the horse.⁸³

This statement typifies the problem of placing pleading standards beyond the reach of a civil rights plaintiff, particularly when that plaintiff seeks to impose liability upon a municipal entity. If a plaintiff wishes to establish that a police officer's use of excessive force was pursuant to a widespread custom or practice of the police force, or that a police department's allegedly unconstitutional conduct was based upon a policy of inadequate training, that plaintiff often will require discovery in order to survive a motion to dismiss. Frequently, additional discovery also will be necessary in order to try the issue of causation. A municipal liability plaintiff with such discovery needs may never overcome a fact pleading requirement.

A good example of this problem is evidenced by the Seventh Circuit's decision in *Strauss v. City of Chicago*.⁸⁴ The plaintiff in *Strauss* alleged that a Chicago police officer arrested him without probable cause and then struck him in the face.⁸⁵ In joining the City of Chicago as a defendant, the plaintiff complained that the city had a custom and practice of hiring police officers with prior histories of brutality, and that the city maintained employment of those officers even though brutality on the job continued.⁸⁶ The complaint also alleged a custom and practice of permitting the silencing of those in custody by beat-

83. Marcus, *supra* note 16, at 468 (footnotes omitted).

84. 760 F.2d 765 (7th Cir. 1985).

85. *Id.* at 766.

86. *Id.*

ing them and claimed that the department's investigation procedures established a custom or practice of consistently exonerating the offending officers.⁸⁷

In affirming the district court's dismissal of the complaint with respect to the City of Chicago, the court of appeals said that the plaintiff "alleged no facts to suggest that the policies of which he complains actually exist."⁸⁸ Although the plaintiff pled the facts surrounding his unlawful arrest and excessive force claim and pled two affirmative acts that, if proven, would support a finding of municipal policy,⁸⁹ the Seventh Circuit found the complaint insufficient. Speaking through Chief Judge Cummings, the court of appeals said that "[a] complaint that tracks *Monell's* requirement of official policy with bare allegations cannot stand when the policy identified is nothing more than acquiescence in prior misconduct. The absence of any facts at all to support plaintiff's claim renders the allegations mere legal conclusions of section 1983 liability."⁹⁰

Without the benefit of discovery, a plaintiff like Strauss cannot access the federal courts because he cannot meet such an elevated pleading requirement. He cannot utilize the sword given to him by Congress and the Supreme Court to compensate him for deprivations of his federally protected rights; nor, as *Monell* intended, can he use the remedial powers of section 1983 to monitor the conduct of local government.⁹¹

However, this problem applies to almost any civil rights plaintiff, and many federal courts, like the *Strauss* court, find it expedient to accept the rationale for, and impose, a heightened pleading standard. That rationale includes such factors as time, expense, notoriety of public officials, a flood of claims brought under the civil rights acts (of which a substantial

87. *Id.*

88. *Id.* at 767.

89. *Id.* at 766.

90. *Id.* at 767 (footnote omitted). *But see* *Evans v. McKay*, 869 F.2d 1341, 1349 (9th Cir. 1989); *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986) (holding it improper to dismiss section 1983 municipal liability claim on the pleadings even though complaint contained bare allegations "that the individual officers' conduct conformed to official policy, custom, or practice").

91. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 700-01 (1978).

number are frivolous),⁹² and the belief that many of these claims belong in state court.⁹³

Not only does the above rationale apply with equal force in municipal liability claims, but it also appears more compelling considering that the time, expense, and notoriety of public officials can increase exponentially when the city itself is sued, since plaintiffs conceivably can subject the city and its employees to sweeping discovery and a lengthy trial.⁹⁴

In *Strauss*,⁹⁵ the court explicitly addressed and rejected the argument that plaintiffs suing municipalities could not allege a *Monell* claim with any degree of specificity absent discovery. The court was concerned that "[a]ll counsel would need to do would be to concoct some explanation of plaintiff's injury that implicated the municipality—for example, a custom and practice of hiring as police officers those with a history of brutality—and the doors of the federal courtroom would swing open."⁹⁶

