Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation

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PRESUMED FRIVOLOUS: APPLICATION OF STRINGENT PLEADING REQUIREMENTS IN CIVIL RIGHTS LITIGATION

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*I can sit down and write a lawsuit and feel like my pen’s got oil on it, it’s so easy.¹

INTRODUCTION

Development of a cynical view about the way in which courts decide cases is a perennial risk and perhaps an inevitable consequence for any thoughtful student of the law. Such cynicism often is grounded in a belief that judges are result oriented—that reasons for a decision in a case follow, instead of dictate, the result. Judicial action that lacks any valid supporting rationale not only invites such criticism, but also suggests that the courts themselves have become cynical. This Article examines one example of such court action, taken in response to the dramatic increase in the volume of civil rights cases, and attempts to expose the underlying judicial attitude and to provide an analytical framework free of that cynicism’s influence.

The Problem

Civil rights actions constitute one of the most significant components of the federal courts’ dockets, at least in terms of sheer quantity of cases. During the twelve-month period ending June 30, 1987, for example, plaintiffs filed 43,359 civil rights complaints in the federal district courts, constituting more than 18% of the total cases commenced.² In contrast, during the twelve-month period

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² 1987 Annual Report of the Director of the Administrative Office of the United States Courts 200-01 (Table C 3B) [All yearly reports of the Administrative Office are cited herein-
from 1966 to 1967, 2,131 plaintiffs initiated civil rights actions, comprising barely 3% of the cases filed. Thus, the number of civil rights actions has increased nearly 2,000% from 1966 to 1987, while the corresponding increase of the total number of cases has been a mere 235%.

Actions brought by prisoners, primarily pursuant to 42 U.S.C. section 1983, account in large part for the dramatic rise in the volume of civil rights litigation. As the Supreme Court has noted:

For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State. . . . What for a private citizen would be a dispute with

after as 19xx Annual Report]. Only contract actions are filed with greater frequency, at a rate of 19% of total cases commenced. Id. at 12. The Administrative Office maintains case data by “statistical year,” which runs from July 1 to June 30. As Professors Eisenberg and Schwab correctly note, several factors concerning the methods by which the Administrative Office maintains case information affect the data’s usefulness. See Eisenberg & Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 662-63 (1987). Those factors, however, do not affect the data’s use here.

The majority of civil rights actions are brought pursuant to 42 U.S.C. § 1983 (1982). State courts have concurrent jurisdiction with federal courts over § 1983 actions. Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980). Although reliable comprehensive data regarding the number of state court § 1983 actions are not available, one commentator suggests that the number of such cases is increasing. Steinglass, The Emerging State Court § 1983 Action: A Procedural Review, 38 U. Miami L. Rev. 381, 435 (1984) (analyzing the number of reported § 1983 state court appellate decisions). Professor Steinglass’ figures, however, suggest that the volume of state § 1983 litigation remains minor relative to the volume experienced by the federal courts. Id. (105 reported state appellate decisions in 1983).

3. 1967 Annual Report 114 (number of nonprisoner civil rights actions filed); 1975 Annual Report 207 (Table 24) (number of prisoner civil rights actions filed during each of previous ten years). The Administrative Office segregates prisoner and nonprisoner civil rights actions. The total number of civil rights cases cited for 1966-67 represents the sum of the numbers from each category.

4. The number of district court judges has increased only 68% over the same interval, from 317 in 1967 to 532 in 1987. 1987 Annual Report 49; 1967 Annual Report 94.

5. Section 1983 states:

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 . . . .

his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.\(^6\)

In 1987, for example, prisoner-initiated cases constituted more than half of the number of civil rights actions filed and almost 10% of all new cases.\(^7\) In contrast, prisoner civil rights suits composed only 1.3% of the federal cases filed in 1967.\(^8\)

Both courts and commentators have given almost constant attention to the burden arising from the high volume of civil rights litigation, particularly by prisoners.\(^9\) The concern, however, has not been limited solely to the quantitative aspects of the litigation deluge. As early as 1968, one district judge contended that “[a] substantial number of these cases [civil rights actions] are frivolous.”\(^10\) This dour assessment has remained a consistent theme in numerous decisions.\(^11\)

The anecdotal evidence suggests that the courts’ characterization is, at least in part, justified.\(^12\) For example, one particularly crea-

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7. 1987 Annual Report 200-01 (Table C 3B) (9.6%). Prisoners filed 22,936 such actions in the 1987 statistical year—808 by federal prisoners and 22,128 by state prisoners. Id. The huge disparity in the number of filings between federal and state prisoners has remained constant over the past three decades. In 1967, the number of civil rights actions by federal and state prisoners were 58 and 878, respectively. 1975 Annual Report 207 (Table 24). One federal judge contends that the disparity is the result of differences in the quality of personnel and training in the federal and state penal systems. See Doumar, Prisoners’ Civil Rights Suits: A Pompous Delusion, 11:1 Geo. Mason U.L. Rev. 1, 9 (1988) (Judge, E.D. Va.).
12. One inmate litigant openly threatened, by letter sent to the Oklahoma Attorney General’s Office, that unless he was released from prison he would continue to file numerous civil suits at the taxpayers’ expense, and train and encourage other inmates to follow suit. Cotner v. Campbell, 618 F. Supp. 1091, 1094 (E.D. Okla. 1985). The inmate, Robert Cotner,
tive litigant filed actions to vindicate constitutional deprivations arising from the overwatering of a prison lawn, the baking of desserts in aluminum pans and the fact that a statutory seat belt requirement did not apply to bicycles and horses.\textsuperscript{13} Other cases, while not outright frivolous, have been based on arguably \textit{de minimis} deprivations.\textsuperscript{14}

\textbf{The Judicial Response}

Courts have developed a number of doctrinal responses intended to mitigate the perceived burden.\textsuperscript{15} The courts also utilize proce-

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\item Calculated that the cost to the state to litigate his complaints would be more than $363,000 during his ten-year prison term. His training of other inmates, he contended, would increase the drain on the public fisc even more. \textit{Id.} at 1102.
\item Other inmate plaintiffs have been even more prolific. Perhaps the most notorious is Clovis Carl Green. Green is credited with filing no less than 600 separate actions, \textit{In re} Green, 669 F.2d 779, 781 (D.C. Cir. 1981), prompting one judge to raise the question of Green's eligibility for inclusion in \textit{The Guinness Book of World Records}. Green v. Arnold, 512 F. Supp. 650, 651 n.4 (W.D. Tex. 1981). In fact, legendary litigants, such as Green, have resulted in significant contributions to the literary quality of judicial opinions. For example, in Green v. Arnold, Judge Hudspeth equated Green with Loki, a character from Norse mythology, noting: "When the Teutonic gods tired of Loki's troublemaking, they chained him to the rocks with a poisonous snake suspended above him, dripping poison on Loki . . . . That case arose prior to the Eighth Amendment." \textit{Id.} at 652 n.11; see \textit{Demos v. Kinchloe}, 563 F. Supp. 30, 32-33 & n.4 (E.D. Wash. 1982) (comparing plaintiff to apples and one-a-day vitamins, and wagering that plaintiff could "easily dethrone the current champion," Mr. Green).
\item Franklin v. Oregon, 563 F. Supp. 1310, 1329-32 (D. Or. 1983). Franklin, albeit no Clovis Green, claimed to have filed more than 140 lawsuits. A district judge noted that court records, however, contained less than 140, but remarked: "I do not know where the others are, nor do I wish to find out." \textit{Id.} at 1317 n.3. Franklin has explained his litigious nature: "The Lord spoke to me, and he told me to file these lawsuits and said, 'You will win big in your lawsuits.'" \textit{Id.} at 1316 n.1. To date the prophecy is unfulfilled. See \textit{id.} at 1318, 1334 (dismissing 37 of Franklin's cases and limiting him to six lawsuits per year).
\item \textit{See} Whitman, \textit{supra} note 9, at 6-7:

During recent years federal judges have elaborated various doctrines that, in purpose or effect, discourage section 1983 litigants and dispose of specific cases: standing; exhaustion; immunities; abstention; interpretation of the eleventh amendment; res judicata; as well as close construction of the statutory
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dual mechanisms, particularly in the case of prisoner suits, to screen out meritless actions at the earliest stage of litigation. For example, an increasing number of federal courts require that civil rights plaintiffs meet a stricter or heightened standard of pleading in complaints.

This judicially imposed standard requires "plaintiffs in civil rights cases . . . to plead facts with specificity." Courts have imposed the more rigorous standard on all types of civil rights actions, including cases based on racially discriminatory employment practices, conspiracy, municipal liability and prison conditions. One court has even applied the heightened requirement to complaints filed by the federal government.

language, of the scope of constitutional rights, and of the elements of a cause of action.

16. Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 611 (1979). One mechanism utilized is 28 U.S.C. § 1915 (1982), the federal in forma pauperis statute, which provides the court with authority to dismiss "frivolous or malicious" actions filed pursuant to the statute. A significant number of civil rights actions are filed under the provision. See infra notes 260-82 and accompanying text (discussing application of § 1915).


This Article does not examine the issue of state court pleading requirements. As mentioned supra note 2, most civil rights actions are brought in federal court. At least one state court, however, has specifically rejected a heightened pleading standard. See Cuhna v. City of Algona, 334 N.W.2d 591, 596 (Iowa 1983). Moreover, application of overly strict state pleading rules to civil rights actions might impermissibly impinge on federally created rights. See Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949).


22. See Gill v. Mooney, 824 F.2d 192, 194 (2d Cir. 1987) (claims brought under § 1983).

This Article considers whether a more rigorous standard of pleading for civil rights complaints is necessary, justified, or even compatible with the federal civil procedural scheme. Section I briefly examines the development and function of pleading under the Federal Rules of Civil Procedure. Section II reviews the courts' development and application of the heightened requirement. Section III analyzes the higher standard to determine whether it is consistent with the intent and design of the Federal Rules of Civil Procedure. This section also explores the relationship between the standard's rationale and other competing policies that it implicates, including the policy of special treatment afforded pro se litigants and the remedial purposes of the civil rights statutes. Section IV examines whether the stricter pleading requirement is even necessary in view of the numerous alternative mechanisms available to the courts, particularly those contained in the federal rules.

The Article concludes that both the purpose and effect of a special pleading standard for civil rights actions is inconsistent with modern procedural theory. The requirement of greater factual specificity is wholly unnecessary and ineffective in achieving its goal. The rule is simply a reflection of a widespread judicial assumption that most, if not all, civil rights suits lack merit.

I. PLEADING UNDER THE FEDERAL RULES

A sixteen year-old-boy could plead under these rules.\(^{25}\)

Simplified pleading was the centerpiece of the new procedural scheme embodied in the Federal Rules of Civil Procedure, adopted in 1938.\(^ {26}\) With perhaps illustrative brevity, Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief."\(^ {27}\) Adoption of

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24. For an overview of this component of the issue, see Wingate, supra note 17, at 688-92.
26. See id. at 59 ("Rule 8 is the keystone of the system of pleading embodied in federal rules."); Smith, Judge Charles E. Clark and The Federal Rules of Civil Procedure, 85 Yale L.J. 914, 917-19 (1976) (Simplified pleading was one of Clark's primary goals for new procedural rules.).
the simple language of Rule 8 represented a complete rejection of previous common law and code pleading principles.

Historically, pleading rules were designed to assist directly in identifying and resolving the merits of the dispute being litigated. To achieve this purpose, pleading served several crucial functions in the litigation process: (1) to provide notice of the nature of the claim or defense; (2) to state the facts the parties believed to exist; (3) to narrow the issues to be resolved; and (4) to dispose of frivolous claims or defenses.\(^\text{28}\) Not surprisingly, considering the breadth of the traditional role of pleadings, extremely strict pleading rules developed. The pleading process operated on the premise that imposing rigid requirements through a series of responsive pleadings would ultimately either terminate meritless claims or reduce the dispute to a single dispositive issue of law or fact.\(^\text{29}\) In application, however, the process served to dispose of cases on technical grounds, not on the merits of the underlying disputes. For example, failure to plead an essential allegation, regardless of the actual facts, often resulted in early termination of the litigation by demurrer or motion to dismiss.\(^\text{30}\)

The modern role of pleading is much more narrow; the simple pleading concept that the drafters envisioned is one of limited function. The federal rules' design constitutes an explicit rejection of the functional responsibilities that the common law and code pleading systems placed on pleading. This design also reflects the view that pleadings are ineffective in performing those functions, particularly at the very outset of the litigation process before all of the relevant facts are available to the parties.\(^\text{31}\) Resolution on the merits is the primary goal of the process.\(^\text{32}\)

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28. See Wright & Miller, supra note 25, at 59-60.
29. See id. at 61.
30. Id. at 60.
32. See Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").
The drafters of the federal rules recognized, however, that the various roles pleadings have played historically are essential to the litigation process and must be performed by other components of the new procedural scheme. Under the modern rules, therefore, the last three of the listed functions are performed by procedural mechanisms other than pleading. For example, discovery and summary judgment now perform the function of identifying and disclosing the relevant facts. Discovery and summary judgment also can operate to narrow the issues to be tried. In limited circumstances, a litigant also may utilize a motion to dismiss for failure to state a claim in order to limit the case's scope. With regard to the last function, early termination of frivolous lawsuits, motions to dismiss and motions for summary judgment that are used properly provide an avenue for the expeditious elimination of meritless suits. In addition, Rule 11 is designed to operate as a deterrent to frivolous actions.

