A PERMANENT STOP SIGN: WHY COURTS SHOULD YIELD TO THE TEMPTATION TO IMPOSE HEIGHTENED PLEADING STANDARDS IN § 1983 CASES

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INTRODUCTION

In a modern legal landscape, the notion of heightened pleadings sounds like rhetoric reminiscent of feudal England, conjuring up images of medieval barriers designed to prevent access to the King's Court.[1] As archaic as the phenomenon sounds, contemporary federal courts have imposed heightened pleading standards on civil rights plaintiffs, partly as a response to the proliferation of civil rights claims being filed – claims that have become a proverbial thorn in jurists' sides and to which federal courts have become increasingly hostile.[2] As a practical, albeit unintentional, effect of these judicially mandated heightened pleading requirements, civil rights plaintiffs' constitutional right of access to the legal system has been severely restricted, as has their opportunity to seek redress for the violation of federal or constitutional rights by agents of the government.

Prior to 1993, American federal courts universally and systematically required specificity in pleading of plaintiffs commencing actions under 42 U.S.C. § 1983,[3] the civil rights statute. To this end, federal circuit courts required that § 1983 plaintiffs craft their complaints with factual detail and particularity that was unique to this cause of action and directly contrary to

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[1] *See* Gary T. Lester, Comment, *Schultea II – Fifth Circuit's Answer to Leatherman – Rule 7 Reply: More Questions than Answers in Civil Rights Cases?*, 37 S. TEX. L. REV. 413, 414 (1996).

[2] *See* Eric Kugler, Note, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551 (1996).

[3] 42 U.S.C. § 1983 (2000).

well-established federal procedural rules. The elevated pleading standards imposed by the federal appellate courts established a burden that most plaintiffs were unable to meet in the formative stages of litigation. Often, the plaintiff, who was without the benefits of discovery or initial fact-finding, had little or no access to the relevant and determinative facts surrounding the alleged constitutional violation, control of which was usually retained by the defendant. The majority of complaints, therefore, were summarily discarded on a motion to dismiss. In the 1993 landmark decision of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,[4] the Supreme Court unanimously held that heightened pleading standards were inapplicable in civil rights cases against governmental entities or municipalities where the defense of immunity was unavailable. The Supreme Court, however, avoided addressing the more complex and contentious issue of the propriety of heightened pleading standards in civil rights cases generally, including where the defendant is a public official entitled to immunity. In the wake of *Leatherman*, lower federal courts have predictably reached conflicting conclusions as to the scope and rationale underlying the decision.[5]

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[4] 507 U.S. 163 (1993).

[5] *See* Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U. L. REV. 59, 76 (1994). *See also* Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839 (1994); Doulgas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990); Alan Connolly, Recent Development, *Section 1983 and Individual Rights: Federal Courts May Not Apply Heightened Pleading Standards to Section 1983 Civil Rights Actions Against Municipalities*, 23 STETSON L. REV. 617 (1994); Bonnie L. Hemenway, Recent Development, *Babb v. Dorman: The Fifth Circuit Requires Heightened Pleading in Section 1983 Cases Against Municipal Defendants Who Plead Qualified Immunity*, 69 TUL. L. REV. 1719 (1995); Paul J. McArdle, *A Short and Plain Statement: the Significance of Leatherman v. Tarrant County*, 72 U. DET. MERCY L. REV. 19 (1994); Tina C. Santopadre, Recent Development, *Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit: The Supreme Court Rejects the Fifth Circuit's Heightened Pleading Requirement in Civil Rights Cases Against Municipalities*, 68 TUL. L. REV. 689 (1994); Mark Evan Sanford Schwartz, Comment, *A Plea for Help: Pleading Problems in Section 1983 Municipal Liability Claims*, 6 TOURO L. REV. 377 (1990); Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 72 N.C. L. REV. 1085 (1994); Michele L. Hammers, Legal Analysis, *Heightened Pleading Standards in Civil Rights Cases Against Municipalities*, 1 TEX. F. ON C.L. & C.R. 13 (1993); Paula Wolff, Annotation, *Propriety and Effect of Heightened Standards of Pleading or Production Required of Plaintiff in Action Under 42 U.S.C.A. § 1983*, 144 A.L.R. FED. 427 (1998).

This has precipitated a split of authority among the federal circuits on the propriety of heightened pleading requirements in civil rights actions when a government agent is sued in his or her individual capacity and/or where intent, motive, or other state of mind is at issue. A review of federal decisions reveals a pervasive lack of consistency. At one end of the spectrum, some courts have abandoned specificity in pleading, opting instead for requirements that are more consonant with the Federal Rules of Civil Procedure (FRCP). A second group of courts have continued their pre-*Leatherman* posture of imposing a heightened pleading standard, requiring civil rights plaintiffs to evince more than conclusory facts of an alleged constitutional violation by a government agent acting under color of state law.

The Supreme Court has again considered the propriety of heightened pleadings in two recent decisions. In *Crawford-El v. Britton,*[6] the Supreme Court held that a plaintiff bringing a constitutional action under § 1983 against a government official for damages, in which the official's improper motive is an essential element, need not adduce clear and convincing evidence of that motive to survive summary judgment. Strong dicta in *Crawford-El* left open, however, the propriety of heightened pleading requirements in § 1983 actions involving allegations of illegal motive, such as racial discrimination. In the 2002 case of *Swierkiewicz v. Sorema,*[7] the Court rejected heightened pleading requirements in Title VII[8] and age discrimination cases, instead requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief" as required under Federal Rules of Civil Procedure Rule 8(a)(2). Thus, although neither *Crawford-El* nor *Swierkiewicz* conclusively resolved the issue of the legitimacy of heightened pleading standards in § 1983 actions against government officials in their individual capacity or where intent or state of mind is at issue, collectively these decisions provide a good indication of the direction the Supreme Court is likely to follow on the contentious issue in the near future.

In an attempt to explain the genesis of heightened pleading in American jurisprudence, as well as the controversy that surrounds it, this article begins by examining the dichotomy between heightened pleading and the pleading requirements evinced in the Federal Rules of Civil Procedure. Part I introduces the § 1983 cause of action and the possibility of immunity as a viable defense. Part II analyzes the origins of heightened pleading, its apparent demise (only in

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[6] 523 U.S. 574 (1998).

[7] 122 S. Ct. 992 (2002).

[8] 42 U.S.C. § 2000e-4 (1994).

certain contexts), and its brief resurrection. It also compares the various approaches that the federal circuits have adopted regarding heightened pleading in the wake of what appeared to be landmark decisions by the Supreme Court. Finally, Part III explores the merits and demerits of heightened pleading and concludes with a proposal that advocates uniformity, impartiality, and neutrality: follow the Supreme Court's lead and completely abrogate heightened pleading requirements in § 1983 cases.