Opponents of a heightened pleading rule go beyond complaints that colorable civil rights claims are shut out of federal courts and that the new standard directly conflicts with the Federal Rules and Supreme Court case law. One critic suggested that the net result of a heightened pleading rule is to allow judges to make questionable merits decisions on the face

92. A recent article contradicted this frivolous claims argument. See Eisenberg & Schwab, *supra* note 6; see also Wingate, *supra* note 10, at 688-93.

93. See *Valley v. Maule*, 297 F. Supp. 958 (D. Conn. 1968) (discussed *supra* note 26).

94. See *Smith v. Ambrogio*, 456 F. Supp. 1130 (D. Conn. 1978). In dismissing a police misconduct complaint against the City of Hamden grounded upon "a series of conclusory allegations," *id.* at 1137, the court stated:

a claim of municipal liability based on an alleged policy reflected by a pattern of prior episodes will inevitably risk placing an entire police department on trial. Sweeping discovery will be sought to unearth episodes in which allegedly similar unconstitutional actions have been taken, and the trial will then require litigation of every episode occurring in the community that counsel believes can be shown to involve a similar constitutional violation. Even if a trial of that scope is warranted by a complaint that does not allege overt acts with requisite particularity . . . neither a federal court nor a municipality should be burdened with such an action unless a detailed pleading is presented.

Id. (citations omitted).

95. 760 F.2d 765 (7th Cir. 1985).

96. *Id.* at 770.

of the complaint.⁹⁷ Such a policy is hardly justifiable when plaintiffs are faced with the danger of dismissal for failure to comply with Rule 8's "short and plain statement" requirement.⁹⁸ Attorneys drafting complaints should not have to find themselves cramped by the Federal Rules of Civil Procedure only to face later uncertain fact pleading policies wielded inconsistently by individual federal judges.⁹⁹

97. See Marcus, *supra* note 16, at 493.

98. FED. R. CIV. P. 8(a)(1). "The requirements of a short and plain statement of claim and simple, concise, and direct averments have been held to be violated by needlessly long, repetitious or confused complaints." 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1217, at 128 (footnotes omitted). See *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988); *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.*, 261 F. Supp. 905, 908 (N.D. Ill. 1966).

99. Even assuming that the complaint satisfies this portion of the pleading obstacle course, the attorney still must be wary not to run afoul of Rule 11 of the Federal Rules of Civil Procedure, to which Congress added teeth with the 1983 amendments to the rules. Federal Rule 11, as amended, provides, in pertinent part:

Every pleading, motion, and other paper of a party . . . shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by [him] that [he] has read the pleading, motion, or other paper; that to the best of [his] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11. The rule, as amended, is designed to increase significantly an attorney's responsibility when signing pleadings or other papers that are submitted to the court, and the amendments mandate that much tougher sanctions be imposed upon attorneys who violate the rule. See FED. R. CIV. P. 11, Notes of Advisory Committee on 1983 Amendments; Sullivan, *Recent Amendments to the Federal Rules of Civil Procedure: An Overview and Words of Caution*, 17 U. TOL. L. REV. 83, 86-89 (1985). For a comprehensive analysis of the rule, see Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Batista, *Symposium, Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 FORDHAM L. REV. 1 (1985).