A. Function of Modern Pleading

Under the structure of the Federal Rules of Civil Procedure, the essential function reserved for pleading is to provide "notice" of the claim or defense. The nature and scope of the concept of "notice," however, is hardly self-evident. The rules do not include, de-
fine, or even refer to "notice," nor did the draftsmen use the term in their comments to the rules or in collateral commentary. The term appears to have rooted in procedural parlance after the Supreme Court referred to modern practice as "simplified 'notice pleading.'" To state that pleadings are to provide notice says little. Standing alone the term "notice" is imprecise. Notice of what, to whom, and, most importantly, for what purpose?

An examination of the intended purpose of pleading is therefore essential to an understanding of notice. Although the principal draftsman of the rules, Judge Clark, was loath to use the term notice, his discussion of the purpose of pleading under the federal rules provides significant guidance. Most importantly, pleadings no longer play a dispositive role with regard to the merits of the case. Instead, for Clark, the Advisory Committee properly described the "pleading objectives and essentials" by stating:

The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

As Clark further commented: "This properly defines and limits the role to be played by the mutual statement of claims of the parties. It sets the lawsuit in action and informs the parties and the court of the general nature of the contentions of the litigants."

41. In fact, Judge Clark stated in subsequent commentary: "But 'notice' is not a concept of the Rules, as the Advisory Committee's Note [to the 1955 amendments] . . . so carefully points out." Clark, Special Pleading in the "Big Case," 21 F.R.D. 45, 49-50 (1957) [hereinafter Clark, Special Pleading]; see Clark, Pleading Under the Federal Rules, 12 Wyo. L.J. 177, 181 (1958) [hereinafter Clark, Pleading Under the Federal Rules] ("No member of the Advisory Committee, so far as I know, has ever said that, and of course that isn't the real theory.");


43. See Clark, Pleading Under the Federal Rules, supra note 41, at 181 (concept of notice "isn't anything that we can use with any precision").

44. See Clark, Special Pleading, supra note 41, at 49-50.

45. Id. at 47 (Pleadings do "not assume to decide the case.").


47. Clark, Special Pleading, supra note 41, at 47.
“Notice” as embodied in modern pleading thus serves only two limited and simple functions: to identify the matter in dispute and to initiate the process of its resolution. The identification must be sufficient to permit the intended recipients of notice, the parties and the court to move forward in the process. Thus, for the court, notice permits the case to “be routed through the court processes,” for example, toward “a jury trial, an injunction, or other kindred interlocutory relief or action.” For the opposing party, such identification permits that party to proceed with litigation through the appropriate mechanisms, such as answer, discovery and dispositive motions.

B. Specificity Required

Despite the functional simplicity of pleading under the federal rules, the amount of detail required in the complaint remains a source of controversy. The uncertainty usually revolves around the degree of factual specificity required. The simple answer is, of course, that absent an express requirement of greater specificity in the rules, pleadings must include enough facts to identify the matter in dispute. As a result, the required specificity must be determined on a case-by-case basis, identifying the particular matter at issue. As the Advisory Committee stated, “[G]ood pleading . . . requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.” A brief examination of the operation of specific provisions of the rules best illustrates the practical dimensions of this general principle.

48. By commencing the action, of course, pleading also operates to toll the statute of limitations. Fed. R. Civ. P. 3 (filing of complaint commences the action).
49. Clark, Handmaid of Justice, supra note 31, at 316.
51. Marcus, supra note 17, at 435-36.
52. Id.
53. Fed. R. Civ. P. 9 (imposing additional pleading requirements on certain types of claims or elements of damage); see infra notes 192-99 and accompanying text (discussing requirements of Rule 9).
1. **Forms**

Numerous form complaints that accompany the federal rules are expressly intended to illustrate the level of specificity required. For example, Forms 3 through 8 cover actions based on a debt owed to the plaintiff. All six forms contain the basic allegation that "defendant owes plaintiff __ dollars." That bare allegation, however, is insufficient. While the identification of the case as an action for a debt may be enough notice to the court to "route it through court processes," such an identification is insufficient to permit the defendant to proceed to answer or file the appropriate motion. The forms thus mandate two additional allegations: (1) the time the debt arose and (2) the type of debt, such as a promissory note, an account, money lent, and so on. This minimal additional detail provides enough information to identify the disputed matter sufficiently to permit the defendant to proceed. "What more could one properly ask?"

2. **Procedural responses to the complaint**

The degree of factual specificity needed also is discernible from the operation of the rules governing the defendant’s available procedural responses to the complaint. The functional principle re-
mains the same: Do the allegations sufficiently identify the matter in dispute to permit the defendant to proceed with those procedural responses—to answer, to pursue discovery, or to file dispositive motions?

a. Answer

The Rules impose minimal burdens on the defendant with regard to the contents of a responsive pleading. Rule 8(b) requires a defendant in the answer: (1) to set forth defenses; (2) to admit or deny the allegations of the complaint as appropriate; or (3) to state that the defendant lacks knowledge or information sufficient to permit an admission or denial of the allegations.62 Under Rule 8(b), therefore, an appropriate response to a vague allegation in a complaint is a denial or statement of a lack of knowledge or information sufficient to admit or deny.63 To the extent that vague allegations in the complaint render it difficult to present defenses, a defendant always can assert applicable defenses by way of amendment at almost any later stage of the litigation.64 Thus, a defendant easily can proceed to discovery to secure greater information regarding the plaintiff's claim in the face of the vaguest of allegations.65

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62. FED. R. CIV. P. 8(b).

63. FED. R. CIV. P. 8(b) also imposes a "good faith" requirement on the defendant in responding to the plaintiff's allegations. See FED. R. CIV. P. 11. However, when a defendant is uncertain about the law or facts on which the plaintiff relies, she may deny. See Schultz v. Manor House of Madison, Inc., 51 F.R.D. 16, 17-18 (W.D. Wis. 1970).

64. See FED. R. CIV. P. 15 (outlining policy of liberal grant of amendments to pleadings, even after trial in appropriate circumstances); Groninger v. Davison, 364 F.2d 638, 640 (8th Cir. 1966) (court permitted amendment to assert defense of statute of limitations after pretrial conference).

65. Of course, proceeding with discovery in the face of vague allegations may not be the most efficient nor cost effective approach. In fact, vague allegations that fail to identify sufficiently the matter in dispute may prevent a party from adequately assessing the most effective course to pursue. In such a case, alternatives are available. See infra notes 66-70 and accompanying text.
b. **Motion for more definite statement**

Alternatively, the defendant faced with vague or confusing allegations may request greater detail by moving for a more definite statement of the claim under Rule 12(e). The circumstances in which such a motion is proper, however, are rather limited. Rule 12(e) provides that a party may make the motion “[i]f a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” Yet, as noted above, a defendant ordinarily can answer even the vaguest of allegations by a denial. Rule 12(e) motions are not to be used when discovery is more appropriate. Most importantly, even when the motion is appropriate and granted, the only result is that the plaintiff must then amend the complaint to provide the detail specifically requested. The effect of Rule 12(e), applied properly, is minimal and supports the conclusion that only very limited specificity is required.

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67. Id. At least one court has held that a court may *sua sponte* require more detail under the authority of Rule 12(e). See Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985). The court’s conclusion is curious as the language of the rule focuses exclusively on the ability of a party to prepare a responsive pleading.
68. See Schultz v. Manor House of Madison, Inc., 51 F.R.D. 16, 17 (W.D. Wis. 1970). The court stated: “It is to be noted that a motion for more definite statement is not to assist in getting facts in preparation for trial as such. Other rules relating to discovery . . . exist for this purpose.” Id. (quoting Mitchell v. E-Z Way Towers, 269 F.2d 126, 132 (1959)). The original text of Rule 12(e) permitted a defendant to move for a “bill of particulars of any matter” necessary “to prepare for trial.” The 1946 amendments to the rule deleted this heavily criticized provision. See Fed. R. Civ. P. 12(e) advisory committee note (discussing 1946 amendments).

Of course, vague allegations may render even discovery difficult; a party may be unable to determine what to pursue other than generalized requests for more factual detail underlying the claim. In that case, arguably, a motion for a more definite statement is appropriate because the party is unable to proceed effectively toward discovery.

70. Not surprisingly, Judge Clark thought that Rule 12(e) was superfluous. In fact, he fought hard to keep it out of the federal rules entirely.

The question may be asked, if the motion to make a more definite statement is so seldom used or seldom granted, why is it left in the rules? My answer is that I did my very best as Reporter to have it left out. It so rarely serves a useful purpose that I think the opportunity it affords for delay outweighs any utility it might be thought to have . . .

In summary, pleading under the federal rules plays a relatively unimportant and limited role in the litigation process. The complaint operates only to initiate the process and to identify the nature of the dispute. The rules are crafted to insulate the pleading phase of litigation from any involvement in substantive resolution of the merits, except in limited and narrowly defined circumstances. Despite these simple concepts, courts continue to strive to give pleadings a larger role.

II. The Stringent Pleading Standard

A. Development of the Standard

The exact genesis of a special rule of pleading applicable to civil rights actions is difficult to establish. In the early 1960s, even prior to the litigation deluge, courts began to dismiss civil rights complaints for failure to allege specific facts in support of conclusory allegations, particularly when claims of conspiracy were involved. Those courts, however, stopped short of identifying a "special rule" applicable only to civil rights actions.

In Valley v. Maule, a Connecticut district court first articulated a rule uniquely applicable to civil rights suits. The plaintiffs asserted a conspiracy claim, pursuant to sections 1983 and 1985 of Title 42, against a municipality, several members of the police department and a private company. The court dismissed the complaint as "utterly devoid of any factual allegations which allege overt acts or a purposeful deprivation of rights.

In response to the plaintiffs' argument, the court acknowledged that detailed factual allegations were unnecessary under the theory of notice plead-

71. See Negrich v. Hohn, 379 F.2d 213, 215 (3d Cir. 1967) (complaint against police and prison officials dismissed as too "broad and conclusory" when impossible to tell which defendant participated in various conduct alleged); Birnbaum v. Trussell, 347 F.2d 86, 89 (2d Cir. 1965) (complaint of reverse discrimination by fired white physician dismissed as containing only "vague and conclusory allegations").


74. Id. at 959.

75. Id. at 960.
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ing. "As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts." 76

The court, however, failed to identify any direct legal support for its broad pronouncement. Instead, it cited by analogy to four cases. 77 Even by analogy, the cited authorities are dubious at best. None of the courts in any of the four cases relied on unique pleading requirements. Indeed, such a rule was not necessary for the result in those cases. Three of the cases involved claims of rights violations by conspiracy. 78 The courts held that, as a matter of substantive law, an overt act in furtherance of the conspiracy is an essential element of the cause of action. 79 As a result, a complaint must include factual allegations of an overt act to state a claim for civil conspiracy. 80 The cases thus revolved around the substantive law of civil conspiracy, not simple pleading requirements. In fact, in one of the three cases the court expressly rejected a heightened pleading requirement, noting that a plaintiff "should not be required here to plead his evidence." 81 Moreover, the fourth case upon which the court in Valley relied, Jemzura v. Belden, 82 explicitly and approvingly referred to the notice pleading concepts contained in the federal rules. 83

76. Id.
77. The court used a "cf." signal. Id. at 961.
79. E.g., Hoffman, 288 F.2d at 295.
80. Id. In comparing civil and criminal conspiracy actions, the court in Hoffman stated: "In a civil conspiracy, the conspiracy itself is not a cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage." Id.
81. Id. at 294-95. The court stated further:

We question some of the broad language used in the decisions concerning "conclusory allegations." We think the validity of the complaint at the pleading stage cannot be disposed on the basis of the presence of so-called "conclusory" allegations of "conspiracy" or "conspiring" of "discriminatory intent" or of "acting under color of state law or authority" but that as to these elements of a cause of action such allegations are proper and necessary.

Id. at 295.
83. Id. at 204 (court considered sua sponte dismissal for failure to comply with Rule 8(a) requirement of "short and plain statement" of claim and entitlement to relief). Similarly, in
In Valley, however, the court relied more heavily on policy considerations than precedent to support an exception to the normal pleading standards. The court stated:

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.  

