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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

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Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*

During the last several years, a "litigation explosion" of civil rights actions has occurred in the federal courts. Civil rights suits have increased steadily in proportion to other types of cases and now occupy a substantial portion of the federal docket.[1] To cope with the influx of this litigation, federal courts have developed methods to terminate cases before the costly and time-consuming process of trial. Some courts have, for example, applied a heightened pleading standard to civil rights cases, requiring plaintiffs to plead all the elements of their claim with greater particularity and factual specificity than normally required in civil cases. By the beginning of 1993, many federal courts had adopted this practice.[2] In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[3] a unanimous Supreme Court decided that a heightened standard applied to a claim brought against a municipality under 42 U.S.C. § 1983 contradicted the purpose of the Federal Rules of Civil Procedure and was therefore invalid.[4] The Court held that Rule 8(a) "meant what it said," and called for more detail in the pleadings only where expressly enumerated.[5]

This Note first recounts the facts and holding in *Leatherman*.[6] The Note then examines the Court's reasoning in light of other § 1983 decisions, particularly those in which immunity defenses were involved.[7] After analyzing the merits of a heightened pleading standard, this Note discusses the confusion courts have experienced in deciding what facts a plaintiff must allege to substantiate a § 1983 claim and how they have used other means to dispose of such cases.[8] Concluding that post-*Leatherman* courts must resort to summary judgment and discovery control under the Federal Rules of Civil Procedure when dealing with § 1983 actions, this Note ar-

1. Although only 270 federal civil rights actions were filed in 1961, more than 30,000 § 1983 actions were commenced in 1981. Patsy v. Board of Regents, 457 U.S. 496, 533 (1982) (Powell, J., dissenting).

2. *See infra* notes 77-101 and accompanying text.

3. 113 S. Ct. 1160 (1993).

4. *Id.* at 1161.

5. *Id.* at 1163.

6. *See infra* notes 11-38 and accompanying text.

7. *See infra* notes 47-108 and accompanying text.

8. *See infra* notes 109-61 and accompanying text.

gues that the proper use of these procedures is a fair means of sifting through claims while still conserving judicial resources.[9]

Section 1983 gives an express cause of action to persons whose civil rights have been violated by an official acting under color of state law.[10] At issue in *Leatherman* were the actions of police officers during two drug raids.[11] In the first raid, police officers, acting on a tip, searched the house of Gerald Andert on January 30, 1989.[12] Andert and his family, who were at home, were forced to lie face down on the floor for ninety minutes while the officers conducted their search.[13] During the search, an unidentified officer inflicted a head wound on Andert that required eleven stitches to close.[14] Not finding evidence of any criminal activity, the officers abandoned their search, allegedly without any apology to the family.[15]

The second search at issue in *Leatherman* occurred on May 20, 1989, while Charlene Leatherman and her son were away from their home.[16] Police officers stopped the Leatherman's car a few blocks from the house to inform them that their house was being searched and that their two dogs had been shot.[17] When Leatherman asked why the dogs had been shot, she reportedly was told that this was "standard procedure."[18]

Andert and Leatherman brought suits against the county, two municipal corporations, and several county officials under § 1983.[19] The plaintiffs

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9. *See infra* notes 162-72 and accompanying text.

10. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

11. Leatherman v. Tarrant County, 954 F.2d 1054, 1056 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993).

12. *Id.*

13. *Id.*

14. *Id.* Andert was 64 years old at the time of the raid. *Id.*

15. *Id.*

16. *Id.* at 1055.

17. *Id.* The Leatherman family owned two dogs, Shakespeare and Ninja. *Id.* Shakespeare was found dead about 25 feet from the front door of the Leatherman house, and had been shot three times. *Id.* Ninja was found dead on the bed in the master bedroom and apparently had been killed by a close range shotgun blast to the head. *Id.*

18. Brief for Petitioner at 6, Leatherman v. Tarrant County, 113 S. Ct. 1160 (1993) (No. 91-1657). The warrants in both cases were issued after police detected odors associated with the manufacture of drugs coming from the house. *Leatherman*, 113 S. Ct. at 1161.

19. The defendants named in the suit were the Tarrant County Narcotics Intelligence and Coordination Unit, Tarrant County, Texas; Tim Curry, in his official capacity as director of the Tarrant County Narcotics and Coordination Unit; Don Carpenter; City of Lake Worth, Texas; and City of Grapevine, Texas.

alleged that the officers had deprived them of their constitutional rights and that the municipal corporations were liable because of their failure to provide adequate training for the officers.[20] The United States District Court for the Northern District of Texas dismissed the complaint because it failed to meet the "heightened pleading standard" used by courts in the Fifth Circuit,[21] and the Fifth Circuit Court of Appeals affirmed.[22] The United States Supreme Court granted certiorari "to resolve a conflict among the Courts of Appeals concerning the applicability of a heightened pleading standard to § 1983 actions alleging municipal liability."[23]

In holding that heightened pleading standards were not required for § 1983 actions, the *Leatherman* Court first addressed the respondent's contention that a municipality's freedom from respondeat superior liability necessarily implies immunity from suit.[24] Rejecting an argument that a more relaxed pleading requirement would expose municipalities to needless discovery in § 1983 suits, the Court found that although a municipality is free from respondeat superior liability, it does not enjoy complete immunity from suit.[25] For example, the Court noted that municipalities do not enjoy the qualified—or "good faith"—immunity accorded public officials.[26] The Court also observed that *Leatherman* provided "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."[27]

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20. Leatherman v. Tarrant County, 755 F. Supp. 726, 728-29 (N.D. Tex. 1991), *aff'd*, 954 F.2d 1054 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993); *see also infra* note 51 (explaining that a municipality could be liable under § 1983 for constitutional violations resulting from a failure to train its employees).