I. BACKGROUND

A. Pleading Under the Federal Rules of Civil Procedure

The complaint is the initial pleading by which a plaintiff initiates a lawsuit[9] and which states the claim for the relief that is sought.[10] Consequently, the complaint is an integral part of the contemporary system of American jurisprudence. At common law, the focus of pleadings was predominantly factual.[11] A plaintiff was required to espouse a detailed factual account of the intended cause of action, which the defendant or counsel could attack as procedurally deficient.[12] This framework encouraged creativity, cleverness, and ingenuity, but also was replete with latent procedural pitfalls.[13]

The adoption of the Federal Rules of Civil Procedure (FRCP) in 1938, however, represented a uniform change from fact pleading to notice pleading.[14] The FRCP, which govern not only pleadings but also the process of pre-trial discovery, were designed and implemented to promote adjudication on the merits of a lawsuit and to eliminate the technical procedural traps that pervaded the common law.[15] The Rules facilitated a transition away from the antiquated vestiges of the common law toward a more concise statement of the claim that operated to put the defendant on fair notice of the plaintiff's complaint and the grounds upon which it rested.[16] The FRCP, therefore, ushered in a new era of pleading requirements and guidelines, which courts, practitioners, scholars and

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[9] *See* BLACK'S LAW DICTIONARY 285 (6th ed. 1998).
[10] *See id.*
[11] *See* Lester, *supra* note 1, at 420.
[12] *See id.*
[13] *See id.*
[14] *See id.* at 419.
[15] *See id.* at 420.
[16] *See id.* at 419.

students have come to know as "notice pleading."[17] Under Rule 8(a)(2) of the FRCP, the plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief."[18] The Supreme Court endorsed the notice-pleading characterization of Rule 8 in *Conley v. Gibson,* stating:

> 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.[19]

The FRCP expressly prescribe heightened pleading in only two distinct cases: where fraud or mistake is alleged. Under Rule 9(b), "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[20] By contrast, Rule 9(b) permits malice, intent, knowledge, and other conditions of the mind to be averred generally.[21]

1. Civil Rights Cases Under § 1983

Despite the unambiguous language of Rule 8 and the Supreme Court's apparent mandate of notice pleading, the majority of contemporary federal circuit courts have imposed a more stringent pleading requirement upon plaintiffs in civil rights cases in a concerted attempt to weed out frivolous claims at the pleadings stage.[22] Traditionally, these federal courts required specificity in pleading or heightened pleading of plaintiffs bringing actions under § 1983, which provides a remedy for deprivations of federally protected rights by persons acting under color of state law.[23] Prior to 1993, federal courts universally required a civil rights plaintiff to meet this heightened standard by pleading with factual detail and particularity that demonstrated that he or she was deprived of a federally protected right by the defendant.[24] In addition, if the defendant was entitled to immunity, these courts also required the plaintiff to state in the complaint why the defendant-official could not successfully maintain the common law defense of official or qualified immunity (sometimes

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[17] *Id.* at 419, 421.
[18] FED. R. CIV. P. 8(a)(2).
[19] 355 U.S. 41, 48 (1957).
[20] FED. R. CIV. P. 9(b).
[21] *See id.*
[22] *See* Blum, *supra* note 5, at 59.
[23] *See id.*
[24] *See* Lester, *supra* note 1, at 414.

even before the affirmative defense was raised).[25] The heightened pleading standard required plaintiffs in civil rights actions to craft their complaints with factual specificity far in excess of the minimal specificity prescribed by the general notice pleading standard of the FRCP, and represented a distinct departure from the clearly established federal procedural rules.[26] Federal courts applied the heightened pleading standard across the board to all civil rights claims, including cases involving municipal liability, cases asserting individual capacity claims in which qualified immunity is a potential defense or where state of mind is an essential component of the constitutional claim, and cases asserting a civil rights conspiracy.[27]

2. *The § 1983 Cause of Action*

Civil rights litigation assumes two basic forms: § 1983 claims and *Bivens* actions. These two breeds of lawsuits differ in that a § 1983 claim redresses the violation of a federally or constitutionally protected right by a government agent acting "under color of state law,"[28] whereas a *Bivens* action vindicates the deprivation of a right by an official acting "under color of federal law."[29] As early as 1871, following the end of the Civil War, Congress enacted civil rights legislation to protect individuals, primarily newly emancipated slaves, from civil rights abuses.[30] The Civil Rights Act of 1871 is today codified at 42 U.S.C. § 1983.[31] This civil rights statute, which was rarely employed before 1961, permits plaintiffs to commence a suit for damages for violation of their constitutional rights against government agents acting with the authority of state law.[32] A § 1983 action affords plaintiffs a broad spectrum of options for seeking legal recourse for the violation of federally protected rights.[33] This type of claim permits a plaintiff to sue a government agent in the agent's individual or personal capacity, as well as in his or her official capacity, for a violation of a constitutional right on the basis of action taken under the color of state law.[34]

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[25] *See id.* at 415.

[26] *See* Wolff, *supra* note 5.

[27] *See* Blum, *supra* note 5, at 60-61.

[28] *See* 42 U.S.C. § 1983 (2000).

[29] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[30] *See* Lester, *supra* note 1, at 423.

[31] *See id.*

[32] *See id.*

[33] *See* Wolff, *supra* note 5.

[34] *See id.*

The plaintiff may also sue the agent in both capacities if he or she elects to do so.[35] Likewise, a plaintiff in a § 1983 action may sue the governmental entity, in addition to or in lieu of suing the individual agent in his or her official and/or personal capacities.[36]

3. Immunity as a Defense

Even though § 1983 does not explicitly provide for any defenses,[37] when a plaintiff commences a civil rights action against a government agent in the agent's individual capacity, immunity – absolute or qualified – is an available defense.[38] Initially, the Supreme Court recognized a "subjective good faith" defense of immunity, which protected officials from liability when they exercised discretion in good faith in the performance of their duties.[39] The Court later expressly rejected this subjective standard and instead formulated the standard of "qualified immunity," which focuses on the objective reasonableness of an official's conduct.[40]

The doctrine of qualified immunity protects officials who are required to exercise their discretion in the public interest, shielding individual government agents from suit as well as liability.[41] This new objective standard was instituted to more fairly balance the competing interests of the litigants.[42] In *Harlow v. Fitzgerald,*[43] the Supreme Court held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[44] An analysis of qualified immunity, therefore, involves two separate inquiries.[45] The first is whether the right was "clearly established" at the time the challenged conduct of the defendant-official allegedly occurred.[46] The second inquiry, predicated on an affirmative answer to the first, is whether a reasonable official, given the same facts and

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35 *See id.*
36 *See id.*
37 *See* Lester, *supra* note 1, at 424.
38 *See* Wolff, *supra* note 5.
39 *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).
40 *See* Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).
41 *See* Wolff, *supra* note 5.
42 *See* Lester, *supra* note 1, at 426.
43 457 U.S. at 800.
44 *Id.* at 818.
45 *See* Lester, *supra* note 1, at 430-31.
46 *See id.*

circumstances confronting the defendant-official, would have understood that his or her conduct violated that clearly established right.[47] The Court reasoned that by relying on the objective reasonableness of an official's conduct with tangible reference to clearly established law, excessive disruption of governmental operations could be avoided or minimized and untenable claims could be disposed of relatively early on in litigation.[48] Frequently, in cases where the defendant-official asserted qualified immunity as an affirmative defense, federal courts have required heightened pleading on behalf of plaintiffs.[49]