Under the Valley analysis, therefore, the creation or existence of a “special” pleading rule is founded on three points. First, many civil rights actions are frivolous, a point that the courts in the cases cited in Valley also made. Second, many civil rights complaints should be litigated in state courts rather than federal courts. Third, civil rights actions potentially subject government and its employees to unnecessary harassment and embarrassment. The court also recognized, however, that the competing duty of the federal courts to remain open to valid claims created tension. Based on the authority and rationale of Valley, a number of other courts

Bargainer v. Michal, 233 F. Supp. 270 (N.D. Ohio 1964), the court remained true to the notice pleading concept by treating the defendants' motion to dismiss as a motion for more definite statement under Rule 12(e). Id. at 274.


85. See Hoffman, 268 F.2d at 295 ("[A]n astonishing few of the actions for violations of civil rights have any real merit."); Powell v. Workmen's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964) (expressing concern about "inviting every party to a state proceeding angered at delay to file a complaint"); Jemzura v. Belden, 281 F. Supp. 200, 207 (N.D.N.Y. 1968) (quoting Powell).

86. See, e.g., Bargainer, 233 F. Supp. at 274 (injury alleged did not involve a “national, as opposed to [a] state” right).


have embraced a similar pleading requirement, albeit not always explicitly.

B. Operation of the Standard

A Rule 12(b)(6) motion to dismiss for failure to state a claim serves as the defendant's principal mechanism for presenting to the court the issue of compliance with the stringent pleading standard. According to the courts adhering to the requirement, a complaint lacking in sufficient factual detail fails to state a claim. Generally, courts enter such dismissals with prejudice. In recognition of the competing policy to remain receptive to valid claims, however, most courts provide plaintiffs an opportunity to amend before entering a judgment with prejudice. Yet, courts will deny an opportunity to amend before dismissal if such an amendment would be futile or if the plaintiff failed to exercise previous opportunities to amend. Although the basic operation of the standard is fairly consistent among the courts, a variety of specific applications of the heightened standard have evolved.

89. See, e.g., Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975) (complaint must contain "at least some allegations of facts indicating a deprivation of civil rights"); Kauffman v. Moss, 420 F.2d 1270, 1275 (3d Cir.) ("[A]llegations in a civil rights case must be specifically pleaded."); cert. denied, 400 U.S. 846 (1970); Ambrogio, 456 F. Supp. at 1137 ("particularized fact pleading" required).

90. E.g., Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (complaints containing vague or conclusory allegations of deprivation subject to dismissal).

91. FED. R. CIV. P. 12(b)(6).


93. See, e.g., Rotolo v. Borough of Charleroi, 532 F.2d 920, 923 (3d Cir. 1976) (remanding with directions to allow amendment within reasonable period); Monitor v. City of Chicago, 653 F. Supp. 1234, 1300 (N.D. Ill. 1987) (allowing plaintiff 30 days to amend; failure to amend will result in dismissal with prejudice); Townsend v. Frame, 587 F. Supp. 369, 372 (E.D. Pa. 1984) (giving plaintiff 20 days to amend).

The necessity of providing an opportunity to amend, however, limits the efficacy of the rule in achieving the objective of expeditiously terminating meritless cases. See infra note 340 and accompanying text.

94. See Strauss v. City of Chicago, 760 F.2d 765, 770 (7th Cir. 1985) (failure to pursue prior opportunity justifies denial of leave to amend); Jafree v. Barber, 689 F.2d 640, 644 (7th Cir. 1982) (previous amendment failed to cure defects; no further opportunity to amend permitted due to complete failure "to allege requisite facts"); United States v. City of Philadelphia, 644 F.2d 187, 206 (3d Cir. 1980) (deliberate rejection of opportunity to amend justified denial of leave to amend).
C. Application of the Standard

A number of jurisdictions, exemplified by the Third Circuit, have adopted the heightened standard for all civil rights actions.95 Other courts have utilized the standard for particular types of claims or defenses, such as cases involving claims of municipal liability,96 or implicating immunity defenses.97 In practice, every circuit has applied some form of a heightened requirement,98 even though several circuits have expressly rejected the concept.99 The stringent standard has proved to be a source of controversy, confusion and inconsistent application.100

1. General application to civil rights actions

The Third Circuit is the recognized leader in use of the stringent requirement,101 having applied it with enthusiasm and aplomb. Relying on the rationale of Valley and the authority of the earlier case of Negrich v. Hohn,102 the Third Circuit's requirement of greater factual specificity applies to all types of civil rights ac-

95. See, e.g., District Council 47 v. Bradley, 795 F.2d 310, 313 (3d Cir. 1986).
98. See Strauss v. City of Chicago, 760 F.2d 765, 768 (7th Cir. 1985) (facts needed in cases alleging municipal liability); Hurney v. Carver, 602 F.2d 993, 995 (1st Cir. 1979) (conclusory allegations insufficient); Smith v. International Longshoremen's Ass'n, 592 F.2d 225, 226 (4th Cir. 1979) ("conclusory," "vague," or "general" allegations insufficient); Hall v. Pennsylvania State Police, 570 F.2d 86, 89 (3d Cir. 1978) (same); Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (same); Wetherington v. Phillips, 526 F.2d 591 (4th Cir. 1975) (same), aff'g, 380 F. Supp. 426, 428 (E.D.N.C. 1974); Place v. Shepherd, 446 F.2d 1239, 1244 (6th Cir. 1971) (same); Jewell v. City of Covington, 425 F.2d 459, 460 (5th Cir.) (same), cert. denied, 400 U.S. 929 (1970); Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977) (conclusory allegations insufficient); Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976) (same); Coopersmith v. Supreme Court of Colorado, 465 F.2d 993, 994 (10th Cir. 1972) (same).
100. See Means v. City of Chicago, 535 F. Supp. 455, 459 (N.D. Ill. 1982) (discussing the "substantial disagreement in this district over what level of specificity in pleading is required under § 1983").
101. Marcus, supra note 17, at 449.
102. 379 F.2d 213 (3d Cir. 1967).
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The rule is based on the premise that plaintiffs "employing civil rights statutes are more likely to bring frivolous lawsuits than other federal plaintiffs," which creates a significant risk that public officials will be subjected needlessly to harassment and expense. As a result, a complaint must include sufficient facts to "satisfy" the court that the claim is not frivolous. Rotolo v. Borough of Charleroi illustrates this point.

In Rotolo, the plaintiff's substantive allegations were extremely straightforward. Rotolo was employed as a building inspector by the defendant borough. According to his complaint, Rotolo was fired pursuant to a vote of the councilmen defendants because he had "exercised his First Amendment privileges," constituting a denial of his constitutional rights. Applying the specificity requirement, the court affirmed dismissal of the complaint as "vague and conclusory" because it failed to include allegations concerning "when, where, and how" Rotolo had exercised his first amendment rights. The court stated that it could not determine from the complaint whether Rotolo's activity was subject to first amendment protection, or whether the activity was causally linked to his discharge. The court's invocation of a higher level of pleading specificity thus related solely to the court's ability to evaluate the merit of the action.

Third Circuit courts, however, have proffered the additional rationale that the rule is necessary to provide the defendant with


105. City of Philadelphia, 644 F.2d at 204 (citing Valley v. Maule, 297 F. Supp. 958, 960-61 (D. Conn. 1968)).


107. 532 F.2d 920 (3d Cir. 1976).

108. Id. at 921.

109. Id.

110. Id. at 923.

111. Id. As further explanation, the court stated: "The allegations state no facts upon which to weigh the substantiality of the claim; they do not aver the content of the alleged first amendment exercise." Id.
sufficient notice of the claim.\textsuperscript{112} This rationale is superfluous. The federal rules require that the defendant receive adequate notice sufficient to permit a responsive pleading.\textsuperscript{113} Moreover, under the federal rules inadequate notice will support the grant of a motion for a more definite statement, not dismissal for failure to state a claim.\textsuperscript{114} Again, \textit{Rotolo} is illustrative. According to the court, the plaintiff failed to set forth adequate facts establishing that the exercise of his first amendment rights caused his termination.\textsuperscript{115} Yet the defendants, perhaps more than the plaintiff, had knowledge of the facts relating to the cause of the termination. Notice to a defendant, therefore, cannot provide a valid rationale for applying a stringent pleading standard.

Moreover, the degree of specificity required is necessarily relegated to a case-by-case determination. As the court in \textit{Frazier v. Southeast Transportation Authority}\textsuperscript{116} concluded after attempting to develop a bright line rule:

\begin{quote}
Inevitably, the sufficiency of a complaint must be determined on a case-by-case basis. The factors discussed in prior decisions are helpful to a court making such an evaluation, but they must be considered in light of the purposes of the specificity rule. Thus, 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.\textsuperscript{117}
\end{quote}

The court in \textit{Frazier} recognized simultaneously, however, that a complaint should not be used to evaluate the plaintiff's proof, especially in civil rights cases in which "much of the evidence can be developed only through discovery."\textsuperscript{118} The court believed that expecting plaintiffs to know fully, much less plead, the details of the

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113. \textit{See supra} notes 65-67 and accompanying text.
114. If a plaintiff is permitted to amend, applying the standard through a 12(b)(6) motion operates much like a motion for more definite statement under Rule 12(e). The key difference is that the heightened fact pleading requirement significantly alters the traditional standard of adequate notice set forth in Rule 12(e). \textit{See supra} notes 66-67 and accompanying text (discussing Rule 12(e) standard).
115. \textit{Rotolo}, 532 F.2d at 923.
116. 785 F.2d 65 (3d Cir. 1986).
117. \textit{Id.} at 68.
118. \textit{Id.}
\end{flushleft}
practices or conduct upon which their claim is based was unreasonable.\textsuperscript{119} Yet, the court made no effort to reconcile these competing policy considerations. Perhaps reflecting this conflict, consistent application of the standard has proved illusory.\textsuperscript{120}

The Courts of Appeals for the Fifth and Seventh Circuits also have expressly adopted a stringent standard applicable to all civil rights actions.\textsuperscript{121} A number of other courts have imposed a stricter requirement, but with far less forthrightness. Instead of openly acknowledging that they are giving civil rights complaints unique treatment, courts obscure their actions by relying on general notions of overly vague or conclusory allegations.\textsuperscript{122} For example, although the Court of Appeals for the Tenth Circuit has expressly rejected a heightened requirement,\textsuperscript{123} courts within the circuit regularly dismiss civil rights complaints as being too "conclusory."\textsuperscript{124} In purpose and effect, of course, the result is the same: early dismissal of complaints that do not display merit affirmatively through factual detail.

2. Claims of municipal liability

A municipality can be held liable under section 1983 of Title 42 only for constitutional violations that its official policies and customary practices cause.\textsuperscript{125} Liability cannot be based solely on a

\textsuperscript{119} Id.


\textsuperscript{122} E.g., Winters v. Palumbo, 512 F. Supp. 7, 9 (E.D. Mo. 1980) (dismissal appropriate because "complaint is so conclusory as to be insufficient to support a claim under § 1983").


\textsuperscript{124} See, e.g., Wiggins v. New Mexico Supreme Court Clerk, 664 F.2d 812, 817 (10th Cir. 1981) (dismissal appropriate when complaints contain only "bare conclusory allegations"), cert. denied, 459 U.S. 840 (1982); Cotner v. Campbell, 618 F. Supp. 1091, 1094 (E.D. Okla. 1985) ("bald conclusions, unsupported by allegations of fact, are legally insufficient").

theory of *respondeat superior*. Normally, therefore, a single incident of unconstitutional conduct by a municipal employee is insufficient to support liability.

This notion of limited municipal liability, coupled with the more general concern about frivolous civil rights actions, has led a number of courts to develop a particular application of the heightened pleading standard. A plaintiff asserting a claim of municipal liability must allege specific facts to support a general allegation that a policy or custom caused a constitutional deprivation. According to the courts, the rationale underlying the pleading rule is even more compelling in a municipal case due to the potential scope of discovery and the issues to be tried. Thus, the rule in such cases implicates the concern, first articulated in *Valley*, of undue harassment of public officials. As the Court of Appeals for the Second Circuit explained:

[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.

As a result, general allegations of a municipal custom or policy are insufficient to ‘‘justify the extensive litigation such a claim entails.’’