Arguments against the doctrine also state that the 1983 amendments to the Federal Rules of Civil Procedure explicitly address and, for the most part, can significantly reduce, within the confines of a notice pleading system, the time problems and financial burdens placed upon defendants, especially government actors defending section 1983 claims.¹⁰⁰ The federal judiciary, however, is apparently unconvinced because fact pleading requirements have flourished since the amendments to the Federal Rules.¹⁰¹

B. Inconsistency

One of the major problems with the new rule, in dealing with both municipal and general civil rights complaints, centers upon the inconsistency with which fact pleading standards are followed and applied. The result is the creation of pronounced intra-circuit conflicts, where many judges justifiably are unpersuaded by the asserted rationales for departing from notice pleading standards and, therefore, simply refuse to recognize such precedent.¹⁰² Or, in following such precedent, they so dilute the new standard that one is hard-pressed to distinguish the rule or its application from a typical *Conley* notice pleading standard.¹⁰³

A good example of this problem is evidenced by case law developments in the Second Circuit. Despite the post-Federal Rules commands of Judge Charles E. Clark in *Dioguardi v. Durning*¹⁰⁴ and the more authoritative United States Supreme

100. See Wingate, *supra* note 10, at 690; Marcus, *supra* note 16, at 444. For a general analysis of the purposes of the 1983 amendments, see Sullivan, *supra* note 99.

101. See generally M. SCHWARTZ & J. KIRKLIN, *supra* note 8.

102. See, e.g., *Estate of Bailey v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985).

103. A good example of this phenomenon in the Third Circuit is *Bartholomew v. Fischl*, 782 F.2d 1148 (3d Cir. 1986), where the court recognized the existence of the heightened pleading standard but stated that such precedent did not alter the liberal standards that govern a Rule 12(b)(6) motion to dismiss. *Id.* at 1152.

For a discussion of *Conley v. Gibson*, 355 U.S. 41 (1957), see *supra* notes 21-22 and accompanying text.

104. 139 F.2d 774 (2d Cir. 1944). For a discussion of the case and Judge Clark, see *supra* note 19 and accompanying text.

Court rulings beginning in 1957,¹⁰⁵ the Second Circuit's decision in *Powell v. Workmen's Compensation Board*,¹⁰⁶ elevating pleading requirements in civil rights conspiracy complaints, laid down precedent that has somehow mutated into authority for fact pleading requirements in all civil rights complaints.

In *Powell*, the Second Circuit relied on the United States Supreme Court decision of *Snowden v. Hughes*¹⁰⁷ to state that "plaintiff was bound to do more than merely state vague and conclusionary [sic] allegations respecting the existence of a conspiracy."¹⁰⁸ Subsequent to *Powell*, the Second Circuit, without analysis, liberally construed the *Powell* holding, extending and heightening its pleading requirement to all civil rights claims.¹⁰⁹

However, recent decisions still adhere to notice pleading standards, ignoring the existence of fact pleading precedent.¹¹⁰ The Second Circuit's most recent pronouncement, *Salahuddin v. Cuomo*,¹¹¹ recognizes two previous fact pleading decisions, but the opinion itself is framed in terms of notice pleading. In *Salahuddin*, the court of appeals held that a district court's *sua sponte* dismissal of a pro se prisoner's complaint without

105. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Radovich v. National Football League*, 352 U.S. 445, 448 (1957); see *supra* notes 21-24 and accompanying text.

106. 327 F.2d 131 (2d Cir. 1964); see also *Birnbaum v. Trussel*, 347 F.2d 86, 89-90 (2d Cir. 1965) (conspiracy and civil rights complaint dismissed for vague and conclusory allegations).

107. 321 U.S. 1 (lack of allegations showing purposeful discrimination not supplied by words such as willful or malicious), *reh'g denied*, 321 U.S. 804 (1944).

108. *Powell*, 327 F.2d at 137.

109. See, e.g., *Fine v. City of New York*, 529 F.2d 70 (2d Cir. 1975) (claim brought pursuant to 42 U.S.C. § 1981); *Albany Welfare Rights Org. Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2d Cir. 1972) (section 1983 retaliation claim); *Avins v. Magnum*, 450 F.2d 932 (2d Cir. 1971) (political retaliation and conspiracy claim). A similar evolution took place in the Third Circuit. See *supra* notes 30-52 and accompanying text.