II. HEIGHTENED PLEADING IN § 1983 CASES

A. *The Supreme Court and* Siegert v. Gilley[50]

While the federal circuits have been embroiled in the controversy surrounding heightened pleading for decades, the 1991 case of *Siegert v. Gilley*[51] was the Supreme Court's first encounter with elevated pleading standards in civil rights cases.[52] In *Siegert*, a clinical psychologist employed by the federal government brought a constitutional tort action against his supervisor claiming the supervisor impaired his future employment prospects by disseminating a defamatory reference letter.[53] The federal district court denied the defense of qualified immunity to the defendant.[54] The U.S. Court of Appeals for the District of Columbia, however, reversed and remanded the case with orders that it be dismissed for failure to satisfy the circuit's heightened pleading standard.[55] The D.C. Circuit, where state of mind was an essential ingredient of the plaintiff's claim, required § 1983 plaintiffs to plead specific direct evidence of intent to defeat a motion to dismiss.[56] Although the Supreme Court granted certiorari in *Siegert* to resolve the issue of heightened pleading in a case implicating qualified immunity as a defense, the majority ultimately

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47 *See id.*
48 *See* Wolff, *supra* note 5.
49 *See* Wolff, *supra* note 5.
50 500 U.S. 226 (1991).
51 *Id.*
52 *See* Lester, *supra* note 1, at 429.
53 *See* 500 U.S. at 226.
54 *See id.*
55 *See id.*
56 *See id.* at 231.

disposed of the case without deciding the propriety of the District of Columbia Circuit's direct evidence requirement. The Court ultimately held that even if direct evidence of motive had been pleaded, the plaintiff's complaint nonetheless failed to allege the violation of any constitutional right.[57]

Following *Siegert*, many lower federal courts required civil rights plaintiffs to meet a two-tiered heightened pleading standard.[58] First, the trial court was charged with determining whether the plaintiff had stated a justiciable claim.[59] Specifically, the first tier required the plaintiff to state sufficient facts to show a violation of a federally protected right.[60] Second, and only if the plaintiff had stated a claim under the first tier, the court required the plaintiff to state sufficient non-conclusory facts to overcome the defense of qualified immunity.[61] This required the plaintiff to prove that the law was clearly established at the time of the alleged violation and that no reasonable official would have acted as the defendant did, given the same facts and circumstances.[62]

B. Leatherman *and Heightened Pleading in Municipal Liability Cases*

Although immunity is an available defense in a suit against a government agent in his or her individual capacity, in a § 1983 action against a governmental entity or municipality or against an individual agent in his official capacity, these individual defenses are unavailable.[63] Therefore, the primary rationales advanced in support of imposing a heightened pleading standard in actions brought under the civil rights statute – dispensing with non-justiciable claims at any early stage in litigation, thereby circumventing disruption of imperative governmental operations, and preserving the protection from suit and liability afforded by immunity – are irrelevant in a discussion of the propriety of a heightened pleading standard in cases where the defendant is a governmental entity or agent in his or her official capacity. The Supreme Court, therefore, summarily rejected the legitimacy of heightened pleading requirements in these varieties of civil rights actions in its unanimous 1993

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[57] *See id.* at 226.
[58] *See* Lester, *supra* note 1, at 431.
[59] *See id.*
[60] *See id.*
[61] *See id.*
[62] *See id.*
[63] *See* Wolff, *supra* note 5.

decision of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.*[64]

Leatherman arose out of two separate incidents involving the execution of search warrants by local law enforcement officers.[65] Each involved the forcible entry into a home based on the detection of odors associated with the manufacture of narcotics.[66] One homeowner claimed that he was assaulted by the officers after they had entered; another claimed that the police had entered her home in her absence and killed her two dogs.[67] The plaintiffs sued several local officials in their official capacity as well as the county and two municipal corporations that employed the police officers involved in the incidents, asserting that the police conduct had violated the Fourth Amendment to the United States Constitution.[68] The stated basis for municipal liability was the failure of these governmental entities to adequately train the police officers involved.[69]

The United States District Court for the Northern District of Texas dismissed the homeowners' complaints, finding that they failed to meet the "heightened pleading standard" for municipal liability.[70] The Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court granted certiorari.[71] Ultimately, the Court held that a federal court may not apply a "heightened pleading standard" – more stringent than the usual pleading requirements of Federal Rules of Civil Procedure Rule 8(a) – in civil rights cases alleging municipal liability under §1983.[72] The Court expressly stated two bases for its holding. First, reasoned the Court, a heightened standard cannot be justified on the ground that a more relaxed pleading standard would eviscerate municipalities' immunity from suit by subjecting them to expensive and time-consuming discovery in every § 1983 case.[73] Municipalities, although free from *respondeat superior* liability under § 1983,[74] do not enjoy absolute or qualified immunity from § 1983 suits.[75] Second, and perhaps most importantly,

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[64] 507 U.S. 163 (1993).
[65] *See id.* at 165.
[66] *See id.*
[67] *See id.*
[68] *See id.*
[69] *See* Canton v. Harris, 489 U.S. 378 (1989).
[70] *Leatherman*, 507 U.S. at 165.
[71] *See id.*
[72] *See Leatherman*, 507 U.S. at 163.
[73] *See id.* at 166.
[74] *See* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978).
[75] *See id.* at 701.

the Court stated that it was not possible to square the heightened standard applied in this case with the liberal system of "notice pleading" set up by the Federal Rules of Civil Procedure.[76] 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." And while Rule 9(b) requires greater particularity in pleading certain actions, it does not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983.[77]

Leatherman, however, left open the possibility of a comprehensive ban on heightened pleading in all civil rights cases. Specifically, the Court reserved judgment on the whether its qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials who could assert qualified immunity as a defense. As is seen in subsequent sections of this article, there is no consensus among the federal circuits as to whether to apply heightened pleading requirements in such cases after *Leatherman.*

C. *Post*-Leatherman *Circuit Split*

Even though *Leatherman* was a municipal liability case, some commentators heralded the decision as marking the definitive end of the heightened pleading requirement for all civil rights cases.[78] However, as with the prophets in the Hebrew Bible and John the Baptist returning from the wilderness, this call to repent proved divisive and was not universally heeded. The First,[79] Second,[80] Seventh,[81] and Eleventh[82] Circuits abandoned the heightened pleading standard for all civil rights cases, reasoning that such a standard could not legitimately be squared with either the FRCP, or the Supreme Court's *Leatherman* decision.[83] The Fifth,[84] Ninth,[85] and District of Columbia Circuits,[86] by contrast, continued to require specificity and particularity in pleading of plaintiffs bringing civil rights actions under § 1983,

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[76] *See Leatherman*, 507 U.S. at 168.
[77] *See id.*
[78] *See* McArdle, *supra* note 5, at 21-23.
[79] *See* Penney v. Town of Middleton, 888 F. Supp. 332 (1st Cir. 1994).
[80] *See* Lacorte v. Hudacs, 884 F. Supp. 64 (2d Cir. 1995).
[81] *See* Baxter by Baxter v. Vigo County School Corp., 26 F.3d 728 (7th Cir. 1994).
[82] *See* Douglas v. Evans, 888 F. Supp. 1536 (11th Cir. 1995).
[83] *See* Lester, *supra* note 1, at 440.
[84] *See* Babb v. Dorman, 33 F.3d 472 (5th Cir. 1994).
[85] *See* Lee v. County of Los Angeles, 240 F.3d 754 (9th Cir. 2001).
[86] *See* Kartseva v. Dep't of State, 37 F.3d 1524 (D.C. Cir. 1994).

even in cases involving immunity.[87] These courts, refusing to extend the rationale of *Leatherman* beyond its specific facts, viewed heightened pleadings as a necessary judicial adaptation of the FRCP to avoid the abridgement of the defendant-official's substantive right of immunity.