21. *Leatherman*, 755 F.2d at 734. The court held that the plaintiff's complaint did not contain the specificity required for § 1983 suits. *Id.* at 730. The court characterized the allegations as "blunderbuss" in nature and stated that the complaint failed to provide any specific evidence as to how the defendant had failed to "formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed." *Id.* The allegations that the officer's conduct represented a policy or custom for which the defendant municipality could be held liable were also dismissed for the same reasons. *Id.* at 731.

22. Leatherman v. Tarrant County, 954 F.2d 1054, 1058 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993). The court noted that "the heightened pleading requirement governs all section 1983 complaints brought in this circuit: If the complaint is all bark and no bite, a district court is constrained to dismiss it even before opening discovery." *Id.* In a separate opinion, Judge Goldberg recognized the logic of the plaintiff's argument that heightened pleading standards should not be imposed in § 1983 suits against municipalities, but concluded that in the absence of an intervening Supreme Court decision, the court must "decline their invitation to reexamine the wisdom of this circuit's heightened pleading requirement." *Id.* at 1061 (Goldberg, J., concurring).

23. *Leatherman*, 113 S. Ct. at 1161.

24. *Id.* at 1162. Respondeat superior is the tort doctrine that allows one person, such as an employer, to be held liable for the negligence of another, such as an employee. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984).

25. *Leatherman*, 113 S. Ct. at 1162.

26. *Id.*

27. *Id.*

The respondent's second contention was that the "heightened pleading requirement" was misnamed and actually required no more factual specificity than called for by the complexity of the background law.[28] The respondents justified their position by claiming that the degree of specificity was consistent with the plaintiff's duty to make a reasonable fact-finding effort under Rule 11.[29] Despite these arguments, the Court held that the Fifth Circuit's heightened pleading standard was what it seemed: "a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief."[30] The opinion cited to the standard adopted by the Fifth Circuit: "In cases against government officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."[31]

The Court unanimously held that this standard is incompatible with the "notice pleading" system of the Federal Rules of Civil Procedure.[32] Chief Justice Rehnquist, writing for the Court, acknowledged the "liberal system of 'notice pleading' " by referring to Rule 8(a)(2), which merely requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[33] The Court then elaborated on its own interpretation of the Rules:

> 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.[34]

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28. *Id.* In its brief to the United States Supreme Court, respondent Tarrant County Narcotics Intelligence and Coordination Unit argued that "a court [must] evaluate the factual sufficiency of a complaint in the context of the applicable rules of law." Brief for Respondents Tarrant County Narcotics Intelligence and Coordination Unit et al. at 9-10, *Leatherman*, 113 S. Ct. 1160 (1993) (No. 91-1657). The respondents cited several cases of different contexts in which a heightened standard was arguably required. *See* Renne v. Geary, 111 S. Ct. 2331, 2337 (1991) (holding that a complaint must clearly allege facts which establish that the plaintiff has standing to bring a claim); Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983) (stating that district court must retain power to insist on specific pleading in large antitrust case).

29. *Leatherman*, 113 S. Ct. at 1162; *see infra* notes 169-72 and accompanying text.

30. *Leatherman*, 113 S. Ct. at 1162-63.

31. *Id.* (citing Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985)); *see infra* notes 85-97 and accompanying text.

32. *Leatherman*, 113 S. Ct. at 1162-63.

33. *Id.*; *see* FED. R. CIV. P. 8(a)(2).

34. *Leatherman*, 113 S. Ct. at 1162-63 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)) (footnote omitted); *see also infra* notes 124-30 and accompanying text (discussing the Court's reliance on *Conley*).

Relying on *Conley v. Gibson*,[35] the *Leatherman* Court affirmed its earlier ruling that "the Rule meant what it said."[36] The Court further reasoned that because Rule 9(b) requires greater particularity for pleadings alleging fraud or mistake, but makes no mention of other situations, applying a heightened pleading standard to additional types of claims is inappropriate.[37] Chief Justice Rehnquist concluded by remarking that if the Rules were rewritten, perhaps a heightened pleading standard would be appropriate in these types of suits.[38]

Section 1983, the federal statute the *Leatherman* plaintiffs relied upon to bring their suit, has been used extensively by civil rights plaintiffs.[39] Congress originally enacted 42 U.S.C. § 1983 as section 1 of the Civil Rights Act of 1871 and intended the statute to provide a federal remedy for the deprivation of civil rights by state and local governments.[40] The Court has interpreted § 1983 to apply to a broad range of situations, many of which were probably not contemplated by the drafters of the statute.[41] Generally, a § 1983 claim is composed of four elements: (1) a violation of

35. 355 U.S. 41 (1957). The petitioners in *Conley* were members of a railway union who sought to compel the union to fairly represent them. The respondent argued for dismissal on several grounds, including the failure of the petitioner's complaint to allege specific acts of discrimination. *Id.* at 47. The Supreme Court reversed and held that the criteria suggested by the respondent went beyond that requested by the Federal Rules. *Id.* at 47-48.

36. *Leatherman*, 113 S. Ct. at 1163 (quoting *Conley*, 355 U.S. at 47).

37. *Id.* Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

38. *Leatherman*, 113 S. Ct. at 1163. Chief Justice Rehnquist's exact words were: "[C]laims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b)." *Id.* That Chief Justice Rehnquist only mentions this particular type of action lends credence to the notion that *Leatherman* is limited to this particular set of facts. *See infra* notes 129-30 and accompanying text.

39. *See supra* note 1 and accompanying text.

40. MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.2, at 6 (1st ed. 1986). Section 1 of the Civil Rights Act of 1871 was titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." The most pressing reason for the statute's enactment was the activity of the Ku Klux Klan, although Section 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." Monroe v. Pape, 365 U.S. 167, 175-76 (1961). For further discussion of *Monroe*, see *infra* note 50.

41. As the Court noted in Monell v. Department of Social Services, 436 U.S. 658, 685 (1978), § 1983 should be construed "to give a broad remedy for violations of federally protected civil rights." For a further discussion of *Monell*, see *infra* notes 47-55 and accompanying text. The Court has discussed the legislative history of § 1983 in several civil rights cases. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496 (1982); Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961). The legislative history of § 1983, however, is often of little help in determining the boundaries of a § 1983 action. As one commentator has observed:

> [T]he legislative history of section 1983 is, in the main, unhelpful. Given the passions raised by Reconstruction and the breadth of the issues addressed, few lawyers are unable to find support for their position in those turbulent decades. . . . Although most opinions

rights protected by the federal constitution or other federal law (2) proximately caused (3) by a "person" (4) who acted under color of a statute, regulation, custom, or usage of any state, territory, or district.[42]

In conjunction with the liability imposed by § 1983 the Court has found "immunity" from liability to exist when it is compatible with the purposes of § 1983, and when such immunity was firmly established at the time the statute was enacted.[43] The immunity doctrine is an attempt to ensure that governmental affairs are carried out without fear of liability. Officials in particularly sensitive positions enjoy "absolute immunity," or complete protection from suit arising from acts performed in their official capacities.[44] Other governmental entities that require a lesser degree of protection have been given "qualified" or "good faith" immunity.[45] Under this standard, officials are shielded from civil liability as long as their conduct did not violate clearly-established statutory or constitutional rights of which a reasonable person knew or should have known.[46]

As the *Leatherman* Court noted, the Court's decision in *Monell v. New York City Department of Social Services* led to an increase in § 1983 actions; this increase in the number of cases prompted many courts to create the heightened pleading standard.[47] The *Monell* plaintiffs were female employees of the City of New York.[48] They brought a § 1983 suit alleging that the defendants had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were medi-

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still mention the legislative history of section 1983, such references are, in large measure, ceremonial.

Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 605, 607 (1985). The wide availability of judicial discretion in interpreting § 1983 has allowed the statute to "burst its historical bounds." Parratt v. Taylor, 451 U.S. 527, 554 (1981) (Powell, J., concurring in judgment).

42. SCHWARTZ & KIRKLIN, *supra* note 40, § 1.3, at 8.

43. *Id.* § 7.1, at 142; *see also* Procanier v. Navarette, 434 U.S. 555, 565 (1978) (finding qualified immunity for prison officials and officers); Imbler v. Pachtman, 424 U.S. 404, 430 (1976) (finding absolute immunity for prosecutors in initiating and presenting the state's case); Pierson v. Ray, 388 U.S. 547, 555 (1967) (holding that judges are immune from liability for acts committed within their judicial discretion).

44. Article I of the United States Constitution grants absolute immunity to federal legislators. U. S. CONST. art I, § 6, cl. 1. Other government officials also enjoy absolute immunity. Imbler v. Pachtman, 424 U.S. 404, 430 (1976) (prosecutors); Tenney v. Broundhove, 341 U.S. 367, 372 (1951) (state legislators); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (judges).

45. *See* Peter H. Schuk, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 281-85.

46. *Id.* at 283-85.

47. 436 U.S. 658 (1978). In *Leatherman*, Chief Justice Rehnquist noted that "[t]he phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in *Monell*, where we for the first time construed § 1983 to allow such municipal liability." *Leatherman*, 113 S. Ct. at 1163.

48. *Monell*, 436 U.S. at 658.

cally necessary.[49] After reviewing the legislative history of § 1983, the Court reversed its previous holding in *Monroe v. Pape* that the Act did not impose civil liability on municipalities.[50] The *Monell* Court held that the Congress of 1871 intended for the municipality to be considered a constitutional "person" under § 1983; therefore, city governments could be sued directly for violation of a plaintiff's constitutional rights stemming from an action or custom of the municipality.[51] A municipality could not be held liable, however, under a theory of respondeat superior.[52] The Court noted that imposing too much liability upon a municipality could impair its ability to govern and lead to unnecessary expense, and therefore, only a compelling reason could lead to the imposition of vicarious liability.[53] The Court found that Congress did not consider the two main justifications for respondeat superior—placing the loss on the best cost-avoider and risk spreading—compelling enough to impose such liability on municipalities under § 1983.[54] Therefore, the Court held that liability under § 1983 can only be imposed when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible [for] under § 1983."[55]

Two years later, the Court further elaborated on the scope of municipal immunity from § 1983 actions in *Owen v. City of Independence*.[56] It determined that municipal corporations do not enjoy the qualified immunity extended to individual officials acting in their official capacities.[57] The Court

49. The plaintiffs brought a class action against the Department of Social Services and its commissioner, the Board and its chancellor, as well as the City of New York and its mayor. *Monell*, 436 U.S. at 661.

50. Monroe v. Pape, 365 U.S. 167, 172 (1961). Although the decision in *Monroe* established § 1983 as a remedy against the actions of police officers, it stopped short of allowing plaintiffs to pursue an action against the local government controlling the officers. *Id.* at 187-90. After scrutinizing the congressional debate on the 1871 Act from which § 1983 sprang, the Court concluded that the legislators had not intended for city governments or other municipalities to be regarded as "persons" under the Act. *Id.* at 187-92.