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126. *Id.*
128. In fact, the Third Circuit has stated that application of the rule is even more compelling in a case alleging municipal liability. See *La Plant v. Frazier*, 564 F. Supp. 1095, 1098 (E.D. Pa. 1983) (“policy underlying the special pleading requirement . . . is even more pronounced”).
129. *See id.* at 1098.
131. *See supra* notes 84-85 and accompanying text.
For example, in *Strauss v. City of Chicago*, the plaintiff sued the city and a John Doe police officer based on the officer's alleged assault of him following an unlawful arrest. As the predicate for the claim against the city, the plaintiff alleged that the city had a "custom and practice": (1) of hiring into the police department individuals with a prior history of brutality; (2) of retaining as police officers individuals who demonstrated consistent brutality and disregard of civil rights while employed by the city; (3) of allowing individuals in custody to be silenced by physical abuse; and (4) of conducting sham investigations into charges of police misconduct. The plaintiff included statistical information regarding the number of complaints filed against the police department to support the allegations. The court, however, granted the defendant’s Rule 12(b)(6) motion because the complaint lacked any facts to suggest that the alleged policies actually existed.

Prior to discovery, however, the plaintiff normally would not have available the factual predicate that the court in *Strauss* required. A plaintiff, of course, would have to undertake reasonable investigation and have a good faith basis for the allegation of a policy or practice. In *Strauss*, the plaintiff had such a basis—statistical information regarding the large volume of similar complaints against the police. By failing to permit the case to proceed on that basis, the court rendered assertion of such a claim nearly impossible, as the court even acknowledged. For the court, however, concern that constitutional violations might go unremedied simply was not sufficient to justify exposing the city to litigation, not to mention liability.

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134. 760 F.2d 765, 766 (7th Cir. 1985).
135. Id. at 766.
136. Id. at 768.
137. Id. at 770.
139. *Strauss*, 760 F.2d at 769-70.
140. Id. As a result, the decision has received strong criticism even within the Seventh Circuit. See *Payne v. City of LaSalle*, 610 F. Supp. 606, 608 & n.3 (N.D. Ill. 1985) (characterizing the problem as a "double Catch 22 . . . (Catch 44?)"). As a result, other courts have held that allegations of the type set forth in *Strauss* are more than sufficient to withstand a motion to dismiss. E.g., *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986) (It is "improper to dismiss [a] . . . complaint alleging municipal liability even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.").
3. Claims implicating immunity defense

The immunity doctrine seeks to minimize subjecting public officials to harassment by litigation and exposure to liability. The doctrine is an affirmative defense that the defendant normally must plead, and is a complete defense in a damage action. This doctrine mitigates litigation burdens through several procedural devices. For example, the denial of a motion for summary judgment that is based on an immunity defense claim is immediately appealable despite its interlocutory nature. Primarily, these devices avoid exposing the officials and their agencies to broad discovery. Several courts have relied upon the more stringent pleading standard to achieve that objective.

For example, in *Elliott v. Perez*, the Court of Appeals for the Fifth Circuit held that when an action implicates an immunity defense, the plaintiff must set forth “detailed facts supporting the contention that the plea of immunity cannot be sustained.” The court reasoned that the immunity doctrine and the modern theory of “notice” pleading inherently conflict.

In view of the purposes of the immunity defense, . . . we conclude that allowing broadly-worded complaints, such as those of the plaintiffs here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity.

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142. See id. at 806-07, 817-18. Officials whose special functions or constitutional status require complete protection from suit, for example judges and legislators when performing judicial or legislative duties, are entitled to “absolute immunity.” Id. at 807. Other public officials are entitled to immunity only if they are performing their duties in “good faith”—referred to as “qualified immunity.” Id. at 814-15.
146. 751 F.2d 1472 (5th Cir. 1985).
147. Id. at 1482.
148. Id. at 1479.
149. Id. at 1476.
Judges thus have an independent duty to ascertain whether the defense of immunity applies; "[t]he trial judge may not wait on motions or other actions by the parties or counsel." The best mechanism to fulfill this duty, according to the court in *Elliott*, is a requirement of sufficient factual specificity in the complaint to permit the court to evaluate the applicability of the defense.

In *Elliott*, the court's approach, however, perverted the normal burdens of pleading allocated to the plaintiff and defendant. Because immunity is an affirmative defense, normally the defendant would bear the burden of raising the issue by motion or answer. Under the *Elliott* holding, however, the plaintiff must anticipate and affirmatively negate the defense with sufficient factual detail in the complaint. As in the case of municipal liability, often the facts necessary to meet such a pleading requirement are not available to the plaintiff prior to discovery. As a result, application of a higher standard may potentially penalize a plaintiff when the defendant controls the crucial facts. Fortunately, in recognition of this problem, some courts have applied a modification of the rule, permitting limited discovery only on narrow factual issues relating to the immunity defense. Such an approach protects public officials without unduly limiting the opportunity to pursue potentially meritorious claims.

In addition to the specific applications discussed above, courts have "tightened the application of Rule 8 where the very nature of the litigation compels it." For example, courts have utilized the stringent requirement in cases founded on claims of retaliation.

150. Id. at 1480.
151. Id. at 1480-82.
152. FED. R. CIV. P. 8(c); see Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
153. *Elliott*, 751 F.2d at 1481-82.
154. FED. R. CIV. P. 9(c); see Harlow, 457 U.S. at 815.
155. See Gutierrez v. Municipal Court, 838 F.2d 1031, 1053 (9th Cir. 1988) (giving directions to district court on remand to determine whether complaint alleged intentional discrimination sufficiently to avoid summary disposition), vacated as moot, 109 S. Ct. 1736 (1989); Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425, 1438 (D.C. Cir. 1987) (discovery limited to immunity issue).
156. *Elliott*, 751 F.2d at 1479.
157. See Gill v. Mooney, 824 F.2d 192, 194-95 (2d Cir. 1987) ("complaint which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleadings alone"); Winters v. Palumbo, 512 F. Supp. 7, 8-9 (E.D. Mo. 1980) (standard applied to claim of retaliation for being called as a witness).
and claims of conspiracy under sections 1983 and 1985 of Title 42.\textsuperscript{158} With very limited exception,\textsuperscript{159} courts applying the stringent pleading standard have not examined critically the doctrinal foundations, policy implications, or effect of their action.

III. **Analysis of the Standard**

_I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings._\textsuperscript{160}

Regardless of the specific application of a heightened pleading standard, the underlying rationale that the courts have articulated remains the same: The vast majority of civil rights actions are frivolous. The general purpose of the higher standard is, therefore, to mitigate the burden that the unwieldy quantity and depressing quality of such actions place on the courts and defendants. This general purpose has three specific overlapping objectives: (1) to reduce the burden on the courts through identification and termination of meritless cases at the outset of the litigation process; (2) to reduce any potential harassment of defendants or interference with their duties; and (3) to provide defendants with adequate notice of the facts underlying the action so that they can take early action to terminate the litigation through motion and/or assertion of appropriate defenses.\textsuperscript{161}

\begin{footnotesize}


\textsuperscript{160} Clark, *Special Pleading*, supra note 41, at 48.

\textsuperscript{161} In practice these three objectives overlap. For example, the second objective, reducing harassment and interference, is duplicative of the other two goals. Terminating frivolous actions early obviously achieves a reduction of the possibility that defendants will be subjected to harassment and interference. Additionally, the other two objectives differ only
\end{footnotesize}
While these functions may seem laudable, the fact is that the basic purpose of a higher standard of pleading, and therefore its operation, is directly contrary to the theory and function of pleading under the federal rules. Moreover, applying such a requirement undermines the remedial purposes of the civil rights statutes and virtually ignores the protective treatment traditionally afforded pro se plaintiffs.

A. Federal Rules

As discussed previously, the function of modern pleading is extremely limited. The complaint simply initiates the litigation process and identifies the nature of the claim for the court and defendant. As such, the complaint is not directly involved in the determination and resolution of the merits of the dispute. Unfortunately, the heightened pleading requirement transmutes the complaint into a device for determining the merits—a function expressly rejected in the development of the federal rules.

As a result, the heightened pleading requirement perverts the entire procedural balance that the rules established and creates a unique class of litigation. Indeed, the standard is avowedly designed to permit the court to evaluate the validity of the claim at the very outset of the litigation. In fact, the general requirement of greater factual specificity has evolved rapidly into a requirement that the plaintiff “satisfy” or convince the court factually that the claim asserted is not frivolous. This unique procedural requirement is not imposed pre-trial in any other type of case.

with regard to the beneficiary of early termination of frivolous actions—the court or the defendants.

162. The ultimate goal of the litigation process is, of course, resolving the dispute, normally through consideration of the merits by the court, the parties, or both. Thus, to the extent that pleadings are a part of that process, they do play an indirect role in resolving the merits.

163. See, e.g., Clark, Special Pleading, supra note 41, at 46; see also supra notes 41-50 and accompanying text.

164. See Valley v. Maule, 297 F. Supp. 959, 960 (D. Conn. 1968) (“It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation.”).

1. Diminished role for discovery

One principle effect of the standard's application is diminish-
ement, if not obliteration, of the role of discovery in the litigation process under the federal rules. In the normal case, the plaintiff must plead only facts and general allegations sufficient to satisfy Rule 8(a)(2). The factual basis need be derived only from the facts known to the plaintiff, subject to the requirement of Rule 11 that the plaintiff make a reasonable inquiry into the underlying facts. In fact, as long as the plaintiff has met the strictures of Rule 11, most courts permit her to make allegations based only upon "information and belief." Further factual support for the claim can be gleaned through the discovery process.

The stringent pleading standard flies in the face of this approach. Under the standard, a plaintiff must have facts sufficient to demonstrate the validity of a civil rights claim prior to discov-
ery. This requirement of a threshold showing of factual valid-
ity—a requirement that takes hold in advance of discov-
ery—imposes an enormous burden that many civil rights plaintiffs find insuperable. In civil rights cases, the very facts that the courts require plaintiffs to set forth in the complaint are often in the exclusive control of the defendants. For example, a municipality normally controls the information necessary to establish a policy or customary practice that would support a claim of municipal liabil-
ity based upon acquiescence in police misconduct, such as the disciplinary records of the officers involved. Such information would be available only through discovery, creating a classic Catch 22: Dis-
covery is necessary to uncover the factual predicate necessary to

167. See Wright & Miller, supra note 25, § 1224, at 155-57.
168. See Brown v. Texas A & M Univ., 804 F.2d 327, 333 (5th Cir. 1986) (qualified immu-
nity defense); Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (municipal liabil-
ity).
169. See Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982), in which the court stated:

We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, i.e., that there was an official policy or a de facto custom which violated the Constitution.

Id.
pursue discovery. Moreover, crucial facts often do not emerge until discovery or even trial. Absent such discovery, a plaintiff is relegated, at best, to state law tort claims—a result that the courts welcome, if not specifically intend.

2. Perversion of the function of Rule 12(b)(6)

Rule 12(b)(6) is the defendant's primary mechanism to challenge complaints for not complying with the heightened pleading standard. Under the federal rules, however, Rule 12(b)(6) is not intended to serve the function of assessing the complainant's factual sufficiency. Use of the rule to apply the standard, therefore, highlights the inherent conflict between the standard and the federal rules.

In Conley v. Gibson, the Supreme Court discussed the factual specificity the plaintiff must provide to survive a motion to dismiss under Rule 12(b)(6). In Conley, black members of a union brought suit under the Railway Labor Act alleging that the union had not fairly represented black members. The union moved to dismiss under Rule 12(b)(6) on two grounds. First, the union argued that the complaint did not "state a claim" because it "failed to set forth specific facts to support its general allegations..."
of discrimination." In response, the Court reasoned that, in terms of factual specificity necessary to state a claim, the standard of Rule 8(a)(2) governed:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Applying the standard of Rule 8, the Court held that the complaint stated a claim. The Court further noted that the plaintiffs could secure disclosure of a more precise basis of the claim through discovery and other pre-trial procedures.

Second, the union's motion raised the issue of whether the plaintiffs were entitled to relief on the claim under the Railway Labor Act. The Court stated "that a complaint should not be dismissed . . . 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." Treating all of the allegations of the complaint as true, the Court found that the plaintiffs' general allegation of discriminatory representation would entitle them to relief under the Act if proven.

Under the Conley reasoning, therefore, the question of whether a plaintiff has set forth sufficient facts per se to support a claim is an entirely irrelevant inquiry. As Judge Clark stated in a case that the Court cited in Conley: "[T]here is no pleading requirement of stating 'facts sufficient to constitute a cause of action.'" If a combination of facts and general allegations adequately identify a claim,

178. Id. at 47.
179. Id. (footnote omitted).
180. Id. at 48.
181. Id. at 47 & n.9 (identifying motion for more definite statement, motion to strike, motion for judgment on the pleadings, pre-trial conferences, discovery, motion for summary judgment and amendment of pleadings).
182. Id. at 45.
183. Id. at 45-46.
184. Id. at 46.
185. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).
then a claim is stated. Legal, not factual, sufficiency is the only issue properly challenged through a 12(b)(6) motion.

Use of the rule to apply a heightened pleading requirement conflicts directly with the intent of Rule 12(b)(6) and the Supreme Court's interpretation of the Rule's function. Courts' and defendants' use of the mechanism for this purpose, however, is not surprising. The rules have no mechanism designed to serve the role of assessing the validity of a claim's factual basis at the pleading stage.