1. Circuits Abandoning Specificity

As stated above, four federal circuits have held that a heightened pleading standard is not required in § 1983 cases against government officials in their individual capacities. One example is the 1993 Seventh Circuit case of *Triad Associates, Inc. v. Robinson*.[88] In this case, Triad Associates, a corporation involved in the business of providing security and guard services, alleged that Renault Robinson, Chairman of the Board of Commissioners of the Chicago Housing Authority (CHA), intentionally discriminated against white-owned security companies.[89] The CHA was a municipal corporation that provided housing for low-income families in Chicago and was governed by a Board of Commissioners whose members were appointed by the Mayor of Chicago.[90] The CHA engaged Triad for its security services from 1982 through 1989.[91] The litigation centered around allegations that after Robinson's appointment as Chairman of the CHA Board by the late Mayor Harold Washington, he led the CHA in a concerted effort to replace the white-owned plaintiff companies with black-owned security companies.[92] Triad asserted that this effort was both racially and politically motivated, and commenced a civil rights action under § 1983.[93] The district court denied Robinson's motion to dismiss based on qualified immunity and Robinson appealed, arguing that Triad failed to allege discriminatory intent with the requisite specificity.[94] Considering it appropriate to review the sufficiency of the complaint as to the allegations of intent, when intent or state of mind is an essential element of the claimed constitutional injury, the United States Court of Appeals for the Seventh Circuit held that no special pleading standard is required in qualified immunity cases to survive a motion to dismiss.[95] The court stated, "In this circuit, on a motion to dismiss,

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[87] *See* Lester, *supra* note 1, at 441.
[88] 10 F.3d 492 (7th Cir. 1993).
[89] *See id.* at 495.
[90] *See id.*
[91] *See id.*
[92] *See id.*
[93] *See id.*
[94] *See id.* at 492.
[95] *See id.* at 497.

we require no more from plaintiffs' allegations of intent than what would satisfy Rule 8's notice pleading minimum and Rule 9(b)'s requirement that motive and intent be pleaded generally."[96] The Seventh Circuit's position, as articulated in *Triad,* maintains that there are no special pleading requirements for § 1983 claims, even in individual capacity suits where state of mind is at issue.

2. *Circuits Requiring Specificity*

Following *Leatherman,* the Fifth, Ninth, and District of Columbia Circuits continued to impose heightened pleading standards in § 1983 cases against a governmental agent in his/her individual or personal capacity. These three circuits, however, formulated different tests to discern whether a complaint satisfied their respective standards. In the District of Columbia Circuit, for example, a plaintiff commencing an action under § 1983 was required to plead specific, direct evidence of unconstitutional intent in order to withstand a motion to dismiss or a motion for summary judgment.[97] The Fifth and Ninth Circuits, by contrast, adopted a more standard approach that required a plaintiff to plead more than mere conclusory allegations of a constitutional violation.[98] The Fifth, Ninth, and District of Columbia Circuits, therefore, represented different branches on the same heightened pleading tree.

3. *D.C. Circuit's "Direct Evidence" Rule*

At the opposite end of the spectrum, the D.C. Circuit, along with the Fifth and Ninth Circuits, has applied a heightened pleading standard across the board to all individual capacity suits brought under § 1983. This standard is applied in conjunction with the requirement that, in those suits in which state of mind is at issue, the complaint must contain allegations of direct evidence of intent or unconstitutional motive to withstand a motion to dismiss.[99] In *Kimberlin v. Quinlan,*[100] plaintiff, Brett C. Kimberlin, was a federal prisoner who announced to the news media, just prior to the 1988 presidential election, that, on one occasion, he had sold marijuana to vice-presidential candidate Dan Quayle

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[96] *Id.*

[97] *See* Blum, *supra* note 5, at 78-80.

[98] *See* Branch v. Tunnell, 14 F.3d 449, 455-57 (9th Cir. 1994); Elliot v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985).

[99] *See* Blum, *supra* note 5, at 78-79.

[100] 6 F.3d 789 (D.C. Cir. 1993).

when Quayle was a law student.[101] Following the announcement, NBC News requested and was granted an interview with Kimberlin.[102] In the midst of impending scandal, a litany of other interview requests ensued, prompting the acting warden of the prison to schedule a press conference for Kimberlin.[103] The defendant, Micheal Quinlan was the Director of the Bureau of Prisons at the time.[104] Quinlan cancelled the press conference, consistent with his prohibition of media events that were orchestrated for or by prisoners.[105] Kimberlin was subsequently held in administrative detention on three separate occasions.[106]

Kimberlin filed a *Bivens* action, which is a civil rights suit similar to a § 1983 action except that it is predicated on the violation of a right by a governmental agent acting under color of federal law as opposed to state law, against both Quinlan and Loye W. Miller, Jr., the Department of Justice's Director of Public Affairs.[107] Kimberlin alleged that his administrative detention on the first two occasions was a concerted attempt to deny him access to the press, and that the third detention was in retaliation for his unauthorized communication with the media.[108] The defendants filed alternative motions – to dismiss or for summary judgment – based on qualified immunity.[109] The federal district court dismissed the motions.[110] On appeal, the D.C. Circuit court noted that precedent required "pleading of specific direct evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment" and that the plaintiff failed to satisfy this burden.[111] Consequently, the circuit court reversed the district court's denial of summary judgment and upheld a heightened pleading standard when a claimant moves for summary judgment, as well as when a defendant files a motion to dismiss.[112]

The court in *Kimberlin* described the D.C. Circuit's standard as one that required a plaintiff to "plead or produce, depending on the stage of litigation,

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[101] *See id.* at 791.
[102] *See id.*
[103] *See id.*
[104] *See id.* at 790.
[105] *See id.* at 791.
[106] *See id.* at 792.
[107] *See id.* at 790.
[108] *See id.* at 793.
[109] *Id.* at 790-91.
[110] *See id.*
[111] *Id.* at 793-94.
[112] *See id.* at 797-98.