51. *Monell*, 436 U.S. at 690. The Court's decision in City of Canton v. Harris, 489 U.S. 378 (1989), established that a municipality could be liable under § 1983 for constitutional violations stemming from a failure to train its employees. *Id.* at 385-92. The *Leatherman* plaintiffs relied on *Canton* for the basis of their claims. Leatherman v. Tarrant County, 755 F. Supp. 726, 730 (N.D. Tex. 1991), *aff'd*, 954 F.2d 1054 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993).

52. *Monell*, 436 U.S. at 690; *see also supra* note 24 (defining respondeat superior).

53. *Monell*, 436 U.S. at 692-94.

54. The Court found that some lawmakers had raised these justifications during the 1871 debate, yet Congress failed to sustain them. The Court reasoned that Congress rejected these justifications because it was unwilling to impose federal liability upon municipalities without a strong showing of causation. *Monell*, 436 U.S at 693 n.57.

55. *Id.* at 694.

56. 445 U.S. 622 (1980).

57. *Id.* at 638; *see also supra* note 45 and accompanying text.

analyzed the question of whether an entity was entitled to immunity in a § 1983 action by examining the common-law tradition and asking if the tradition was still supported by public policy reasons.[58] If so, then the Court assumed that "Congress would have specifically so provided had it wished to abolish the doctrine."[59] Because "there is no tradition of immunity for municipal corporations," the Court held that a municipality may not assert the good faith of their officers or agents as a defense to liability under § 1983.[60]

The *Owen* Court listed several reasons for not extending qualified immunity to municipalities. First, the opinion distinguished the interests involved in suits against individual government officials from those brought against municipalities.[61] When individual officials are concerned, the Court noted, immunity insulates them from personal liability.[62] That concern is not present in an action against a municipality because "only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds."[63] The Court's second rationale for not extending qualified immunity to municipalities focused on fairness.[64] Although the Court explained that it is arguably unjust to hold a well-intentioned official liable for a civil rights violation, it reasoned that there is no injustice in forcing a municipality to bear the loss for which it was responsible.[65] Whereas liability might preclude an individual official from effectively carrying out his duties, the same is not true if liability is imposed on a municipality.[66] In fact, the Court stated that con-

58. *Owen*, 445 U.S. at 637.

59. *Id.* (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)).

60. *Id.* at 638.

61. *Id.*

62. *Id.* at 638 n.18.

63. *Id.* The *Owen* Court referred to several instances in which it had held that "different considerations come into play when governmental rather than personal liability is threatened." *Id.* at 653 n.37. The Court cited Hutto v. Finney, 437 U.S. 678 (1978), and Wood v. Strickland, 420 U.S. 308 (1975), for the proposition that "imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from *public* funds." 445 U.S. at 653 n.37 (emphasis added). As additional support, the *Owen* Court cited Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), which found that government officials were not liable to the plaintiffs because of qualified immunity, but the municipal agency itself was held liable. *Owen*, 444 U.S. at 653 n.37. The Court stated that "the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself." *Id.*

64. *Owen*, 445 U.S. at 655.

65. The Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated." *Id.*

66. *Id.* at 656.

cern over the consequences of a municipal policy, including possible liability, is properly within the scope of consideration of policy-makers.[67] An official's concern over the liability of a municipality should not have the same debilitating effect that it would have were the liability personal.[68] The Court also reasoned that granting municipalities a defense of qualified immunity would frustrate public policy. Noting that one of the purposes of the Civil Rights Act is to protect citizens from the abuses of state power, the Court stated: "[O]wing to the qualified immunity enjoyed by most government officials . . . , many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated."[69]

Harlow v. Fitzgerald[70] offered the Court its first opportunity to examine the immunity doctrine in the context of the need to conserve judicial resources. In that case, the Court considered whether two former presidential aides were entitled to a defense of absolute immunity.[71] Holding that they were only entitled to qualified, or "good faith" immunity, the Court analyzed the conflicting values the immunity doctrine seeks to preserve.[72] The pre-*Harlow* qualified immunity standard consisted of an objective and a subjective element.[73] However, the Court recognized that:

> [t]he subjective element of the good faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules

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67. *Id.* The Court noted: "[T]he *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials." *Id.*

68. The Court reasoned: "[I]t is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc." *Id.* (citations omitted). Another reason the Court gave was that although extending qualified immunity to officials helped encourage good candidates to seek office, no such purpose would be served if the immunity were extended to municipalities. *Id.* at 656 n.40 (citing Wood v. Strickland, 420 U.S. 308, 319-20 (1975)).

69. *Id.* at 651 (citations omitted).

70. 457 U.S. 800 (1982).

71. *Id.* at 801.

72. *Id.* at 810-15.

73. *Id.* "Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' The subjective component refers to 'permissible intentions.'" *Id.* at 815 (citations omitted). The Court defined these elements by using a negative proposition:

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury."

Id. (quoting Wood v. Strickland, 420 U.S. 302, 322 (1975)).

> of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.[74]

The Court found that the "subjective" element of the immunity defense prevented courts from quickly disposing of insubstantial claims; consequently, the *Harlow* Court changed the standard of pleading relevant to the "subjective" element so that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery."[75] The pleading requirements for a § 1983 action involving qualified immunity were thus distinctly weighted in favor of the defendant. Until the plaintiff proved that the immunity defense did not apply, discovery would not be allowed.[76] *Harlow* therfore appeared to approve of tougher pleading requirements for plaintiffs bringing suit against officials claiming qualified immunity.

Heightened pleading standards with respect to certain types of actions have existed for some time, and in some specific circumstances, the Federal Rules of Civil Procedure even mandate them.[77] Even before the post-*Monell* "deluge" of § 1983 actions, courts had dismissed civil rights complaints for non-specific pleading.[78] Most commentators point to *Valley*

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74. *Id.* at 815-16. *Harlow* referred to an earlier decision as emphasizing "our expectation that insubstantial suits need not proceed to trial," saying:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . ., it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Id. at 808 (citing Butz v. Economou, 438 U.S. 478, 507-08 (1978)) (citations omitted); *see also infra* notes 90-93 and accompanying text (discussing analysis of *Harlow* in later decisions).