3. Alteration of the allocation of procedural responsibility

The procedural double standard created for civil rights actions significantly alters the carefully balanced relationship between the plaintiff and defendant. In the normal case, the plaintiff asserts a claim based on her knowledge of the facts. To terminate the claim before trial, the defendant may use primarily three procedural mechanisms or techniques. First, the defendant may assert and establish an affirmative defense by means of an answer and dispositive motion. Second, the defendant may prove, through a motion for summary judgment and accompanying evidence, facts that defeat the plaintiff's claim. Third, the defendant may establish, through discovery followed by a motion for summary judgment, that the plaintiff cannot prove facts sufficient to prevail on the

186. See United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188 (1954) ("[M]ere conclusions of the pleader . . . must be taken into account."). The Court noted that additional facts could be obtained through a motion under Rule 12(e). Id. at 189. .

187. In Leimer v. State Mut. Life, 108 F.2d 302 (8th Cir. 1940), the court stated: [T]he making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. . . . [F]or instance, [when] a complaint states a claim based upon a wrong for which there is no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by limitations.

Id. at 305-06 (8th Cir. 1940), cited with approval in Conley, 355 U.S. at 46 n.5. But see Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (case dismissed under 12(b)(6) for lack of factual specificity).

188. Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim); id. 12(c) (motion for judgment on the pleadings); id. 56 (motion for summary judgment).

189. Id. 56 (motion for summary judgment).
In each of the options, the burden of producing evidence to accomplish termination rests with the defendant. The defendant must convince the court of the lack of merit in the plaintiff's case.

As applied, the stringent pleading requirement alters this procedural scheme as to the first and third options. Under the requirement, the plaintiff must convince the court of the case's merit, instead of the defendant establishing its lack of merit. With regard to the existence of an affirmative defense, for example, the plaintiff must negate its existence through presentation of facts in the complaint to avoid dismissal and proceed to discovery. Similarly, the defendant need not pursue discovery and a motion for summary judgment to challenge the plaintiff's ability to prove facts establishing the claim. The defendant need only file a motion to dismiss on the basis that the complaint is not sufficiently specific, and the plaintiff must come forward with facts to withstand the challenge. In essence, the standard relieves the defendant of all obligations to proceed with litigation and resolution of the dispute until the plaintiff has established the claim's substantiality.

4. Specific language of the rules

Imposition of a higher pleading standard is not only contrary to the structure and spirit of the Federal Rules of Civil Procedure, it also conflicts with the rules' express language. When the drafters intended to require greater pleading specificity, they included a specific provision. Rule 9 sets forth a requirement that in certain limited circumstances allegations must be specifically stated. For example, the circumstances constituting fraud or mistake must be stated with particularity. Similarly, special pleading requirements are imposed in condemnation cases because of the unique

192. Fed. R. Civ. P. 9(b) (fraud or mistake); id. 9(c) (denial of occurrence or performance of condition precedent); id. 9(g) (special damage). Commentators advance several reasons for the various requirements. Foremost is the concept that greater specificity is necessary to give fair notice in such cases. With regard to fraud, however, a primary reason is that courts disfavor such suits. WRIGHT & MILLER, supra note 25, § 1296, at 399-400. Such a rationale is not applicable to statutorily based civil rights actions.
features necessary to adjudicate definitively such actions. In fact, the rules' drafters proposed, considered and rejected a number of additional applications of a particularity requirement, such as patent and copyright cases. By negative implication, therefore, a heightened standard, particularly when applied to civil rights cases, is contrary to the drafters' intent.

Moreover, even the Rule 9 particularity requirement is applied with far less rigor than the heightened pleading standard. For example, the forms of Rule 84 contain an illustration of the factual specificity required for a fraud claim. According to Form 13, a plaintiff alleges a claim of fraudulent conveyance with sufficient "particularity" by simply stating that "Defendant C.D. . . . on or about . . . conveyed all his property, . . . to defendant E.F. . . . for the purpose of defrauding plaintiff." Such "particularity" falls far short of providing a court with enough facts to assess the validity of the claim, as required under the civil rights pleading requirement.

Because adoption of a special pleading rule conflicts with the federal rules' directives, a number of judges have appropriately criticized such action as "judicial legislation." The Federal Rules of Civil Procedure, including Rule 8(a)(2), "govern the procedure in the United States district courts in all suits of a civil nature." Under the Rules Enabling Act, the power to promulgate and amend the Federal Rules of Civil Procedure resides exclusively

194. Id. 71(A)(c).
195. See Clark, Special Pleading, supra note 41, at 48.
196. See id. at 48-49 (discussing pressure to impose stricter pleading requirements in "big" cases such as antitrust actions). Judge Clark stated: "Now it is clear that in federal pleading no special exceptions have been created for the 'Big Case' or any other particular type of action." Id. at 48; see Thompson v. Village of Evergreen Park, 503 F. Supp. 251, 252 (N.D. Ill. 1980) (making point of negative implication).
197. See Wright & Miller, supra note 25, § 1291, at 389 (Rule 9 must be read in conjunction with Rule 8 and "should not be construed strictly.").
198. See supra note 55 (discussing Rule 84).
199. Fed. R. Civ. P. 84 (Form 13).
200. Thompson, 503 F. Supp. at 252; see Wingate, supra note 17, at 692 ("[T]he judicial development of a strict pleading standard in civil rights cases is inappropriate."); see also Rotolo v. Borough of Charleroi, 532 F.2d 920, 925-27 (3d Cir. 1976) (Gibbons, J., dissenting) ("[A] fact pleading requirement [is] at variance with that approved by Congress in Rule 8, Fed. R. Civ. P.").
with Congress upon recommendation of the Supreme Court. The standard, particularly as applied, represents an attempt to accomplish implicitly what the courts cannot do explicitly: The courts have no power to adopt procedural rules that conflict with the federal rules.203

B. Civil Rights Statutes

Quite apart from the courts' power, or lack thereof, to adopt a unique rule of pleading, the application of such a rule in civil rights cases is particularly problematic. The remedial nature of the civil rights statutes mandate liberal interpretation and application204 "to effectuate the high congressional priority placed upon the vindication of civil rights' deprivations."205 The Supreme Court has stated that the civil rights statutes must be accorded "a sweep as broad as [their] language."206 As a result, courts have a duty to "be especially solicitous of civil rights plaintiffs" in the application of procedural rules.207

Utilizing the stringent standard of pleading conflicts directly with the legislative judgment embodied in the statutes. First, the standard impermissibly discriminates against the very federal rights that Congress has indicated should be afforded generous

203. See Holloway v. Lockhart, 813 F.2d 874, 880 (8th Cir. 1987) (striking down a local district court rule requiring plaintiff in a § 1983 action to demonstrate good cause before being permitted to conduct discovery because such a rule conflicts directly with federal rules). Judge Higginbotham, however, has taken the position that the stringent standard, at least as applied in cases involving immunity defenses, is not judicial legislation. He has argued instead that it is simply judicial interpretation—the courts' effort to define the word "claim" in the specific context of a case involving official immunity. Elliott v. Perez, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring). Unfortunately, Judge Higginbotham failed to recognize that the basic purpose of the stringent standard conflicts directly with the intent of the rules.


207. Canty, 383 F. Supp. at 1399 (holding that civil rights complaints must be construed broadly because of the importance of the interests at stake); see Bonner v. Circuit Court, 526 F.2d 1331, 1334 (8th Cir. 1975), cert. denied, 424 U.S. 946 (1976) (holding that court has duty to examine complaint to determine if relief is available under any theory).
treatment. The heightened requirement applies only to plaintiffs alleging constitutional and statutory violations; all other plaintiffs need comply only with the liberal requirements of Rule 8(a)(2). Second, and more important, the heightened standard potentially operates to obscure meritorious cases and prevent vindication and deterrence of constitutional violations. As discussed earlier, for example, a court may dismiss a plaintiff's claim for failing to allege supporting facts that may be available to the plaintiff only after discovery. On a more fundamental level, the strict pleading standard operates to minimize the liability of governmental defendants, particularly in cases implicating immunity defenses—an objective "manifestly inconsistent" with the purposes of section 1983 of Title 42.

C. Treatment of Pro Se Litigants

The conflict between the strict pleading requirement and the policies contained in both the federal rules and the civil rights statutes is significantly exacerbated by the requirement's application to pro se litigants. Available data indicate that the majority of civil rights actions are filed without the aid of counsel. Pro se litigants, however, are traditionally afforded great latitude in complying with procedural rules. In fact, courts have an affirmative

208. Cf. Felder, 108 S. Ct. at 2308 (holding that state notice of claim statute discriminates against federal right and, therefore, is preempted).

209. Fed. R. Civ. P. 8(a)(2) ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

210. See supra notes 168-72 and accompanying text.

211. Felder, 108 S. Ct. at 2308 (rejecting state's attempt to minimize governmental liability through notice of claim requirement).

212. For example, pro se plaintiffs filed over 90% of the civil rights actions terminated in the District of Arizona during 1987. With regard to actions brought by prisoners, which constituted 93% of those actions, over 97% were litigated pro se. Of the nonprisoner cases, 49% were pursued pro se. The raw data are on file with the author. The data are based on a review of the docket entries for all cases terminated during calendar year 1987 in the district for two categories of cases: prisoner civil rights and other civil rights. The latter category includes primarily constitutional tort cases brought under § 1983. The Administrative Office of the United States Courts' codes for those cases are 550 and 440, respectively. For a detailed review of the data compilation procedures and codes used by the federal courts, see Eisenberg & Schwab, supra note 2, at 660-65. The District of Arizona graciously provided a computer generated list of the terminated cases in 1987 for those categories. The docket entries for 758 cases were reviewed.
duty to apprise pro se litigants of potentially dispositive procedural requirements, such as those involved in responding to a motion for summary judgment.\textsuperscript{213}

This protective attitude in the pleading context is derived from the Supreme Court's pronouncements in \textit{Haines v. Kerner}.\textsuperscript{214} In \textit{Haines}, the Supreme Court reversed the district court's dismissal of a pro se inmate's section 1983 complaint as inconsistent with the \textit{Conley} standard,\textsuperscript{215} stating that it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."\textsuperscript{216} In applying the standard, the Court further stated that the allegations of a pro se complaint should be held to "less stringent standards than formal pleadings drafted by lawyers."\textsuperscript{217} Pro se complaints, therefore, are to be construed liberally in applying the already generous \textit{Conley} standard.\textsuperscript{218} Although \textit{Haines} involved a prisoner plaintiff, courts regularly have applied the standard to nonprisoner pro se parties.\textsuperscript{219}

The policy underlying this paternalistic approach, free and open access to the judicial system,\textsuperscript{220} is reflected in the simple pleading requirements of the federal rules. As Judge Clark commented within that context: "I think it's a sound philosophical approach to

\textsuperscript{213} See Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) ("[C]ourts have a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their case due to ignorance of technical procedural requirements," for example, notice of summary judgment procedures.).
\textsuperscript{214} 404 U.S. 519 (1972).
\textsuperscript{216} \textit{Haines}, 404 U.S. at 521.
\textsuperscript{218} Duncan v. Duckworth, 644 F.2d 653, 655 (7th Cir. 1981) (pro se complaint liberally construed in applying \textit{Conley} test).
\textsuperscript{220} See 28 U.S.C. § 1654 (1982) (stating that "parties may plead and conduct their own cases personally"); Mullen v. Starr, 537 F. Supp. 945, 947-49 (W.D. Mo.) (discussing treatment afforded pro se plaintiff and stating that "[f]ree access to the courts is a keystone of our democratic society"), aff'd, 696 F.2d 1000 (8th Cir. 1982), cert. denied, 461 U.S. 960 (1983).
say that in this stage of coming to the courts we allow any person [sic] to come in and put his claim before the judge. We don't want to establish rules with which only the highest grade counsel can comply."221 Consistent with this philosophy, the liberal approach to such litigants is not limited solely to evaluation of pleadings.222

Under Haines and the spirit of the federal rules, therefore, any heightened pleading requirement should not apply to pro se complaints. Indeed, the nature of pro se complaints only magnifies the incongruity of attempting to assess the merit of an action solely through the pleadings. As Justice Stevens stated:

The reasons for the Haines test are manifest. A pro se complaint provides an unsatisfactory foundation for deciding the merits of important questions because typically it is inartfully drawn, unclear, and equivocal, and because thorough pleadings, affidavits, and possibly an evidentiary hearing will usually bring out facts which simplify or make unnecessary the decision of questions presented by the naked complaint.223

Moreover, the societal value placed on the interests at stake renders application of the Haines standard even more compelling in civil rights cases.224