110. See *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988) (section 1983 political retaliation claim); *Frazier v. Coughlin*, 850 F.2d 129 (2d Cir. 1988) (section 1983 pro se prisoner complaint); *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983) (section 1983 municipal liability claim); see also *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (discussed *supra* note 10 and accompanying text).

111. 861 F.2d 40 (2d Cir. 1988).

leave to amend, for failure to comply with Rule 8's short and plain statement requirement, was an abuse of discretion.¹¹² In so doing, the court never referred to any of the circuit's expansive fact pleading precedent but cited two cases in which conspiracy allegations were subjected to a heightened pleading rule¹¹³ and stated: "We have required pleadings under § 1983 to contain more than mere conclusory allegations. . . . [W]hile a plaintiff should not plead mere evidence, he *should make an effort to provide 'some details of time and place and the alleged effect of the conspiracy.'*"¹¹⁴

Such language does not compel, but simply suggests, that a complainant's allegations contain some facts averring conduct implying a deprivation of rights. The opinion itself accepts a claim that "certain of the defendants combined and conspired to deprive [plaintiff] of due process at certain prison disciplinary hearings by, *inter alia*, preventing [plaintiff] from calling witnesses and tampering with testimony of witnesses called."¹¹⁵

As a result, the Second Circuit now has a potpourri of pleading law fraught with inconsistencies and lacking any clarity. Such inconsistencies can lead to a great deal of ad hoc adjudication where federal district court judges, unsure of the law in their circuit, simply will apply the rule they deem appropriate when addressing the sufficiency of the complaint, since authority exists to support either standard. And the rule they apply may reflect a hostility towards an attorney, a repeat plaintiff, or civil rights complaints generally.

One of the most recent examples of inconsistency and injustice caused by a specificity requirement occurred in the Third Circuit and involved two substantially similar jail suicide claims against individuals and municipalities. In *Colburn v. Upper Darby Township*,¹¹⁶ a woman named Melinda Lee Stierheim, while intoxicated, was taken into custody by the

112. *Id.* at 43. See *supra* note 12 and accompanying text.

113. *Salahuddin*, 861 F.2d at 43.

114. *Id.* (citations omitted) (emphasis added) (quoting 2A J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 8.17[5] (2d ed. 1985)).

115. *Id.*

116. 838 F.2d 663 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1138 (1989).

Upper Darby Police.¹¹⁷ Although Stierheim was scantily clad, Police Officer Diane Miller failed to find a concealed handgun on Stierheim while searching her.¹¹⁸ Approximately four hours after her search and subsequent lockup, Stierheim killed herself with the undiscovered handgun.¹¹⁹

Colburn, the administratrix of Stierheim's estate, subsequently brought a section 1983 action against Officer Miller, Police Commissioner Martin Kerns, Mayor James Ward, the Upper Darby Police Department, and Upper Darby Township.¹²⁰ The complaint stated allegations of negligent or reckless performance of search and supervision by Officer Miller, inadequate training of officers in searching individuals, inadequate supervision and monitoring of jail cells amounting to gross negligence and deliberate indifference to the safety of those taken into custody, and a custom of laxity with respect to the monitoring and supervision of jail cells.¹²¹

The district court dismissed the complaint and later denied a motion for reconsideration, which included more specific allegations in the plaintiff's memorandum of law.¹²² On review, the court of appeals accepted the additional facts asserted in the memorandum, stating that such facts could appear in plaintiff's amended complaint.¹²³ These allegations stated that the Upper Darby Police Department knew Stierheim from previous encounters; that they also had been called to her apartment on the day before her suicide in response to a failed attempt by Stierheim to commit suicide; that she was very depressed; that she had visible scars on her right wrist from another suicide attempt; that the detaining officer had to stop her from swallowing three valium; that she was detained by the police for

117. *Id.* at 664.

118. *Id.* at 664-65.

119. *Id.* at 665.

120. *Id.* at 664.