75. *Harlow*, 457 U.S. at 817-18.

76. *Id.* at 818. The immunity defense could be defeated by showing that the officials' conduct had violated "clearly established constitutional rights of which a reasonable person would have known." *Id.* (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)). The Court meant for this requirement to serve as a hurdle before access to the litigation process is given. "Until this threshold immunity question is resolved, discovery should not be allowed." *Id.*

77. FED. R. CIV. P. 9(b); *see supra* note 37.

78. Even before civil rights actions became widespread, courts used a heightened pleading standard to dismiss such claims. *See, e.g.*, Negrich v. Hohn, 379 F.2d 213, 215 (3d Cir. 1967) (dismissing complaint against police for being too conclusory); Powell v. Workmen's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964) (dismissing §§ 1983 and 1985 claims for not alleging deliberate acts on the part of the defendant).

v. Maule[79] as the origin of a heightened pleading standard specifically for civil rights cases, and many courts followed the *Valley* rationale, imposing their own heightened standards.[80] In *Valley*, the court dismissed the plaintiff's claims under §§ 1983 and 1985 for lack of sufficient factual allegations to substantiate his claims of wrongdoing by the defendants.[81] The court then held that the complaint was subject to a special pleading rule for civil rights cases, even though it passed the notice pleading standard.[82] "As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts."[83] The *Valley* court went on to state:

> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. 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.[84]

The particular heightened pleading standard at issue in *Leatherman* had its origins in *Elliott v. Perez*.[85] The *Elliott* plaintiffs brought separate actions for damages against a district attorney, his assistant, and a state district judge, alleging that a conspiracy between the defendants deprived the plaintiffs of their civil rights.[86] Two of the defendants successfully moved to dismiss the claims based on their absolute immunity from suits

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79. 297 F. Supp. 958 (D. Conn. 1968).

80. *See* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 948-50 (1990); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984).

81. *Valley*, 297 F. Supp. at 959. The plaintiffs in *Valley* alleged that the defendants had conspired to infringe upon their civil rights. *Id.* The district court found that the plaintiffs' allegations were insufficient and characterized them as "utterly devoid of any factual allegations which allege overt acts or purposeful deprivation of rights." *Id.* at 960. The *Valley* decision therefore enacted a heightened pleading standard as a response to the increase of civil rights litigation and justified it primarily on grounds of public policy and judicial efficiency.

82. *Id.* at 960.

83. *Id.*

84. *Id.* at 960-61. According to one commentator, the *Valley* court justified the heightened pleading rule on three grounds. First, the court assumed that many civil rights actions are frivolous. Second, the court expressed that many of the actions should be litigated in state, not federal courts. Third, the court observed that civil rights actions could possibly expose defendants to "unnecessary harassment and embarrassment." *See* Blaze, *supra* note 80, at 950.

85. 751 F.2d 1472 (5th Cir. 1985).

86. *Id.* at 1474-75.

for damages as judges and prosecutors.[87] The Fifth Circuit Court of Appeals held that "the absolute constitutional tort immunity accorded to some government officials requires the trial judge to demand heightened standards of pleading by plaintiffs in cases in which that doctrine is going to come into play."[88] Noting that "[t]he blunderbuss phrasing of the arguable claims in the plaintiff's complaints . . . presents this Court initially with an issue which goes to the heart of the 'immunity' from damage suits long accorded certain government officials," the court analyzed the policies supporting a heightened pleading standard in actions involving immunity defenses.[89]

The *Elliott* court discussed in detail how *Harlow v. Fitzgerald* contrasted the concerns of the immunity doctrine with the need to let meritorious claims proceed.[90] The court also noted there was a substantial interest—beyond the traditional interest in providing freedom from damages—in protecting government officials from having to *defend* against damage claims:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. [There are] the general costs of subjecting officials to the risk of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service . . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. In-

87. *Id.* at 1476.

88. *Id.* at 1473. The court's opinion went so far as to point out that "[i]n the now familiar cases invoking 42 U.S.C. § 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations." *Id.* at 1479.

In Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987), the Fifth Circuit utilized the rule formulated in *Elliott* in a § 1983 action against a municipality. Although *Palmer* represents the first time the Fifth Circuit used a heightened pleading standard in a case involving a § 1983 suit against a municipal corporation, it was arguably not the first time the Fifth Circuit had used the standard in a § 1983 case. *See, e.g.*, Parish v. N.C.A.A., 566 F.2d 1028, 1033-34 (5th Cir. 1978) ("Conclusory allegations, however, are no substitute for a factual showing of actual discriminatory intent or effect."); Johnson v. Wells, 566 F.2d 1016, 1017 (5th Cir. 1978) ("The applicant must set forth *specific* facts that would, if proved, warrant the relief he seeks.") (emphasis added).

89. *Elliott*, 751 F.2d at 1476. The relevant passages of the complaint were quoted in the opinion:

> [T]he defendants PEREZ, KLEIN and LEON *conspired* to deter by force, intimidation or threat *through the criminal prosecution of complainant and improper discharge of the special grand jury* to influence the verdict, presentment and indictment of the special grand jury and specifically [plaintiff Elliott] as foreman of the special grand jury and *to injure complainant* in his person and property . . . .

Id.

90. *Id.* at 1473-76.