direct evidence of unconstitutional intent."[113] This direct/circumstantial distinction employed by the D.C. Circuit is unique to that circuit and has not been adopted elsewhere. The "direct evidence rule" was implemented by the D.C. Circuit in an attempt to reconcile two conflicting goals: to protect officials entitled to qualified immunity from undue burdens of litigation and to afford viable legal remedies to citizens whose federally protected rights may have been abused.[114] A strong *Kimberlin* dissent not only questioned the validity of a heightened pleading standard as directly contrary to the FRCP, but also disparaged the "direct evidence rule" as having "no foundation in reason or in the case law."[115]

4. Fifth Circuit's "Standard" Approach

While the Fifth and Ninth Circuits are commonly grouped with the D.C. Circuit as representing those federal courts that continued to impose heightened pleading standards in § 1983 cases in the post-*Leatherman* era, these two circuits used a more standard approach rather than the "direct evidence rule" propounded by the D.C. Circuit in *Kimberlin* and its progeny. In the 1996 Fifth Circuit case of *Baker v. Putnal*,[116] the family of a decedent who was shot and killed by a local police officer brought a § 1983 action against the city and its police chiefs as well as the police officer individually, alleging the use of excessive force.[117]

The defendant, Sergeant Michael Putnal, was a police officer for the City of Galveston.[118] On March 14, 1992, he was on duty patrolling a local park where a large gathering of people was celebrating spring recess from colleges and universities.[119] While Putnal and his fellow officers surveyed the park and beach area, a civil disturbance erupted.[120] Two witnesses informed Putnal that someone had entered the crowd with a pistol-gripped shotgun.[121] Minutes later, the officers heard gunfire, which sent the crowd scurrying.[122] As Putnal moved to investigate, two people grabbed him and gestured toward a red car, which

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[113] *Id.* at 796.
[114] *Id.* at 798.
[115] *Id.* at 799.
[116] 75 F.3d 190 (5th Cir. 1996).
[117] *See id.*
[118] *See id.* at 193.
[119] *See id.*
[120] *See id.*
[121] *See id.*
[122] *See id.*

they claimed contained the perpetrators.[123] As Putnal approached the car, he saw Wendell Baker, Jr., and another man sitting in a truck parked on the beach.[124] As Putnal approached the vehicle, Baker, Jr., who was sitting in the passenger's seat, turned in Putnal's direction at which time Putnal shot and killed him.[125] Afterwards, police recovered a Browning automatic .380 caliber pistol under the passenger's seat of the truck.[126]

The plaintiffs brought a § 1983 action, and defendants moved to dismiss. The United States District Court for the Southern District of Texas granted defendants' motion.[127] On appeal, the Court of Appeals held that the trial court properly applied the circuit's heightened pleading requirement in § 1983 actions against government agents in their individual capacities, a standard that requires claims of specific conduct and actions giving rise to the constitutional violation.[128]

In upholding its heightened pleading requirement, the Court of Appeals stated, "We do not abandon the insistence [articulated] in *Elliott v. Perez* that a complaint must do more than allege conclusions. Rather, we embrace it. . . ."[129] As the district court correctly noted, this standard required more than conclusory assertions – it required claims of the specific conduct and actions giving rise to a constitutional violation.[130] Thus, the Bakers were required to plead more than, as the district court found, "conclusory allegations fail[ing] to set forth specific facts showing that the use of force by Defendant Putnal was excessive to the need and objectively unreasonable."[131] In failing to do so, their claim was dismissed by the trial court – a dismissal that was affirmed on appeal.[132]

D. Crawford-El*: Individual Liability + Intent*

In the 1998 case of *Crawford-El v. Britton*,[133] the Supreme Court had the opportunity to bridge the chasm between the federal circuits and not only

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[123] *See id.*
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] *See id.*
[128] *See id.*
[129] *Id.* at 195.
[130] *Id.*
[131] *Id.*
[132] *See id.*
[133] 523 U.S. 574, 574 (1998).

examine, but also resolve, the issue of the propriety of heightened pleading requirements in § 1983 cases against government agents in their individual capacity.[134] Leonard Rollon Crawford-El, a litigious and outspoken prisoner in the District of Columbia's correctional system, filed suit under § 1983, alleging that Patricia Britton, a District correctional officer, intentionally diverted the delivery of his belongings while he was being transferred to another facility.[135] Due to overcrowding at the District's prison in Lorton, Virginia, Crawford-El was transferred – first to Washington State, then to facilities in several other locations, and ultimately to the federal prison in Marianna, Florida.[136] His personal belongings – three boxes containing personal assets and legal materials – were transported separately.[137] When the District of Columbia's Correctional Department received Crawford-El's possessions, Britton enlisted his brother-in-law to pick them up, rather than shipping them directly to the next destination.[138] The boxes were ultimately shipped to Marianna by Crawford-El's mother, at the prisoner's expense.[139] Despite the successful transfer, however, Crawford-El was initially denied permission to receive his personal effects because they had been sent outside official prison channels, but he eventually recovered the property several months after his arrival in Florida.[140]

Crawford-El alleged that Britton deliberately misdirected the boxes to punish him for exercising his First Amendment rights while he was confined – providing interviews to reporters who chronicled the deteriorating conditions of federal prisons – and to deter similar conduct in the future.[141] Beyond generalized allegations of Britton's hostility, Crawford-El's complaint articulated specific incidents in which his protected speech provoked the correctional officer.[142] Crawford-El claimed injury caused by the delay, including the costs of having the boxes shipped, purchasing new belongings in the interim, as well as mental and emotional distress.[143] Britton denied any retaliatory motive and asserted that she entrusted Crawford-El's property to his

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134 *See id.*
135 *See id.*
136 *See id.* at 578.
137 *See id.*
138 *See id.*
139 *See id.*
140 *See id.*
141 *See id.*
142 *See id.* at 578-79.
143 *See id.* at 579.

brother-in-law, who was a fellow D.C. corrections officer, in order to ensure its prompt and safe delivery.[144]

The broad question presented for the Supreme Court's review was whether the courts of appeals may craft special procedural rules for such cases (i.e., § 1983 actions) to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties.[145] The more specific issue was whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive to defeat a motion for summary judgment.[146] The Court's ultimate holding in *Crawford-El* was that the Court of Appeals erred in fashioning a heightened burden of proof for unconstitutional-motive cases against public officials.[147] The Court held that a plaintiff bringing a constitutional action against a government official for damages, in which the official's improper motive is a necessary element, need not adduce clear and convincing evidence of improper motive to defeat the defendant-official's motion for summary judgment.[148]

The *Crawford-El* Court distinguished its previous decision in *Harlow*[149] (a decision upon which many federal courts had predicated their heightened pleading standard) as a case that addressed only the defense of qualified immunity, noting that *Harlow* did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation nor did it address any question concerning the plaintiff's affirmative case.[150] The Court also noted that without existing precedent, changing the burden of proof for an entire category of claims would deviate from the traditional constraints on judicial authority.[151] Neither the text of § 1983 or any other federal statute, nor the FRCP, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at summary judgment or in the trial itself.[152] Consistent with its exercise of judicial restraint, the *Crawford-El* Court declined the invitation to revise established rules and employ a blunt instrument that inflicts a high cost on plaintiffs with bona fide constitutional claims.[153] In