121. *Id.* at 665.

122. *Id.* at 665, 670. The district court dismissed the complaint three days prior to the time it had extended to the plaintiff to file her answer and denied a motion for reconsideration, despite what would have been a timely response. *Id.* at 666.

123. *Id.* at 670.

her own protection; and that Officer Miller found a live round of ammunition in her pocket.¹²⁴

Speaking for the majority, Judge Sloviter found that these facts sufficiently pled section 1983 claims against all the defendants with the exception of Mayor Ward and Police Commissioner Kerns in their individual capacities.¹²⁵ Thus, the court reversed the district court dismissal of the complaint and remanded to the lower court.¹²⁶

Although the holding was justified by the extensive set of facts pled, the court of appeals took a rather circuitous and confusing route through pleading law to get there. Starting with a recognition that the Third Circuit has adopted a heightened pleading standard, the Court then proceeded to articulate various reasons that would permit a chiseling down of the new burden.

First, the court reiterated that the new rule does not change the standard when ruling on Rule 12(b)(6) motions.¹²⁷ Then, the court stated that "[a] plaintiff is not required to provide either proof of her claims or 'a proffer of all available evidence' because in civil rights cases 'much of the evidence can be developed only through discovery' of materials held by defendant officials."¹²⁸ In addition, trial judges were reminded that "'failure to permit amendment of a complaint dismissed for want of specific allegations constitutes an abuse of discretion.'"¹²⁹

This language, as a package, indicates that trial judges need not demand as much from the pleadings as some earlier Third

124. *Id.*

125. *Id.* at 673. The judge also ordered that the lower court strike the allegations of inadequate training with respect to proper search techniques, absent further factual allegations. *Id.* However, the court may have decided the inadequate training issue differently in light of the United States Supreme Court's decision in *City of Canton v. Harris*, 109 S. Ct. 1197 (1989) (discussed *supra* notes 79-82 and accompanying text).

126. *Colburn v. Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1138 (1989).

127. *Id.* at 666.

128. *Id.* (quoting *Frazier v. Southeastern Pa. Transp. Auth.*, 785 F.2d 65, 68 (3d Cir. 1986)).

129. *Id.* (quoting *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981)).

Circuit decisional law required. However, the *Colburn* court failed to state clearly what the complaint actually should state in order to meet the heightened standard. The opinion required that a plaintiff, to satisfy its fact pleading rule, first submit allegations that are specific enough factually to identify the alleged conduct by which the defendants have caused the plaintiff's harm.¹³⁰ But, the court stated in the next paragraph that "[w]e have routinely held that complaints comply with this standard if they allege the specific conduct violating the plaintiff's rights, *the time and the place of that conduct, and the identity of the responsible officials.*"¹³¹

Did the court of appeals wish to demand compliance with the former standard, or the more stringent latter standard? If the court wants a complaint to allege the requirements in the latter, can a district court dismiss a complaint for failure to allege any one of the named allegations, or do the mitigating factors expressed by the court of appeals permit a trial judge to view a less specific complaint more leniently? Such questions point out how inconsistent and unclear the pleading standard is after *Colburn*.

Little more than five months after *Colburn*, whatever rules the court had attempted to articulate were muddled further by *Freedman v. City of Allentown*.¹³² In *Freedman*, speaking again through Judge Sloviter, the court affirmed the dismissal of a section 1983 complaint against the City of Allentown and various city police, probation officers, and other officials based upon a hauntingly similar set of facts.

Jerry Freedman appeared at the Allentown Police Station.¹³³ For the next two and one-half hours, he was questioned by Allentown Police Detective Carl Balliet before being arrested and placed in a cell that was isolated from those cells where police officers could readily observe detainees.¹³⁴ Within forty min-

130. *Id.*

131. *Id.* (emphasis added).

132. 853 F.2d 1111 (3d Cir. 1988).

133. *Id.* at 1113.