> quiries of this kind can be peculiarly disruptive of effective government.[91]

The Fifth Circuit reasoned that because the Supreme Court, through *Harlow*, had decided that defendants entitled to official immunity "should be free not only from ultimate liability, but also from trial, and the oft-time overwhelming preliminaries of modern litigation,"[92] then those officials would be exempt from trial and trial preparation until a showing was made that the immunity doctrine would not apply.[93]

The *Elliott* court stated the equation from the standpoint of the immunity doctrine, reasoning that because immunity constitutes a substantive right, the Enabling Act precluded the Rules from abridging or modifying it.[94] The court found substantial authority within the Rules for the exclusion of frivolous complaints.[95] First, the court described the recently amended Rule 11 as a provision requiring a more intense pre-filing inquiry into the facts that would lead to greater specificity in complaints, as well as encouraging courts to take a more active role in managing the litigation.[96] Second, the Court found that a Rule 12(e) motion for a more definite statement allowed courts the authority to require detailed facts from a plaintiff to support the contention that the immunity defense could not be sustained.[97]

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91. *Id.* at 1477-78 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982)).

92. *Id.* at 1478.

93. *Id.*

94. *Id.* The Rules Enabling Act provides that the Federal Rules of Civil Procedure may not abridge, enlarge, or modify any substantive right. 28 U.S.C. § 2072 (1988). The *Elliott* court reasoned that official immunity was enough of a substantive right to preclude the notice pleading standard of Rule 8(a) from compromising it. *Elliott*, 751 F.2d at 1479.

95. *Elliott*, 751 F.2d at 1480-82.

96. *Id.* Rule 11 provides that the "signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading . . . [and] that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact." FED R. CIV. P. 11. The Elliott court elaborated that "[t]his means also that having a good faith belief, he is able to state with some particularity what those facts are." *Elliott*, 751 F.2d at 1481-82.

97. *Id.* at 1482. Rule 12(e) reads in pertinent part: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." FED. R. CIV. P. 12(e). The *Elliott* court found precedent for such an interpretation of Rule 12(e) in its decision in *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976), which approved a district court's use of a questionnaire to flesh out *pro se* prisoner complaints.

However, not all the judges on the Fifth Circuit Court of Appeals thought that a heightened pleading standard was the best means to accomplish their goal. In his special concurrence, Judge Higginbotham wrote, "I do not know where we find the authority to add the requirement that claims against officials who enjoy immunity from suit shall be plead with particularity." *Id.* at 1483 (Higginbotham, J., concurring). Judge Higginbotham advocated changing the requirements of the cause of action to include a statement of sufficient facts which, if true, would demonstrate the absence of immunity. *Id.* This solution would, however, simply create a different pleading requirement for summary judgment. In any case, Judge Higginbotham at least thought it to be more in accord with the spirit of the Rules. "It does no violence to notice pleading to suggest that the adequacy of a pleading is case specific." *Id.* (Higginbotham, J., concurring).

Karim-Panahi v. Los Angeles Police Department[98] illustrates the confusion among the circuit courts concerning heightened pleading standards. In *Karim-Panahi*, the Ninth Circuit Court of Appeals considered a pro se § 1983 complaint that was dismissed on a 12(b)(6) motion.[99] Employing an approach different from that used by the Fifth Circuit in *Elliott*, the *Karim-Panahi* court stated: "In this circuit, a claim of municipal liability under section 1983 *is sufficient* to withstand a motion to dismiss '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.'"[100] It seems unlikely that the claim in *Karim-Panahi* could have withstood the heightened standard employed by the Fifth Circuit in *Elliott*, which required far more than "conclusory allegations."[101]

In *Siegert v. Gilley*,[102] the Supreme Court declined an opportunity to resolve the confusion among the lower federal courts as to heightened pleading standards. The plaintiff brought suit against his former supervisor, alleging that the supervisor infringed his "liberty interests" in violation of the Due Process Clause of the Fifth Amendment.[103] Gilley filed a motion to dismiss, asserting qualified immunity among his defenses.[104] The court of appeals found that Siegert's claims were insufficient to overcome its heightened pleading standard for cases involving qualified immunity defenses.[105] Yet the Supreme Court declined to comment on the heightened pleading standard and instead held that Siegert's claim failed to state a vio-

98. 839 F.2d 621 (9th Cir. 1988). *Leatherman* made reference to *Karim-Panahi* for this very purpose. *Leatherman*, 113 S. Ct. 1160, 1161-62 (1993).

99. *Karim-Pahani*, 839 F.2d at 623.

100. *Id.* at 624 (quoting Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986)) (emphasis added).

101. *Elliott*, 751 F.2d at 1479; *see supra* text accompanying note 93.

102. 111 S. Ct. 1789 (1991).

103. *Id.* at 1792. Petitioner Fredrick Siegert was employed as a clinical psychologist at Federal Hospital from November 1979 to October 1985. *Id.* at 1791. After being terminated for his "inability to report for duty in a dependable and reliable manner," Siegert found work in a United States Army Hospital in Germany. *Id.* When Siegert requested that his former supervisor provide the Army Hospital with information on his job performance, H. Melvin Gilley responded with a letter characterizing Siegert as inept, unethical, and untrustworthy. *Id.* As a result, Siegert did not receive the necessary credentials to continue his work and was terminated from federal service. *Id.* Siegert alleged that Gilley's statement had infringed upon his "liberty interests" guaranteed by the Fifth Amendment. *Id.* at 1792.

104. Siegert v. Gilley, 895 F.2d 797, 799 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). The Court of Appeals for the District of Columbia found that "improper motive" was an essential element of Siegert's claim, and that to defeat a defendant's claim of qualified immunity, a plaintiff must adequately allege specific evidence of illicit intent. *Id.* at 802. The Court of Appeals then decided that Siegert's claims only asserted that Gilley either knew his statements to be false or gave them in reckless disregard of the truth, and therefore did not satisfy the heightened standard. *Id.* at 803-05.