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144 *See id.*
145 *See id.* at 577.
146 *See id.* at 577-78.
147 *See id.* at 574.
148 *See id.*
149 *See* Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).
150 *See* Crawford-El v. Britton, 523 U.S. 574, 588-89 (1998).
151 *See id.* at 575.
152 *See id.* at 575-76.
153 *See id.* at 576.

addition, the Court noted that a heightened proof standard dramatically alters the cause of action in a way that undermines the very purpose of § 1983 actions – to provide a remedy for the violation of federally-protected rights.[154] Finally, the Court reasoned that when a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court, rather than the appellate court, must exercise its discretion in a manner that ensures that the substance of the qualified immunity defense is not eviscerated and existing procedures are available to do just that.[155]

*E. Post-*Crawford-El *Circuit Split*

1. Currier v. Doran*: Heightened Pleading Is Dead*

The Supreme Court's decision in *Crawford-El* appeared to conclusively resolve the issue of whether courts may impose a heightened pleading requirement on a plaintiff commencing a § 1983 action against a governmental agent in the agent's individual capacity where intent or state of mind is an essential element of the allegation. The issue, however, re-emerged in the Tenth Circuit Court of Appeals case of *Currier v. Doran.*[156] The plaintiffs, the representatives of two minor children abused by their father, brought suit pursuant to 42 U.S.C. § 1983 alleging that the defendants violated their fundamental rights under the Fourteenth Amendment.[157] The defendants, Tom Doran, Shirley Medina and Regina Sentell, were social workers for the Children, Youth and Families Department of the State of New Mexico (CYF) and defendant Melba Gonzales was a supervisor for the organization.[158] The two minor children, Latasha and Anthony Juarez, were in the temporary custody of CYF after their mother left them in the care of their five-year-old cousin and fled the state.[159] CYF petitioned the New Mexico Children's Court for an order formally granting legal custody of the children to CYF, supporting its position with an affidavit illuminating the financial and general irresponsibility of the children's biological father, Christopher Vargas.[160]

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[154] *See id.*
[155] *See id.*
[156] 242 F.3d 905 (10th Cir. 2001).
[157] *See id.* at 908, 909.
[158] *See id.*
[159] *See id.* at 909.
[160] *See id.*

Nevertheless, in the interim, Vargas was awarded physical, and then legal, custody of the children.[161]

Over the next several months, while Latasha and Anthony were in the care of their father, Doran periodically visited Vargas' home.[162] On these visits, Doran repeatedly noticed bruises on various parts of Anthony's body, which Vargas' girlfriend attributed to a fall on the playground.[163] Despite knowledge of the bruises, and of allegations made by Juarez that Vargas and his fiancée were physically abusing the children, Doran failed to further investigate.[164] On subsequent home-visits, bruises were noticed on both Anthony and Latasha and in November 1993, CYF removed the children from Vargas' custody and placed them with relatives.[165] The children ultimately were returned to Vargas – after Doran remained silent at a CYF meeting and failed to advocate strongly against such a return – and the situation was monitored.[166] On April 16, 1994, however, Vargas poured boiling water on Anthony, causing severe burns over most of his body.[167] Both children were taken to the emergency room and the defendants then sought and gained custody of them on CYF's behalf.[168] Unfortunately, Anthony died in the intensive care unit on May 3, 1994, at the age of three.[169]

The defendants moved for summary judgment based on qualified immunity, which the district court denied.[170] On appeal, the defendants correctly noted that the Tenth Circuit precedent predating *Crawford-El* required plaintiffs to meet a heightened pleading standard once a defendant raises the defense of qualified immunity.[171] This standard required plaintiffs to "do more than assert bare allegations of a constitutional violation."[172] The issue presented to the Tenth Circuit, therefore, was whether its heightened pleading requirement survived *Crawford-El*.[173] After careful examination of the

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161 *See id.*
162 *See id.*
163 *See id.*
164 *See id.*
165 *See id.* at 909-10.
166 *See id.* at 910.
167 *See id.*
168 *See id.*
169 *See id.*
170 *See id.* at 911.
171 *See id.*
172 Breidenbach v. Bolish, 126 F.3d 1288, 1293 (10th Cir. 1997).
173 *See* Currier v. Doran, 242 F.3d 905, 912 (10th Cir. 2001).

Supreme Court's analysis in *Crawford-El,* the *Currier* court concluded that its heightened pleading requirement did not survive its predecessor.[174]

The Tenth Circuit is not alone in its repudiation of a heightened pleading standard in § 1983 cases against individual agents where qualified immunity is an available defense. The Seventh Circuit has recently cited *Crawford-El* for the proposition that "civil rights complaints are not held to a higher standard than complaints in other civil litigation."[175] Similarly, the D.C. Circuit, the very court from which Crawford-El appealed to the Supreme Court, has recently stated that the Supreme Court "held [in *Crawford-El*] that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard."[176]

2. Judge v. City of Lowell: *Any Reports of Death Are Greatly Exaggerated*

The First Circuit adopted a unique approach after the Supreme Court's decision in *Crawford-El.* Unlike the Seventh, Tenth, and District of Columbia Circuits, the First Circuit concluded that *Crawford-El* did not affect its heightened pleading requirement. To the contrary, the First Circuit interpreted isolated excerpts of the Court's opinion in *Crawford-El* to substantiate, rather than undermine, the imposition of a heightened pleading standard in § 1983 cases against a government official in his or her individual capacity where discriminatory intent is an essential element of the claim.

In *Judge v. City of Lowell,*[177] the plaintiff, Rebecca Judge, brought a § 1983 action against the city police officers and medical examiner that were involved in what she believed was a lackluster investigation of her brother's death. Judge alleged "on information and belief" that the defendants' conduct "would not have been characterized by the gross deficiencies with which it was characterized had [she], her deceased brother Gary Weems and his wife Denise Weems been White, instead of Black."[178] Judge further alleged that these circumstances were part of a pattern and practice, pursuant to which one level of care was used by defendants in the investigation of the deaths of White persons, and another, inferior level of care was used by defendants in the investigation of the death of Black persons, particularly if the Black persons in

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[174] *See id.* at 916.

[175] Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998).

[176] Harbury v. Deutch, 233 F.3d 596, 611 (D.C. Cir. 2000).

[177] 160 F.3d 67 (1st Cir. 1998).