For these reasons, a few courts have expressly refused to apply the stringent standard to civil rights complaints of unrepresented plaintiffs,225 while several others have applied the Haines/Conley standard without comment in such cases.226 Yet, a significant number of courts have applied the stringent standard to pro se plain-
tiffs in general, ignoring the directives of *Haines*,\(^\text{227}\) or giving its language only superficial acknowledgement.\(^\text{228}\)

Only the Court of Appeals for the Third Circuit, with characteristic candor, has expressly recognized and attempted to resolve the inherent conflict between *Haines* and applying the strict standard to pro se plaintiffs. The seminal Third Circuit pre-*Haines* authority for a strict pleading requirement, *Negrich v. Hohn*,\(^\text{229}\) originated from the civil rights complaint of a pro se inmate.\(^\text{230}\) The inmate asserted a claim of cruel and unusual punishment while in pre-trial custody.\(^\text{231}\) In support of the claim, he alleged that he had been repeatedly beaten, forced to sign a statement implicating himself in a prison break, provided only bread and water, placed in solitary confinement on a restricted diet, and denied the right to see his attorney.\(^\text{232}\) The court in *Negrich* dismissed the complaint on the grounds that such allegations were "broad and conclusory."\(^\text{233}\)

Following *Haines*, the Third Circuit made a superficial attempt to reconcile the Supreme Court's holding and the *Negrich* decision. In *Gray v. Creamer*,\(^\text{234}\) the court reversed dismissal of a complaint that a group of represented inmates had filed, reasoning that the existence of "at least some" specific allegations rendered the *Negrich* procedure inapplicable.\(^\text{235}\) The court further commented that it had "no reason to believe" that *Negrich* was inconsistent with *Haines* because the plaintiff in *Haines* "made specific allega-

\(\text{227.} \) Gill v. Mooney, 824 F.2d 192, 194 (2d Cir. 1987); Jafree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982).
\(\text{229.} \) 379 F.2d 213 (3d Cir. 1967).
\(\text{230.} \) The court in *Negrich* did not consider affording the pro se complaint any special treatment, perhaps in part because the plaintiff was represented by appointed counsel on appeal. *Id.* at 215 n.4. A subsequent pre-*Haines* Third Circuit panel, however, acknowledged that pro se litigants should not be "denied the opportunity to state a civil rights claim because of technicalities." Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir.), cert. denied, 400 U.S. 846 (1970). The court resolved the competing policies by providing the plaintiff an opportunity to amend the complaint. *Id.*
\(\text{231.} \) *Negrich*, 379 F.2d at 214.
\(\text{232.} \) *Id.*
\(\text{233.} \) *Id.* at 215.
\(\text{234.} \) 465 F.2d 179 (3d Cir. 1972).
\(\text{235.} \) *Id.* at 182 n.2.
tions of unconstitutional conduct." Any distinction between the degree of specificity alleged in the two cases, however, is illusory. To the contrary, the allegations in both cases were remarkably similar in nature and scope.

The Third Circuit subsequently concluded that the distinction drawn by the Gray court, however tenuous, "harmonized" Negrich and Haines. In Rotolo v. Borough of Charleroi, the court held that pursuant to Gray "the Haines standard 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.'"

The "harmony" achieved, however, is discordant and a direct reflection of the inconsistent results in the two cases. The bifurcated standard emasculates the protection afforded pro se litigants under Haines by imposing a threshold specificity requirement on its application. The end result is unchanged by Haines: In civil rights actions, pro se plaintiffs must meet a stricter standard of pleading than the standard that the federal rules impose.

Townsend v. Frame illustrates the point well. In Townsend, a pro se inmate plaintiff alleged that on a specific day he was "punched in the face" by a prison guard. The complaint further stated that despite a report to prison administrators, "[t]he problem continued." Applying the test articulated in Rotolo, the court dismissed the claim for lack of the specificity needed to establish a viable civil rights claim. The complaint, according to the court, was deficient in that it failed to set forth the circumstances surrounding the incident and what transpired thereafter.

236. Id.
237. Like Mr. Negrich, the plaintiff in Haines asserted a claim of cruel and unusual punishment arising out of detention in solitary confinement. Id. at 181-83. Haines alleged that a foot disability caused the confinement to be unconstitutionally cruel and imposed without due process. Haines v. Kerner, 427 F.2d 71, 72 (7th Cir. 1970), rev'd, 404 U.S. 519 (1972).
239. Id. (quoting Gray, 465 F.2d at 182 n.2).
241. Id. at 370.
242. Id.
243. Id. at 371.
244. Id. The court further stated:
The court's holding, while consistent with Negrich, represents a complete disregard of the Haines test. Even ignoring the fact that the plaintiff appeared pro se, under existing precedent it is impossible to conclude "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."245

The conflict between applying a strict pleading requirement to pro se litigants and the holding in Haines arises from the tension between the purpose of each. The Haines standard ensures that procedural technicalities do not deny pro se litigants the opportunity to pursue vindication of constitutional and statutory deprivations, such as ensuring that resolution of the merits does not occur at the pleading stage. In contrast, the heightened pleading standard is designed expressly to terminate cases through stringent procedural requirements at the pleading stage. Any attempt to resolve this conflict fails.

IV. Necessity for a Stringent Pleading Standard

Is it not wiser to use to the full these highly practical devices than once again to pursue the phantom of pleading certainty?246

The heightened pleading rule has one primary objective: identifying and terminating frivolous actions as early as possible in the litigation process. As discussed below, however, numerous alternative procedural mechanisms designed specifically to accomplish this objective are available to both courts and defendants. Also available are other devices that assist indirectly in reducing the burden on courts and defendants. Before examining those alterna-

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246. Clark, Special Pleading, supra note 41, at 52.
tive mechanisms, I will examine the issue of the magnitude of that burden.

A. Burden on Courts and Defendants

Two points generally are made with reference to the alleged burden that civil rights litigation imposes on courts and defendants. Both are at least superficially supportable. First, the heavy volume of such litigation is undeniable. Second, the frivolous nature of a large number of such cases is also, at least anecdotally, supportable. A stringent pleading standard is not designed to reduce the volume of frivolous complaints themselves. Instead, the requirement operates to reduce the burden created by the process of resolving and disposing of such cases.

A true assessment of the resulting “burden” as it relates to the pleading requirement, therefore, requires an examination of how the process of litigating the actions actually affects the courts and defendants. At least one study suggests that the impact is much less than perceived. The majority of civil rights actions are filed by prisoners. According to the study, defendants never even answer more than two-thirds of prisoner civil rights complaints. Few inmate plaintiffs, less than ten percent, request discovery and even fewer successfully obtain it. Seldom, if ever, are the cases actually tried. The percentage of cases appealed is also remarkably small, generally less than ten percent.

247. See Doumar, supra note 7, at 6 (discussing the “deluge” of § 1983 cases); see also 1987 Annual Report 182 (reporting number of civil rights cases commenced in U.S. district courts between 1983 and 1987).

248. See supra notes 12-13. In addition, as discussed infra note 280, almost 70% of prisoner civil rights cases are dismissed as frivolous under the authority of 28 U.S.C. § 1915(d). Turner, supra note 16, at 618. But see Rotolo v. Borough of Charleroi, 532 F.2d 920, 927 (3d Cir. 1976) (Gibbons, J., dissenting) (questioning the empirical validity of the majority’s characterization of civil rights litigation as “burdensome, vexatious, and largely unfounded”).

249. Doumar, supra note 7.

250. See supra note 7 and accompanying text.


252. Id. at 662.

253. Id. at 661.

254. Id. at 661-63 (statistical analysis of cases in five selected districts). None of the five districts apply the stringent pleading standard.
A review of all civil rights actions terminated in the District of Arizona during the calendar year 1987 produced similar results. More than one-third of the complaints in the 758 cases reviewed were never served on the defendants. Discovery occurred in slightly more than ten percent of the actions. Almost half of the cases were terminated by the grant of a dispositive motion, such as a motion to dismiss or a motion for summary judgment. Only three percent of the cases proceeded to trial, and less than one percent in the case of prisoner suits.

An exhaustive empirical assessment of the nature and extent of the burden that the civil rights litigation created is beyond the scope of this Article, but even this brief examination of the issue suggests that the burden is exaggerated.

B. Alternative Procedural Mechanisms

1. 28 U.S.C. section 1915 review

The federal in forma pauperis statute, 28 U.S.C. section 1915, permits indigent individuals to pursue litigation despite their inability to pay the lawsuit's costs. Congress realized, however, that permitting plaintiffs to proceed without payment reduces the economic incentive that operates on paying litigants to refrain

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255. The source of the data and the method of analysis are discussed supra note 212. The district does not employ a heightened pleading requirement.

256. In prisoner cases, 38% were not served. In nonprisoner cases, only 8% of the complaints were not served.

257. Discovery occurred in almost half (47%) of the nonprisoner cases. Prisoner case litigants, however, engaged in discovery in only 7.5% of the suits. The low percentage for both cases reflects the much larger volume of prisoner cases than nonprisoner cases.

258. The grant of motions for summary judgment terminated 28% of prisoner cases and 19% of nonprisoner cases. The grant of motions to dismiss pursuant to Rule 12(b)(6) terminated 18% of prisoner cases and 30% of nonprisoner cases.

259. According to data from the Administrative Office, 5.4% of all cases nationally proceeded to trial in statistical year 1987. See 1987 Annual Report 213 (reporting total number of cases terminated and the number terminated by trial of the action).

260. The statute states in pertinent part: "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, . . . without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a) (1982).
from filing frivolous, malicious, or repetitive suits.\textsuperscript{261} To prevent such abusive litigation, the statute further provides that a court may dismiss an action filed under its authority "if satisfied that the action is frivolous or malicious."\textsuperscript{262} Courts \textit{sua sponte} routinely dismiss these actions on such grounds before the issuance of process.\textsuperscript{263}

A significant portion of civil rights actions are filed \textit{in forma pauperis}.\textsuperscript{264} This is particularly true of prisoner cases, which, as noted earlier, constitute the majority of civil rights cases.\textsuperscript{265} In fact, available data indicate that, nationally, much more than eighty percent of prisoner civil rights complaints are filed pursuant to section 1915 of Title 28.\textsuperscript{266} Of cases terminated in 1987 in the District of Arizona, eighty-six percent of prisoner civil rights actions, and eighty percent of all civil rights cases, had been filed pursuant to the statute.\textsuperscript{267} The majority of civil rights complaints are thus already subject to review for frivolity at the outset.

The Supreme Court recently examined the standard applicable to a determination of frivolity under section 1915. In \textit{Neitzke v. Williams},\textsuperscript{268} a unanimous Court affirmed the reversal of the district court's dismissal of an inmate's section 1983 claim. The Court stated that a complaint is frivolous under section 1915 of Title 28 "where it lacks an arguable basis either in law or in fact."\textsuperscript{269} The Court further explained: "[T]he statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless."\textsuperscript{270} According to the Court, a

\begin{thebibliography}{99}
\bibitem{262} 28 U.S.C. § 1915(d) (1982).
\bibitem{263} Neitzke, 109 S. Ct. at 1831.
\bibitem{264} See Doumar, \textit{supra} note 7, at 27 ("A great number of prisoners seek \textit{in forma pauperis} status when filing civil rights suits.").
\bibitem{265} See \textit{supra} note 7.
\bibitem{266} See Turner, \textit{supra} note 16, at 617 (analysis of cases in five districts disclosed that the percentage of prisoner cases filed under § 1915 ranged from 85% to 95%).
\bibitem{267} See \textit{supra} note 212 (discussing data source).
\bibitem{268} 109 S. Ct. 1827 (1989).
\bibitem{269} Id. at 1831.
\bibitem{270} Id. at 1833.
\end{thebibliography}
case against a defendant entitled to absolute immunity is an example of a meritless legal claim subject to dismissal under the statute.\textsuperscript{271} Claims describing fantastic or delusional scenarios exemplify baseless factual contentions.\textsuperscript{272}

In rendering its decision, the Court also resolved a longstanding dispute among the circuits regarding the relationship between the standards for dismissal under section 1915 and Rule 12(b)(6). A number of circuits had adopted the position that a complaint that failed to state a claim under the Rule 12(b)(6) standard was subject to dismissal automatically under section 1915.\textsuperscript{273} In rejecting this position, the Court acknowledged that although the two standards overlap significantly, the purposes of the two mechanisms differ.\textsuperscript{274} Rule 12(b)(6) is designed to allow courts to dismiss claims on the basis of dispositive issues of law.\textsuperscript{275} Section 1915 is intended to replicate the function of screening out unsupportable claims—a function the cost of bringing suit and the threat of financial sanctions normally perform.\textsuperscript{276} Thus, under Rule 12(b)(6) a court may properly dismiss a claim based on a finding that the plaintiff lacks an arguable legal theory.\textsuperscript{277} With regard to issues of law, section 1915 limits dismissals to wholly baseless legal claims; arguable claims, however unavailing, are not subject to dismissal.\textsuperscript{278} Moreover, to achieve its screening function section 1915 permits a court to evaluate the factual allegations and dismiss those that are baseless. In contrast, a judge's disbelief of a plaintiff's factual allegations cannot justify dismissal under Rule 12(b)(6).\textsuperscript{279}

\begin{footnotesize}
\begin{enumerate}
\item Id.\textsuperscript{271}
\item Id.\textsuperscript{272}
\item Id. at 1832.\textsuperscript{273}
\item Id.\textsuperscript{274}
\item Id.\textsuperscript{275}
\item Id. at 1832-33.\textsuperscript{276}
\item Id. at 1833.\textsuperscript{277}
\item Id.\textsuperscript{278}
\item Id. at 1832. The Court also noted that conflating the two standards would result in unequal treatment of paying and nonpaying litigants. A court normally would dismiss the complaint of a paying plaintiff only after a defendant filed a motion setting forth the arguments for dismissal to which the plaintiff could respond. A court could dismiss \textit{sua sponte}, however, the complaint of a nonpaying plaintiff and thereby deny the plaintiff, without the normal procedural protections, notice of the deficiencies and an opportunity to respond. Id. at 1834.\textsuperscript{279}
\end{enumerate}
\end{footnotesize}
Courts dispose of a high proportion of prisoner civil rights cases through section 1915's initial review before issuance of process. Jurisdictions vary in the procedures and personnel used. For example, in the Districts of Arizona and Oregon, law clerks review each complaint filed pursuant to section 1915 and make recommendations to the assigned judge or magistrate regarding appropriate disposition. Courts also have developed procedures to gather additional information perceived necessary to make a reasoned frivolity determination. For example, courts have: required prison authorities to investigate and report to the court; required the state's attorney general to undertake a similar procedure; used form complaints; and required plaintiffs to complete questionnaires that the court propounded.