105. *Id.* at 802.

lation of any clearly established constitutional right.[106] Justice Kennedy's concurrence, however, addressed the lower court's pleading standard:

> The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis in a general manner. There is a tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.[107]

In striking contrast to Justice Kennedy's defense of the heightened standard, Justice Marshall's dissent criticized the lower court's requirement: "I find no warrant for such a rule as a matter of precedent or common sense."[108] *Siegert*, then, left the Court divided on the applicability of heightened pleading standards, at least when individual officials were concerned.

Leatherman is of enormous practical significance to civil rights plaintiffs in particular and the federal judicial system in general. Although *Leatherman*'s prohibition of heightened pleading standards in § 1983 suits against municipalities seems clear enough, the true scope of the decision is difficult to assess. The breadth of *Leatherman*'s ban on heightened pleading standards is unclear. The addition of considerations not present in the facts of the case, such as the immunity doctrine, might justify the use of a heightened pleading standard. There is a plausible argument that a heightened standard is appropriate in the context of § 1983 suits against municipalities, but there is a stronger argument that the policy goals of § 1983

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106. *Siegert*, 111 S. Ct. at 1793-94.

107. *Id.* at 1795 (Kennedy, J. concurring) (citations omitted). Justice Kennedy went on to say that a heightened standard surpassed the Rules' usual requirements but seemed well-suited to qualified immunity cases:

> [A]voidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.
>
> Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.

Id. (Kennedy, J., concurring). *Leatherman* did not involve a qualified immunity defense, *see* 113 S. Ct. at 1162, and the decision was unanimous. The claim of a qualified defense would appear to be Justice Kennedy's main criterion for the imposition of a more stringent pleading standard.

108. *Siegert*, 111 S. Ct. at 1801 (Marshall, J., dissenting). Justice Marshall was concerned that the stricter rule might preclude plaintiffs from obtaining through discovery the evidence they needed to proceed. "Because evidence of such intent is peculiarly within the control of the defendant, the 'heightened pleading' rule employed by the court of appeals effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim." *Id.* (Marshall, J., dissenting). In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court allowed a private party to bring an action for compensatory damages under the Fourth Amendment. *Id.* at 397. "A Bivens remedy has become a judicially created version of a section 1983 remedy, and it relies heavily on traditional common law compensatory damages rules." KENNETH F. RIPPLE, CONSTITUTIONAL LITIGATION § 8-4(A), at 327 (1984).

prevent the use of the heightened standard.[109] That the *Leatherman* decision was purportedly based on the requirements of the Federal Rules instead of some of the compelling policy reasons supporting § 1983 actions against municipalities suggests that the scope of the decision is, in fact, quite broad.[110] The justifications of a heightened standard arguably fall short even in cases involving the immunity doctrine.[111] The varied reactions of lower courts to the *Leatherman* decision suggest that the Court needs to clarify what circumstances, if any,[112] would justify a heightened standard.[113]

Leatherman seems consistent with the Court's views on municipal liability. The *Owen* Court found no injustice in denying qualified immunity to municipalities when it held that principles of fairness and loss-spreading required municipal liability, and that such liability would not lead to undesirable indecisiveness in policy-making.[114] This line of reasoning arguably forbids heightened pleading standards from minimizing municipal liability. A heightened standard would minimize liability by insuring that only a fraction of suits filed actually would be tried. Because municipalities are subject to § 1983 liability, perhaps a heightened standard is no more necessary to protect them from frivolous claims than for any other defendant.[115]

However, the simplicity of the preceding argument may be misleading because municipalities are not like any other defendant. To hold a municipality liable under § 1983, a plaintiff must allege not only that a constitutional deprivation occurred, but also that a municipal policy or custom caused it.[116] A § 1983 plaintiff sometimes must engage in a great deal of costly and disruptive discovery to substantiate a claim. Some courts consequently have held that the policy reasons in favor of a heightened pleading rule are even more compelling in an action against a municipality, given the potential disruption to the government itself.[117] As one court noted, "[T]he

109. *See infra* notes 114-23 and accompanying text.

110. *See infra* notes 124-30 and accompanying text.

111. *See infra* notes 131-50 and accompanying text.

112. This Note concludes that the Federal Rules provide better solutions to the "explosion" of § 1983 litigation than the heightened pleading standard. *See infra* notes 162-72 and accompanying text.

113. *See infra* notes 151-61 and accompanying text.

114. Owen v. City of Independence, 445 U.S. 622, 654-56 (1980).

115. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Id.* at 654.

116. Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

117. Blaze, *supra* note 80, at 956. Professor Blaze relates an excellent example of this line of judicial reasoning:

> [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 occur-

policy underlying the special pleading requirement in § 1983 claims is even more pronounced when a local government is charged with a violation under the statute. There is a public interest in protecting local government files from overbroad and irrelevant inquiries."[118] A stricter pleading standard could conceivably operate as a "golden mean" between qualified immunity and no restriction on liability at all because it would provide less protection than immunity (meritorious suits would, in theory, still proceed), and still prevent frivolous claims. Thus, the *Leatherman* Court might have chosen to accept a heightened pleading standard when a municipality is named as a § 1983 defendant.

The policy goals of § 1983, however, outweigh the special considerations due municipalities. In *Owen*,[119] the Court discussed the fact that the statute was enacted to provide a remedy against the abuse of state power and was intended to deter future violations:

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[120]

Both of these goals would be seriously compromised by the imposition of a heightened pleading standard in cases involving municipalities. Because individual officials would still enjoy "qualified immunity" from § 1983 claims, a heightened pleading standard would hamper a § 1983 plaintiff's

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ring in the community that counsel believes can be shown to involve a similar constitutional violation.