[178] *Id.* at 71.

question were of a low economic class and the cause of death was ostensibly a drug overdose.[179] The district court dismissed the plaintiff's claim and the circuit court held that the allegations of the (third amended) complaint were insufficient to state a cause of action under § 1983.[180]

On appeal, the First Circuit cited to its earlier precedent (predating both *Leatherman and Crawford-El*), which held that in civil rights cases, a bare conclusory allegation of the critical element of illegal intent, including intent to discriminate based on race, is insufficient.[181] In justifying the resurrection of its heightened pleading standard, the court in *Judge* relied extensively on the Supreme Courts' strong dicta in *Crawford-El* – dicta that articulated an awareness of, and some semblance of sympathy for, the potential problems facing defendant-officials in civil rights cases instituted against them personally.[182] The Supreme Court in *Crawford-El* found it necessary to expound upon the existing procedures available to federal trial court judges in handling claims that involve examination of an official's state of mind.[183] The *Crawford-El* Court suggested that federal trial court judges exercise their discretion in a way that protects the substance of the qualified immunity defense, so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.[184] One way of accomplishing this, explained the Court, was for trial courts (prior to permitting any discovery) to use existing procedures, such as ordering a plaintiff to reply to a defendant's answer or granting defendant's motion for a more definite statement to require that the plaintiff allege specific facts supporting an allegation of "wrongful motive."[185]

The First Circuit focused on one sentence in *Crawford-El* in ruling that its heightened pleading standard does not contravene *Crawford-El*: "The [trial] court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment."[186] Although the Supreme Court carefully phrased its endorsement of such an approach to constitutional claims in which "improper motive" was an essential element of the claim, the First Circuit interpreted this statement as giving

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[179] *See id.*
[180] *See id.* at 67.
[181] *See id.* at 72-73.
[182] *See id.* at 73-74.
[183] *See id.* at 74.
[184] *See* Crawford-El v. Britton, 523 U.S. 574, 597-98 (1998).
[185] *Id.* at 598.
[186] *Id.*

judges at both the trial and appellate levels the same leeway to require plaintiffs to plead specific facts from which to infer "illegal motive." The rule fashioned by the First Circuit, in essence, amounts to the imposition of a heightened pleading standard by a federal appellate court. To date, the First Circuit is the only court to have held that its heightened pleading standard survives *Crawford-El.*[187]

3. Swierkiewicz v. Sorema: *If Not Dead, Heightened Pleading Is Certainly Terminal*

In 2002, the Supreme Court re-examined the issue of the propriety of heightened pleading standards in a non-§ 1983 case. In *Swierkiewicz v. Sorema,*[188] fifty-three year-old Akos Swierkiewicz alleged that he had been discharged from his position on account of his national origin in violation of Title VII of the Civil Rights Act of 1964[189] and on account of his age in violation of the Age Discrimination in Employment Act of 1967.[190] Swierkiewicz, a native of Hungary, complained that his employer, Sorema N.A., a reinsurance company headquartered in New York and principally owned and controlled by a French parent corporation, demoted him from his position as Senior Vice President and Chief Underwriting Officer and transferred the bulk of his responsibilities to a fellow employee who was several years his junior as well as a French national.[191]

The district court granted Sorema's motion to dismiss on the basis that Swierkiewicz's complaint did not adequately allege a prima facie case under the *McDonnell Douglas* standard for employment discrimination.[192] The *McDonnell Douglas*[193] framework is a four-part test that requires the plaintiff to show: (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action and (4) circumstances supporting an inference of discrimination.[194] The Court of Appeals for the Second Circuit affirmed the dismissal, holding that Swierkiewicz failed to meet his burden

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[187] *See* Gallardo v. DiCarlo, 203 F. Supp. 2d 1160, 1163 (C.D. Cal. 2002).

[188] 122 S. Ct. 992, 992 (2002).

[189] *See* 42 U.S.C. § 2000e-4 (1994).

[190] *See* 29 U.S.C. § 621 (1994). For a general discussion of burden-shifting under the ADEA, see Jennifer J. Clemons & Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 OHIO N.U. L. REV. 1, 4-10 (2000).

[191] *See Swierkiewicz*, 122 S. Ct. at 995-96.

[192] *See id.* at 996.

[193] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[194] *See Swierkiewicz*, 122 S. Ct. at 994.

because his allegations were insufficient to raise an inference of discrimination, and the Supreme Court granted certiorari to resolve the split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases.[195] The issue presented for review was whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the *McDonnell Douglas* framework.[196] The Court ultimately answered this question in the negative, holding instead that an employment discrimination complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" under Rule 8(a)(2) of the FRCP.[197]

In so holding, the Court reiterated that it has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.[198] In addition, the Court noted that, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.[199] Moreover, the precise requirements of a prima facie case can vary depending on the context, and were "never intended to be rigid, mechanized, or ritualistic."[200] Furthermore, reasoned the Court, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases is diametrically contrary to FRCP Rule 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief."[201] Rule 8(a)'s simplified pleading standard, the Court explained, applies to all civil actions, with limited exceptions.[202] Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.[203] The Court noted, however, that it has declined to extend such exceptions to other contexts, including cases alleging municipal liability under § 1983 and employment discrimination, noting that other provisions of the Federal Rules of Civil Procedure are

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[195] *See id.* at 996.

[196] *Id.* at 995. For a general discussion of the *McDonnell Douglas* burden of proof in an employment discrimination case, see Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor 'Inference' in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 257-61.

[197] Swierkiewicz v. Sorema, 122 S. Ct. 992, 995 (2002).

[198] *See id.* at 997.

[199] *See id.*

[200] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[201] FED. R. CIV. P. 8(a)(2). *See also Swierkiewicz*, 122 S. Ct. at 998.

[202] *See id.*

[203] *See id.*

inextricably linked to Rule 8(a)'s simplified notice pleading standard.[204] Even though *Swierkiewicz* is an employment discrimination case, as opposed to a § 1983 action, it provides a good indication of the path the Supreme Court is likely to follow regarding the continued (or discontinued) viability of heightened pleading standards generally, in civil rights cases and beyond.

III. ANALYSIS AND PROPOSAL

A. *Merits of Heightened Pleading*

Heightened pleading standards are a source of great and seemingly irreconcilable contention between the federal circuits. Despite the apparent guidance provided by the Supreme Court in *Crawford-El*, these courts continue to be in somewhat of an endless quandary, plagued by the inherent tension that surrounds the issue of heightened pleading – the tension created between a plaintiff that must allege impermissible motive (which is often easy to allege, yet difficult to disprove) to state a justiciable claim and a defendant who is entitled to an early disposition of his qualified immunity defense based on the objective reasonableness of his or her conduct.

A rigorous pleading standard is not without its merits. Such a standard affords federal courts an operative mechanism for filtering out meritless or baseless claims in order to confer proper attention on what appear to be substantial claims.[205] Civil rights cases have often been stigmatized as a burden on the federal courts, occupying up to seventeen percent of a court's entire caseload.[206] More rigorous pleading requirements also preserve the benefits of the qualified immunity defense, shielding government officials not only from the substantial costs of being susceptible or subjected to the risks inherent in trial, but also from judicial inquiry into subjective motivation, including extensive and burdensome discovery and the deposition of numerous people. Such inquiries can be particularly disruptive of effective government.[207] Heightened pleadings have been rationalized as a "necessary judicial adaptation" of the FRCP to avoid the abridgement of the substantive right of

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[204] *See id.*

[205] *See* Kugler, *supra* note 2, at 575-76.

[206] *See id.* at 558-59.