134. *Id.*

utes of his incarceration, Freedman hung himself by tying his shirt to an air vent grating in the cell.¹³⁵

The administrator of Freedman's estate filed a section 1983 complaint against the City of Allentown and various officials, including Detective Balliet, the chief and assistant chief of police, and Freedman's state probation officer.¹³⁶ Allegations against the individual officers stated that they knew or should have known that Freedman had suicidal tendencies, had attempted suicide, and "posed a significant and substantial risk of suicide . . . if left unattended"¹³⁷ but still failed to take proper precautions with respect to that risk.¹³⁸ The complaint alleged that the officers' actions constituted willful, deliberate, and intentional misconduct in reckless disregard of the decedent's rights.¹³⁹ As to the City, the complaint alleged the existence of municipal policies that failed to institute procedures to effectively monitor detainees with suicidal tendencies and failed to adequately train police officers in handling mentally disturbed suspects.¹⁴⁰

Those allegations were supported by facts as follows: decedent had "'large prominent scars' on his wrists, the inside of his elbows, and his neck . . . described . . . as 'suicide hesitation cuts.'"¹⁴¹ These scars were shown to Detective Balliet in response to his query on whether decedent had any scars; and the scars were "'readily apparent' when Freedman was 'physically searched by the defendants' after his arrest."¹⁴² To factually support the allegations of municipal liability, the complaint stated that "there had been at least one attempted suicide by the manner used by Freedman in the jail, and one actual suicide."¹⁴³

The district court dismissed the complaint, stating that the allegations against the individual officers, even if true, consti-

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (citing Record at 7).

142. *Id.* (citing Record at 7).

143. *Id.*

tuted mere negligence because the complaint alleged no facts to indicate "that the policemen knew or should have known of Freedman's suicidal tendencies."¹⁴⁴ In addition, the district court found the allegations of inadequate training factually insufficient to support a municipal liability claim.¹⁴⁵

Although the Third Circuit's recent decision in *Colburn v. Upper Darby Township*¹⁴⁶ would seem to have mandated reversal based upon these facts, Judge Sloviter's majority opinion affirmed the lower court's dismissal in all respects. The appellate court agreed with the district court that failure to recognize Freedman's scars as suicide hesitation cuts, without additional facts, constituted mere negligence insufficient to support a section 1983 action.¹⁴⁷ The court also used the same analysis to dispose of the inadequate monitoring and supervision allegations, saying that failure to put Freedman in a closely watched cell constituted, at most, mere negligence.¹⁴⁸ Lastly, the court stated that the allegations of inadequate training lacked "even a modicum of factual support."¹⁴⁹

Viewing this decision side-by-side with *Colburn*, it is difficult to glean an appropriate standard by which future civil rights complaints can be judged. Indeed, Judge Brotman's dissent in *Freedman* pointed out the problems and inconsistencies contrived by the *Freedman* majority. Responding to the majority's affirmation of the district court's dismissal of the claim against Detective Balliet, Judge Brotman said that "the relevant inquiry is whether a police officer's failure to recognize 'prominent' scars on a detainee's elbows, wrists and neck can ever amount to anything more than simple negligence?"¹⁵⁰ In Detective Balliet's case, the dissent remained unconvinced by the poorly analyzed conclusions of the majority:

144. *Id.* at 1113-14.

145. *Id.* at 1114.

146. 838 F.2d 663 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989) (discussed *supra* notes 116-31 and accompanying text).

147. *Freedman*, 853 F.2d at 1116. In *Daniels v. Williams*, 474 U.S. 327 (1986), the Supreme Court held that mere negligence does not implicate the due process clause of the fourteenth amendment. *Id.* at 333.

148. *Freedman*, 853 F.2d at 1116.

149. *Id.*

150. *Id.* at 1119 (Brotman, J., dissenting).