Courts thus have an extremely powerful mechanism available that is specifically designed to achieve the primary objective of a strict pleading standard—early termination of frivolous claims. Moreover, this mechanism affords defendants more protection than the pleading requirement because it operates to terminate such claims pre-service. Although not available in all civil rights actions, the screening mechanism of section 1915 is applicable to a large number of the cases perceived to be the most problematic—indigent prisoner lawsuits.

280. For example, in 1976 approximately 70% of civil rights actions filed by inmates were dismissed as a result of initial review under § 1915. Turner, supra note 16, at 618. The District of Arizona dismisses a smaller proportion of cases under § 1915. In 1987, the court dismissed 38% of prisoner cases under the authority of § 1915. The court did not dismiss any nonprisoner civil rights actions pursuant to the statute. See supra note 212 (discussing source of data).

281. See Franklin v. Oregon, 563 F. Supp. 1310, 1334 n.24 (D. Or. 1983). Notes from an interview with the "pro se" clerks in the District of Arizona regarding the procedure are on file with the author.

282. See Martinez v. Chavez, 574 F.2d 1043, 1046 n.4 (10th Cir. 1978); Watson v. Ault, 525 F.2d 886, 892-98 (5th Cir. 1976). Arguably, some of these procedures are subject to criticism similar to that leveled against applying a heightened pleading standard. In contrast to the pleading standard, however, the procedures have been developed and utilized pursuant to general statutory authority.
2. Summary judgment

Summary judgment pursuant to Rule 56283 is the primary mechanism for eliminating meritless claims before trial under the federal rules.284 As Chief Justice Rehnquist recently remarked:

Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.285

Perhaps in recognition of its vital function, the Supreme Court recently has demonstrated significant enthusiasm for increasing the role of summary judgment in the litigation process.286 As a result, summary judgment arguably has become an even more effective method of disposing of meritless claims pre-trial.287

The moving party bears an initial burden of “production” to establish a prima facie case of entitlement to summary judgment. The moving party must show that the material facts are undisputed and under the applicable law those facts render judgment appropriate.288 The ultimate burden of persuasion remains with the party who would bear it at trial. If the moving party has the burden of persuasion, that party must support the motion with

284. Clark, Special Pleading, supra note 41, at 49 (citing United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 189 (1954)).
286. See id. at 327 (Rule 56 construed with due regard for persons defending claims that have no factual basis). See generally Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 6 Rev. Litigation 263 (1987).
288. If the motion fails initially to establish a prima facie case, the motion must be denied. The Supreme Court has closely equated the standard for summary judgment and the standard for directed verdict. As articulated by the Court, the basic test is whether the evidence is such that a reasonable factfinder could find for the party opposing summary judgment. If so, summary judgment is not appropriate. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).
credible evidence establishing entitlement to judgment. The other party then must counter with evidence to establish the existence of a material factual dispute. If, however, the nonmoving party bears the ultimate burden of persuasion, the moving party must either present evidence negating an essential element of the other party's claim or otherwise demonstrate that the other party lacks evidence to support its claim. In either situation, to withstand the motion the nonmoving party must come forward with credible evidence establishing the existence of contrary facts.

Proper use of the summary judgment process provides civil rights defendants with a simple, effective and relatively inexpensive method of terminating cases that lack a sufficient factual basis. Discovery, of course, often plays an important role. Necessary discovery, however, need not be unduly time consuming or costly. For example, in an action in which a plaintiff alleges a conspiracy or a municipal policy, defendants can simply serve interrogatories asking the plaintiff to disclose all facts that support the claim. If the claim lacks factual support, the response should disclose the deficiency, and the defendants may move successfully for summary judgment. Alternatively, any facts disclosed may fail to establish a civil rights violation as a matter of substantive law, thereby entitling defendants to summary judgment.

In some cases discovery may not even be necessary. For example, in cases implicating immunity defenses a defendant can simply move for summary judgment based on his own affidavit, setting forth facts surrounding the occurrence at issue. Unless the plaintiff

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289. A party opposing a motion for summary judgment on the basis that material facts are in dispute "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Or, of course, the opposing party could argue that the movant's application of the law is wrong.

290. Exactly what is required to "otherwise demonstrate" that the other party lacks sufficient evidence to support its claim remains somewhat unclear. Both the plurality opinion and Justice White's concurrence in *Celotex* suggest that at a minimum the lack of such evidence must be apparent in the discovery record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 328 (1986).

291. *Id.* at 330-32 (Brennan, J., dissenting) (agreeing with majority's allocation of burdens, but disagreeing with the application).

292. If the plaintiff fails to respond, sanctions including dismissal are available under Fed. R. Civ. P. 37.
provides sufficient credible evidence to establish a material factual dispute, summary judgment would be appropriate.293

Applying a stringent pleading requirement is less effective in achieving this result fairly. First, and most importantly, summary judgment terminates cases based on a review of the merits. In contrast, termination for noncompliance with stringent pleading requirements creates the risk of precluding vindication of meritorious claims.294 Second, a properly used summary judgment operates to terminate all factually deficient claims, not just those that are wholly frivolous. Third, one objective of the pleading standard is disclosure of facts sufficient to permit the defendant to pursue summary judgment. Discovery requests, however, can be far more specific and, therefore, more effective than a generally applicable pleading requirement in securing the factual detail, or lack thereof, necessary to support a motion. Fourth, inevitable delays are built into use of the pleading standard as a means of dismissal. Before dismissal for deficient pleading, the plaintiff normally is afforded at least one opportunity to amend the complaint.295 Both the standard and summary judgment, therefore, require some expenditure of the courts' and the parties' time.296

293. See Marsh v. Barry, 824 F.2d 1139, 1143 (D.C. Cir. 1987) (holding that affidavits of defendants established the reasonableness of their conduct); Miller v. Solem, 728 F.2d 1020, 1025-26 (8th Cir.) (holding that affidavits of defendants established lack of reckless disregard for plaintiffs' rights), cert. denied, 469 U.S. 841 (1984).

294. See supra notes 168-71 and accompanying text.

295. See supra note 93 and accompanying text.

296. Nor does the existence of Rule 56(f) seriously undermine or inappropriately delay effective use of summary judgment. Rule 56(f) provides that a party faced with a motion for summary judgment may request a continuance of its consideration to permit the nonmoving party to engage in discovery or secure affidavits necessary to oppose the motion. Fed. R. Civ. P. 56(f). Application of the rule, however, is somewhat limited. First, the party requesting additional time under Rule 56(f) must explain satisfactorily her failure to obtain the material previously or complete discovery. See WRIGHT & MILLER, supra note 25, § 2741, at 541. Second, the requesting party must describe the nature of the requested discovery and its relevance to genuine issues of material fact. See Belfiore v. New York Times Co., 826 F.2d 177, 184 (2d Cir. 1987), cert. denied, 484 U.S. 1067 (1988). "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980) (citations omitted), cert. denied, 449 U.S. 1082 (1981). Third, the court may limit the scope and the time allowed for such discovery. Fed. R. Civ. P. 26(b). Operation of the rule, therefore, is limited to circumstances in which it is truly warranted. For example, courts should always permit discovery prior to judgment or dismissal in cases in which the relevant facts are in the control of the opposing party, as is often the case for civil rights plaintiffs. Nor does the pur-
Summary judgment, in tandem with discovery, thus provides an extremely effective mechanism for identifying and disposing of frivolous and factually unsupported civil rights actions.

3. Other provisions of the federal rules

Although summary judgment is the principal device in the federal rules for pre-trial termination of meritless claims, other rule provisions provide mechanisms that can play a similar role.

a. Rule 12(b)

Rule 12(b)(1) authorizes dismissal of an action when the court lacks subject matter jurisdiction. Such a dismissal normally is made upon motion by the defendant. Because existence of subject matter jurisdiction implicates the court's very power to entertain the suit, however, a court also may dismiss the action under 12(b)(1) sua sponte before issuance of service.

As a threshold matter, claims brought under the civil rights statutes fall within federal courts' federal question jurisdiction. Courts, however, have added a requirement that the federal aspect of the claim be "substantial." Although the Supreme Court has questioned the analytical soundness of the doctrine, it has stated: "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,'

pose of the qualified immunity doctrine justify a different result. Courts certainly may limit such discovery exclusively to the immunity issue. See Martin v. D.C. Metro. Police Dep't 812 F.2d 1425, 1438 (D.C. Cir. 1987).

298. Id. 12(b) (stating that defense of lack of subject matter jurisdiction may be made by motion).
299. See Franklin v. Oregon, 662 F.2d 1337, 1342-43 (9th Cir. 1981) (affirming sua sponte dismissal under 12(b)(1) of non-indigent plaintiff's § 1983 complaint before issuance of process). The court noted that such a dismissal lacks the procedural protections of the normal adversarial process. However, the fact that such dismissals are not adjudications of the merits and, therefore, do not preclude further litigation of the claim, mitigates the problem. Id.
300. See 28 U.S.C. § 1331 (1982) (conferring federal question jurisdiction). The civil rights statutes, such as § 1983, do not independently create a basis of jurisdiction. Other statutes, such as § 1331, must confer jurisdiction. See id. § 1343(3) (conferring jurisdiction over deprivation of constitutional rights under color of state law).
'obviously frivolous,' ‘plainly insubstantial,’ or ‘no longer open to discussion.’” The inquiry is purely legal, however, because the court accepts the factual allegations of the complaint as true. Although similar to Rule 12(b)(6) in terms of the nature of the inquiry, the examination of legal sufficiency under 12(b)(1) is much less searching than that conducted in determining whether a claim has been stated.

Applying the insubstantiality doctrine, courts have used dismissals under Rule 12(b)(1) to terminate patently frivolous civil rights actions. Moreover, the doctrine applies to all cases, not only those filed in forma pauperis. For example, in Franklin v. Oregon, the court reviewed the dismissal of thirty-three complaints that had been refiled, fee-paid, after initial dismissals under section 1915. The Court of Appeals for the Ninth Circuit affirmed dismissal of twenty-two of the actions, pre-service, under the authority of Rule 12(b)(1). The insubstantial actions included claims that the state welfare agency caused Franklin’s divorce by providing benefits to his wife, that the prison clinic took twelve X-rays when two would have sufficed, and that prison officials refused to replace his year-old t-shirts.