[207] *See id.* at 559.

qualified immunity.[208] Therefore, it seems that judicial economy and pragmatism strongly favor the existence of such a device.[209]

B. Demerits of Heightened Pleading

Despite its apparent advantages, a heightened pleading standard also invites critical analysis, raising distinct issues of procedure, fairness, and justice. First, heightened pleading requirements as they have been and are currently used and interpreted are textually unsupported and do not fit neatly into the present procedural system.[210] The FRCP require simple notice pleading, intended to put the defendant – government official or otherwise – on fair notice of the plaintiff's claim and the ground upon which it rests. Second, a heightened pleading standard erects a hurdle at the pleading stage that most civil rights plaintiffs are unable to clear. So although completely disposing of such a standard would deprive courts of one of the most effective tools for weeding out cases that are often presumed frivolous, it would nevertheless demolish this impervious barrier and give plaintiffs with genuine claims their day in court.

C. Proposal: Follow the Supremes' Lead

Heightened pleading standards have proved to be a contentious contemporary legal issue, engendering protracted and complex debate among courts, judges, practitioners and scholars alike. The dichotomy posed by heightened pleading is not necessarily unique. On one hand, heightened pleading implicates practical concerns such as judicial economy and effective governmental operation. On the other hand, these standards also raise issues of common sense, fairness and justice. Not surprisingly, a plethora of solutions have been proposed to ease the tension that plagues the issue.

Many of the proposed remedies incorporate procedural devices that are rooted in the FRCP. The first proposal, advocated by the First Circuit in *Judge* suggests that the question of requisite specificity should be left to the discretion of trial court judges. The Supreme Court's dicta in *Crawford-El* lends credence to this proposal, noting that existing procedural devices are at the disposal of trial court judges to determine an appropriate level of specificity in pleading. Relegating this power to trial court judges, however, fails to establish bright

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[208] *Id.*
[209] *See id.*
[210] *See id.*

line rules that may be used to guide other courts. The net effect of this proposal would essentially be ad hoc inquiries, determined on a case-by-case analysis.

Another proposed solution, proffered by the Fifth Circuit, invokes Rule 7(a)'s reply. Rule 7(a) of the FRCP allows a court to order a reply to a defendant's answer or a third-party complaint. Although rarely resorted to, the Fifth Circuit adopted this unique approach in *Schultea v. Wood.*[211] This standard requires a plaintiff to file a reply if the defendant-official pleads the affirmative defense of qualified immunity in his or her answer and if the court so orders. The detailed Rule 7 reply gives the court discretion to retain the burden of persuasion with the plaintiff at the pleading stage on the immunity issue, while appearing to place the burden of proof on the defendant. When the defendant-official raises qualified immunity in his or her answer, the district court may, on the defendant's motion or its own accord, order the plaintiff to reply to that defense in detail. By definition, the reply must be tailored to the assertion in the answer and fairly engage its allegations. A defendant-official has an incentive to plead the defense with some degree of particularity because it has the practical effect of eliciting a similar degree of particularity in the reply. Although the Rule 7 reply appears to shift some of the burden away from the civil rights plaintiff, the problem that plagues heightened pleadings remains – the relevant and determinative facts surrounding the alleged constitutional violation are controlled by the defendant-official. Discovery would more than likely be unavailable even under Rule 7 and the complaint would meet the same fate as it would under a heightened pleading standard.

Perhaps the most credible proposal lies in the complete abrogation of heightened pleading standards in all contexts, save for allegations of fraud or mistake pursuant to FRCP 9(b). This appears to be the Supreme Court's intention as articulated in *Swierkiewicz.* Not only are elevated pleading standards textually unsupported by existing procedural rules, but they also prematurely dispose of cases that may in fact be genuine, albeit in the laudable interest of judicial economy and deference to the nature of the defendant-official's occupation.

The question at the pleading stage is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the allegations. It is virtually impossible to discern between justiciable and frivolous claims at such an early stage in litigation. So although heightened pleading accords courts an operative mechanism for filtering out

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[211] 47 F.3d 1427 (5th Cir. 1995).

unsubstantiated suits, plaintiffs with meritorious claims should not be deprived of their day in court. The interests of all should not be sacrificed for the benefit of a few. The Supreme Court stated it most aptly when it correctly noted that a requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules of Civil Procedure, and not by judicial interpretation.[212] The federal courts must function within the rules as they are, not as the courts wish they were. To do otherwise would undermine the integrity and viability of the Federal Rules of Civil Procedure.

CONCLUSION

Relying on the Supreme Court's decision in *Siegert v. Gilley*[213] in 1991, most federal courts universally and systematically began requiring plaintiffs bringing an action under § 1983 to meet a heightened pleading standard. Heightened pleading, however, began to experience a long and protracted death in 1993 with the Supreme Court's decision in *Leatherman,* which held that heightened pleading standards were inapplicable in § 1983 cases alleging municipal liability where the defense of qualified immunity was unavailable. The *Leatherman* decision precipitated a split of authority among the federal circuits regarding the propriety of heightened pleading in other § 1983 cases, including where a government official is sued in his or her individual capacity and/or where intent or state of mind is an essential ingredient of the alleged constitutional violation. While some circuits abandoned any requirement of specificity in pleading, opting instead for a standard that was more consonant with the notice-pleading requirement of the FRCP, other circuits maintained their pre-*Leatherman* posture of requiring § 1983 plaintiffs to meet a more stringent pleading requirement.

Heightened pleading received yet another terminal diagnosis in the 1998 decision of *Crawford-El*, when the Supreme Court held that a plaintiff bringing a constitutional action under § 1983 against a government official (in his or her personal capacity) for damages, for which the official's improper motive is a necessary element, need not adduce clear and convincing evidence of improper motive in order to defeat the official's motion for summary judgment. Even though most of the federal circuits hailed *Crawford-El* as putting the final nail in heightened pleading's coffin, the Court's opinion contained dicta indicating

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[212] *See* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

[213] 500 U.S. 226, 226 (1991).

some semblance of sympathy for the plight of government officials. The Court even went so far as to expound on some of the existing procedural tools that federal trial court judges have at their disposal to elicit more factual detail or particularity from § 1983 plaintiffs. The First Circuit has subsequently regarded this dicta as supporting its heightened pleading standard when the plaintiff's complaint contains allegations of illegal motive, a standard that had been peacefully laid to rest in the wake of *Leatherman*. The First Circuit has thereby resurrected a circuit split that many courts and commentators had thought was permanently laid to rest by *Crawford-El*.

Heightened pleading received one more critical blow in the 2002 decision of *Swierkiewicz v. Sorema*.[214] In *Swierkiewicz*, the Supreme Court rejected heightened pleading requirements in Title VII and age discrimination cases, instead requiring only a "short and plain statement" as mandated by Rule 8(a)(2) of the FRCP. Even though neither *Crawford-El* nor *Swierkiewicz* conclusively resolved the issue of the continued viability of heightened pleading in § 1983 cases alleging individual liability where intent is a requisite element of the claim, collectively these decisions provide a good indication of the path the Supreme Court is likely to pursue on the issue in the near future.

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[214] 122 S. Ct. 992, 992 (2002).