I remain unconvinced that Detective Balliet's inability to recognize the tell-tale signs of a high suicide risk individual can never amount to "recklessness." I fail to see how the majority can be so resolute in its position without knowing the extent of the police officer's background and training in detecting suicide risks and in suicide prevention, in addition to his prior experience with prisoners who have taken their own lives or attempted unsuccessfully to do so. None of the information concerning the officer's knowledge, experience and professional competence would likely be known even to the most diligent civil rights plaintiff at the pleadings stage, and, therefore, he should be entitled to adduce such pertinent facts through discovery.¹⁵¹

Turning to the municipal defendants, Judge Brotman showed how unfaithful the majority truly was to the *Colburn* decision. In *Colburn*, the Third Circuit found the allegations of two prior suicides in the Upper Darby Police Department Jail sufficient to state a claim against the supervisory officials for decedent Stierheim's suicide.¹⁵² The court of appeals stated that "[t]he two prior suicides can be viewed as providing the governing body of Upper Darby with actual or constructive knowledge of the alleged custom of inadequate monitoring of jail cells."¹⁵³

The dissent's response to the majority's apparent indifference to *Colburn* is clearly the persuasive position:

Plaintiffs' allegations at bar are completely indistinguishable from those in *Colburn*. Plaintiffs' complaint in this case alleges "[a]n attempted suicide in the precise manner in which the plaintiffs' decedent killed himself occurred approximately one-year prior by another detainee in the defendant jail" and that "at least one actual suicide" had occurred in the same jail at some unspecified prior time . . . [y]et, notwithstanding allegations almost identical to those in *Colburn*, the majority here, without explanation, finds them insufficient to withstand a motion to dismiss. I fail to perceive a meaningful distinction between the two cases on this particular claim.¹⁵⁴

Perhaps the only thing in the majority's opinion that reconciled with *Colburn* was acknowledgment that plaintiffs should be entitled to a reasonable amount of discovery "when the lack

151. *Id.*

152. *Colburn v. Upper Darby Township*, 838 F.2d 663, 672 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

153. *Id.*

154. *Freedman v. City of Allentown*, 853 F.2d 1111, 1121 (3d Cir. 1988) (Brotman, J., dissenting).

of factual specificity is fairly attributable to defendants' control of required information,"¹⁵⁵ and the majority seemed to ignore its own precedent by rejecting all the allegations in the complaint.

Indeed, the only response that the majority could conjure up to address the dissent wholly lacked merit: "The dissenting opinion's eloquent argument would, in effect, extend *Colburn* to apply to all jail suicides. The majority of this court has chosen to take a middle course. . . . Our difference with [the dissent] in this case is not one of principle but merely as to the specifics of line-drawing."¹⁵⁶

C. *Finding a Middle Ground*

Some commentators have suggested that elevated pleading standards simply do not work.¹⁵⁷ Although history and case law seem to bear out this position, the lower federal courts appear convinced that fact pleading is an important and useful doctrine. Indeed, no federal circuit that has adopted heightened pleading in civil rights claims has later determined that such law was error. The doctrine seems enthusiastically applied, and increasingly so.

Perhaps a more effective solution to this problem could come by analyzing the rule with respect to the particular party being sued. However, accepting, without analysis, a fact pleading requirement in every conceivable civil rights claim, without an assessment as to which complainants will be highly disadvantaged when suing certain defendants, is an irresponsible way to create new law. Such carelessness is amplified when grounded upon reasoning that cannot find empirical support.¹⁵⁸

Defendants can first be divided into individual officers and municipalities. Individual officer claims come in as many varieties as there are officials: prosecutors, police officers, school board members, city councilors, mayors, zoning and planning

155. *Id.* at 1114.

156. *Id.* at 1117-18.