As discussed previously, Rule 12(b)(6) challenges for failure to state a claim address exclusively the issue of the asserted claim’s legal sufficiency. All allegations of the complaint are treated as true, regardless of the court’s belief in their veracity. A motion

302. Id. at 536-37 (citations omitted).
303. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Curiously, however, the Supreme Court in Neitzke v. Williams, 109 S. Ct. 1827 (1989), appears to have suggested otherwise. After stating that a Rule 12(b)(6) dismissal cannot be “based on a judge’s disbelief of a complaint’s factual allegations,” the opinion indicated that a dismissal on such grounds might be appropriate under the insubstantiality doctrine. Id. at 1832 & n.6.
304. See Feldman, Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity, 54 Fordham L. Rev. 413, 416-17 (1985). For example, a court would not properly dismiss a completely novel legal theory under 12(b)(1), but could dismiss it under 12(b)(6) if the court rejected the theory. Id.
305. 662 F.2d 1337 (9th Cir. 1981). The legendary Harry Franklin brought these actions. See supra note 13.
306. 662 F.2d at 1340.
307. Id. at 1348.
308. Id. at 1343-45.
309. See supra notes 62-64 and accompanying text.
by the defendant is the primary mechanism for initiating a dismissal under 12(b)(6). Courts' dismissals *sua sponte* are strongly disfavored because they lack the procedural protections inherent in the adversarial process.\(^{311}\) In fact, some courts have expressly rejected use of such dismissals, particularly before service of the complaint.\(^{312}\)

Although limited in its scope of application, Rule 12(b)(6) provides an effective mechanism for disposing of certain meritless cases early in the litigation process. Dismissal is certainly appropriate in cases involving claims that are not legally cognizable, that include facts that are legally dispositive, or that assert novel legal theories that the court rejects. In the civil rights context, for example, courts could properly dismiss a claim if the defendant was entitled to absolute immunity,\(^{313}\) the complaint disclosed that the statute of limitations had run,\(^{314}\) or the claim involved the negligent deprivation of property without due process.\(^{315}\) In such cases, the burden of the litigation on the court and defendant is eliminated early in the process.

**b. Rule 16**

Rule 16 affords federal courts a significant degree of authority to control and manage the litigation process.\(^{316}\) Although this rule does not provide a direct mechanism for identifying and terminating meritless cases, properly exercised the rule can meaningfully

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311. In *Neitzke*, for example, the Supreme Court discussed the problems created by *sua sponte* action. *Id.* at 1833-34. The Court, however, expressly declined to address the "permissible scope, if any," of the practice. *Id.* at 1834 n.8. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court reversed and remanded the *sua sponte* dismissal under 12(b)(6) without commenting on that procedural aspect of the case. *Id.* at 108. In dissent, however, Justice Stevens noted that the Court's disposition of the case should not be taken as an "endorsement of th[e] practice since the question was not raised by the parties." *Id.* at 112 n.5 (Stevens, J., dissenting).

312. *Franklin*, 662 F.2d at 1341-42.


316. Courts also retain inherent authority to control and manage the pre-trial process. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989).
expedite resolution of cases. As a result, the litigation burden on the courts and defendants can be substantially reduced.

The rule contains two primary procedures to accomplish this purpose. First, the rule provides that the judge shall enter a scheduling order establishing time limits for amending pleadings, completing discovery, and filing and hearing motions. The judge also may establish a time for a pre-trial conference and trial. Second, the rule provides that the court may hold a pre-trial conference to address, among other things, simplification of the issues and elimination of frivolous claims, stipulations and admissions of the parties, identification of witnesses and exhibits, and settlement. Both procedures can be utilized effectively to achieve timely resolution of all actions, particularly those that lack merit.

For example, orders under Rule 16 can direct and limit discovery to reduce its burden by allowing it to proceed solely under the parties' control. Courts also can establish a tight schedule for pre-trial activity, followed by an immediate trial date. Such a procedure can be effective particularly in cases in which summary judgment is not appropriate due to factual disputes. For example, in a case that an inmate filed in the District of Arizona, immediately after denying the state's motion for summary judgment, the judge set the case for trial three months later—at the prison. Trial occurred, and the court entered judgment for the defendants only five months after they had filed their answer. Moreover, holding trial at the prison reduced the burden of trial for the defendant prison officials.

Additionally, most courts require that the parties file a pre-trial statement prior to a pre-trial conference. Such statements must include the parties' theories of the case, undisputed factual and legal issues, and disputed factual and legal issues. As a result,

317. FED. R. CIV. P. 16(b).
318. Id.
319. Id. 16(c).
322. E.g., D. ARiz. R. 42(C).
323. Id.
the court is provided the opportunity at conference to narrow issues and weed out frivolous claims. Moreover, the process itself potentially serves the same purpose for the parties. Finally, failure to comply with the requirements or any pre-trial orders can result in dismissal.\textsuperscript{324}

Most importantly, this process permits resolution of the process on the merits, something pleading requirements are functionally less capable of accomplishing. As Judge Clark remarked: "Affirmatively a pre-trial order—if the judge is competent and effective—settles facts, plans and programs for the future course of a case with a precision we have never accorded to mere pleading allegations."\textsuperscript{325}

c. Sanctions

Deterring factually unsupported claims also can reduce the burden on the courts and defendants. The most common deterrent is the imposition of monetary sanctions upon the party and/or the attorney responsible for advancing the frivolous litigation. The federal courts have available several sources of authority for sanctions.\textsuperscript{326} Rule 11, however, is most frequently used to sanction the assertion of frivolous claims.\textsuperscript{327}

Rule 11 provides, in part, that the signature of an attorney or party constitutes certification that the pleading is, to the best of that person's knowledge "after reasonable inquiry[,] 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 . . . not interposed for any improper purpose."\textsuperscript{328} "Appropriate sanction[s]" are available to remedy a violation of the obligation, in-

\begin{thebibliography}{9}
\bibitem{324} Fed. R. Civ. P. 16(f), 37(b)(2)(C).
\bibitem{325} Clark, \textit{Special Pleading, supra} note 41, at 52.
\bibitem{326} See, e.g., 28 U.S.C. § 1927 (1982) (stating that attorneys' fees and excessive costs are chargeable to the attorney for bad faith); 42 U.S.C. § 1988 (1982) (stating that attorneys' fees are chargeable to party if claim is frivolous, unreasonable or groundless); \textit{see also} Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (discussing courts' inherent power to impose sanctions against parties and attorneys), \textit{cert. denied}, 480 U.S. 918 (1987).
\bibitem{327} Fed. R. Civ. P. 11; \textit{see} Golden Eagle Dist. Corp. v. Burroughs Corp., 801 F.2d 1531, 1537 (9th Cir. 1986) (Since strengthening amendments to Rule 11 in 1983, "[l]iterally hundreds of published opinions have appeared.").
\bibitem{328} Fed. R. Civ. P. 11.
\end{thebibliography}
cluding assessment of costs and attorneys' fees. Some sanction, however, is mandatory.

Rule 11 can be an effective device to punish advancement of frivolous claims and to deter similar conduct by others. Courts, however, must recognize simultaneously the potential chilling effect that nonjudicious use of such authority might have on attorneys and litigants in unpopular cases. As a result, courts must examine carefully the entire factual basis of a claim before imposing sanctions.

Three additional considerations, however, limit the effective use of Rule 11 within the context of civil rights litigation. First, in a significant portion of such actions, those filed pro se, the rule is applied less strictly. Second, and more importantly, monetary sanctions simply are not effective in the case of indigent litigants. Third, monetary sanctions have primarily a remedial, not prospective, effect on some litigants. A number of litigants, particularly prisoners, persist in filing repeated actions regardless of their lack of success or exposure to remedial sanctions.

In response, courts have developed prospective sanctions in particularly egregious cases. Relying on their inherent power and the authority to preclude frivolous cases under section 1915 of Title 28, courts have imposed numerical restrictions on, or required court

329. Id.
330. Id. Courts apply an objective standard in determining whether the rule has been violated. "[S]anctions shall be imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is asserted . . . ." Oliveri, 803 F.2d at 1275.
331. See id. at 1280-81 (reversing sanction against attorney in civil rights case despite use of inappropriate boilerplate pleadings in which facts disclosed reasonable basis for suit).
332. See Patterson v. Aiken, 111 F.R.D. 354, 355, 358 (N.D. Ga. 1986) (holding pro se litigant held to standard of "layman with his education"); aff'd, 841 F.2d 386 (11th Cir. 1988); Fed. R. Civ. P. 11 advisory committee's note ("absence of legal advice is an appropriate factor to be considered" in determining whether rule violated).
333. See Neitzke v. Williams, 109 S. Ct. 1827, 1833 (1989) (holding that monetary sanction under Rule 11 not effective as deterrent in in forma pauperis cases); In re Tyler, 839 F.2d 1290, 1294 (8th Cir. 1988) (holding that litigants' lack of funds precluded effective use of typical Rule 11 sanctions).
334. See Franklin v. Oregon, 662 F.2d 1337, 1340 (9th Cir. 1981) (following denial of in forma pauperis status in 33 cases, plaintiff paid filing fees for all 33; 22 of those dismissed for lack of jurisdiction).
approval for, the filing of lawsuits, including fee-paid filings. Such restrictive conditions, of course, have to be crafted carefully and limited to only the most extreme cases in order to preserve the right to meaningful court access. Because a relatively small number of plaintiffs file a large number of such cases, however, carefully crafted prospective restrictions can significantly reduce the volume of litigation.

C. Summary

Courts and defendants have at their disposal an abundance of procedural mechanisms, such as 28 U.S.C. section 1915 and summary judgment, that can directly and efficiently dispose of frivolous claims. Other devices also can operate indirectly to reduce the burden of the volume and nature of civil rights litigation. A more stringent pleading standard, therefore, is unnecessary. Indeed, employment of the standard can divert reliance on other more effective procedures.

Nor does applying the standard add to effective operation of other procedural devices. First, pleadings are functionally limited in their ability to uncover the facts necessary to operate those mechanisms. Discovery, by design, is a much more valuable technique. All of the mechanisms discussed above are designed to, and do operate within the liberal pleading framework of Rule 8(a). Second, applying a stringent pleading requirement is intrinsically imprecise, leading to inconsistent application by, and confusion among, the courts. Third, applying the standard delays, rather than expedites, resolution and disposition of claims, thereby im-

335. In re Tyler, 839 F.2d at 1295 (limiting inmate to one filing per month under § 1915); Phillips v. Carey, 638 F.2d 207, 209 (10th Cir.) (discussing possibility of restrictions on future filings pursuant to court's inherent power and authority under § 1915), cert. denied, 450 U.S. 985 (1981).

336. See Franklin v. Murphy, 745 F.2d 1221, 1223 (9th Cir. 1984) (holding that inmate who often paid filing fees required to obtain leave of court for "all civil filings" beyond the limit of six imposed by the district court).

337. See In re Green, 669 F.2d 779, 787 (D.C. Cir. 1981) (holding that order barring all further in forma pauperis filings violates fourteenth amendment).


339. E.g., Means v. City of Chicago, 535 F. Supp. 455, 459 (N.D. Ill. 1982) ("There is substantial disagreement in this district over what level of specificity in pleading is required under § 1983.")
peding the efficiency of other procedures. Courts normally do not dismiss complaints for failure to meet the standard without affording the plaintiff an opportunity to amend. Numerous motions, responses and continued court involvement result.\textsuperscript{340}

The standard, operating alone or in conjunction with other procedures, is not only unnecessary, but also fails to achieve its objective of quick termination of meritless claims with a reduction in the burden on courts and defendants.

VI. Conclusion

Applying a stringent standard of factual pleading in civil rights cases lacks any valid supporting rationale. To the contrary, such a requirement is functionally inconsistent with the design of modern federal civil procedure and the role of pleading in that process. This inconsistency renders the standard inefficient in achieving its stated purpose. Instead, the standard engenders confusion, uncertainty and delay. Permitted to operate properly, the litigation process is entirely capable of efficiently eliminating factually baseless claims; the heightened pleading requirement simply is unnecessary.

Moreover, applying the stringent standard ignores the nature and purpose of civil rights actions. Rather than facilitating vindication of constitutional and statutory deprivations as Congress intended, this judicially created rule of procedure has defined civil rights plaintiffs as a special class of litigants subject to unique and more stringent procedural treatment. A large portion of that class pursue their claims without benefit of counsel. Applying the pleading requirement emasculates the doctrine of affording the pleadings of such litigants more liberal treatment than provided under Rule 8(a).

The lack of a valid rationale and the significant competing doctrinal and policy considerations suggest that the special pleading

\textsuperscript{340} One author described a case, brought by two law professors in the Eastern District of Pennsylvania, that required eight months of motions and amendments before the court was able to conclude that "while the point is very close, we believe plaintiff has pleaded with sufficient specificity." Jennings, \textit{The Relationship of Procedure to Substance in Civil Rights Actions Under Section 1983: No Cause For Complaint?}, 12 SETON HALL 1, 15 n.76 (1981) (citations omitted).
rule represents more of a judicial attitude about the character of civil rights claims than a reasoned solution to a significant problem. That attitude is based on the explicit assumption that many, if not all, civil rights actions are unfounded. By requiring that plaintiffs' pleadings "satisfy" the courts that their claims have merit, the assumption has been operationally converted into a presumption of frivolity that must be overcome. As a result, access to the courts, predicated on open-minded judicial consideration, is less meaningful.