157. See Wingate, *supra* note 10, at 688-93; Marcus, *supra* note 16.

158. See Wingate, *supra* note 10, at 688 (stating that there is really no evidence to show that civil rights suits are more likely to be frivolous than other claims). See generally Eisenberg & Schwab, *supra* note 6.

board members, etc. In this area, plaintiffs normally will be faced with a common law immunity assertion at the complaint stage or on a motion for summary judgment.¹⁵⁹ Although the immunity obstacle as formulated in *Harlow* was designed to resolve civil rights claims at as early a stage as possible, it may not be unreasonable for a court to ask a plaintiff to put some details in the complaint. For example, allegations that set forth the conduct that violated plaintiff's rights, along with reasonably close approximations of when and where the alleged conduct took place, always should pass muster. A court also could request that the name of the defendant(s) be averred when possible.¹⁶⁰

With respect to municipalities, the court always should keep in mind the difficulties that attorneys will have in pleading policy or custom and causation without the benefit of discovery.¹⁶¹ This should not mean that every alleged federal deprivation by a government official should authorize a civil rights plaintiff to reach for the government's wallet on the barest of allegations.

For example, claims alleging a municipal custom or a policy of inadequate training or supervision always should be construed liberally if properly pled but lacking in detail. Allegations pointing to acts by official policymakers, on the other hand, perhaps can get less delicate treatment in light of *City of*

159. The Supreme Court has recognized numerous common law immunities for public officials. *See, e.g.,* *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (presidents); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) (judges functioning as legislators); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (regional legislators); *Butz v. Economou*, 438 U.S. 478 (1978) (administrative judges and prosecutors); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecuting attorneys); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators). Public officials who have not had an immunity specifically meted out to them by the Court are afforded a qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-08 (1982); *Wood v. Strickland*, 420 U.S. 308, 313-22 (1975).

160. In many cases, however, the plaintiff does not know the identity of the official(s) involved. *See, e.g.,* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implied right of action against federal officials directly under the fourth amendment to the United States Constitution); *Partridge v. Two Unknown Police Officers*, 751 F.2d 1448 (5th Cir. 1985).

161. *See* *Colburn v. Upper Darby Township*, 838 F.2d 633, 666 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986).

St. Louis v. Praprotnik.¹⁶² Here, courts may be justified in asking that pleadings allege that state law properly identifies the named defendant as an authorized policymaker, as well as averring that the policymaker affirmatively acted, placing the responsibility for plaintiff's federally protected deprivation of rights upon that policymaker.

Lastly, if plaintiffs provide plausible explanations for their complaints' factual inadequacies, then defendants' motions to dismiss should be denied, and judges should exercise the great discretion granted to them under the Federal Rules of Civil Procedure that permit limited discovery in order to ferret out the validity of plaintiffs' claims during the summary judgment stage.¹⁶³

CONCLUSION

Neither rewriting nor reinterpreting the Federal Rules of Civil Procedure is a function properly presented for resolution to the lower federal courts. However, the mounting burden placed upon the judiciary, as well as other policy considerations,¹⁶⁴ do not necessarily give judges any room to accept the most minimal allegations as a statement of a claim at all times. To concede that a federal judge can ask for something more specific than just the elements of the cause of action in the complaint is not an outlandish concession. But, simply permitting a court to so elevate complaint requirements in civil rights claims is a much more difficult concession to make. And to so burden a municipal plaintiff, whose pleading problems under *Monell* and its progeny are already difficult, and who normally

162. 485 U.S. 112 (1988); *see supra* notes 71-77 and accompanying text.

163. This technique of handling factually questionable complaints has been suggested by a number of commentators. *See, e.g.,* Vairo, *supra* note 99, at 220; Marcus, *supra* note 16, at 493-94; Wingate, *supra* note 10, at 689.

164. It is not a foregone conclusion that taxpayers would concur with a federal judge's opinion that factors such as time, expense, and notoriety outweigh the public policy interests of ensuring that public officials act within constitutional limitations and that plaintiffs be given their "day in court."

cannot obtain the facts necessary to meet this requirement without some discovery, is both irrational and unjust.

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