Id. (quoting Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (imposing higher pleading standard for cases involving municipal corporations)).

118. LaPlant v. Frazier, 564 F. Supp. 1095, 1098 (E.D. Pa. 1983). The *LaPlant* court employed a heightened pleading standard to dismiss a § 1983 claim against a police station and two officers. *Id.*

119. Owen v. City of Independence, 445 U.S. 622 (1980).

120. *Id.* at 651-52 (citations omitted). Concerning the interest of curbing abuses of state power, the Court wrote:

> How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it had begotten.

Id. at 651 (citations omitted).

most effective remedy. The deterrent power of § 1983 would lose its force if municipal officers knew that the vast majority of civil rights suits would fail under a heightened standard. Indeed, the majority of such actions would probably fail because most plaintiffs would not have enough evidence to allege sufficiently the existence of a municipal policy or custom *prior* to discovery. As one 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.[121]

In essence, a heightened pleading standard would place a civil rights plaintiff in a vicious circle of pleading requirements: specific facts are needed to get to the discovery stage, but the specific facts in question are almost invariably under the defendant's control and thus can only be obtained through discovery.[122] Municipalities would therefore enjoy de facto freedom from civil rights cases, despite the Court's interpretation that § 1983 should serve as a remedy and a deterrent to governmental deprivations of federal rights.[123] In a sense, the heightened pleading standard achieves the same minimization of municipal liability that an extension of qualified immunity would have—a result the *Owen* Court opposed.

Leatherman can be viewed as a decision that balances the interest in minimizing municipal liability against the importance of allowing civil rights claims to proceed. Interestingly enough, the opinion cited none of these reasons to justify its holding but instead relied upon the spirit and letter of the Federal Rules of Civil Procedure. The Court based its interpretation of Rule 8(a)(2) on *Conley v. Gibson*,[124] and by doing so, the *Leatherman* Court indicated that it took Rule 8(a)(2) at face value and that no more would be required of a plaintiff except in the limited circumstances provided for in Rule 9(b).[125]

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121. Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982). The *Means* court declined to impose a heightened standard on a § 1983 claim. *Id.* at 462. Instead, the court held that "the teaching of the Supreme Court in Conley v. Gibson and the pleading concepts of Fed.R.Civ.P. 8(a) are no less applicable to § 1983 actions than to any other lawsuit." *Id.* at 459 (citations omitted).

122. *See* Blaze, *supra* note 80, at 962-63. Justice Marshall raised this very concern in Siegert v. Gilley, 111 S. Ct. 1789, 1801 (1991) (Marshall, J., dissenting). *See supra* note 108.

123. *See supra* note 120 and accompanying text.

124. 355 U.S. 41 (1957).

125. *Leatherman*, 113 S. Ct. at 1163. The best interpretation of what the *Conley* Court meant by the passage quoted in *Leatherman* is probably found in Leimer v. State Mutual Life Assurance Co., 108 F.2d 302 (8th Cir. 1940), one of the cases cited by the *Conley* Court to support its holding. The *Leimer* court stated that a complaint would be deficient if it appeared that no valid

Leatherman could therefore be read as a blanket prohibition on heightened pleading standards. The language of the opinion provides some evidence of this, as Chief Justice Rehnquist concluded by stating that the only way to require a greater degree of specificity in the pleadings would be to amend the Federal Rules. "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[126] The Court's treatment of *Conley* also suggests that the Court would not countenance creative interpretation of the Rules.[127] Finally, the Court read the particularity requirement of Rule 9(b) as indicating that because the Rules do not mention any other requirements for particularity, no others exist.[128]

Interpreting *Leatherman* as imposing a complete ban on heightened pleading standards may, however, presume too much. The opinion carefully stated that the stricter standard is inappropriate in the context of § 1983 claims against municipalities, but the Court did not state that a heightened standard would be inappropriate in all circumstances.[129] Perhaps the most revealing aspect of the opinion with regard to its scope was the Court's announcement that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."[130] This statement suggests that the Court was at least willing to consider the merits of a heightened standard in another context and did not interpret its decision as holding that heightened pleading standards apart from Rule 9(b) were invalid per se.

Although *Leatherman*'s ban on heightened standards may be consistent with the Court's views on municipal liability, it is less clear how the Court would rule on the applicability of the heightened standard in actions involving immunity defenses. The Court's refusal to decide whether a heightened standard could properly be applied to a claim involving a quali-

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claim existed at all, but not if it had merely been insufficiently stated. *Id.* at 306; *see also* Wingate, *supra* note 80, at 680 (discussing *Leimer*).

126. *Leatherman*, 113 S. Ct. at 1163.

127. "In *Conley v. Gibson*, we said in effect that the Rule meant what it said." *Id.* (citations omitted).

128. *Id.* The Court stated, "[T]he Federal Rules do address in 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" *Id.*

129. Chief Justice Rehnquist noted, "Perhaps if Rules 8 and 9 were rewritten today, *claims against municipalities under § 1983* might be subjected to the added specificity requirement of Rule 9(b)." *Id.* (emphasis added). It is unclear what the Chief Justice intended by this comment, but it is possible that he would favor such an amendment to the Rules.

130. *Id.* at 1162.

fied immunity defense invites speculation. In *Harlow v. Fitzgerald*,[131] the Court indicated that special care should be taken in screening suits involving an immunity defense.[132] *Harlow* voiced strong disapproval of the litigation of frivolous § 1983 actions and manifested its concern by doing away with the "subjective" element of the qualified immunity standard, thus making it easier for these suits to be dismissed before trial.[133] The Court even went so far as to say that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery."[134] By eliminating the subjective nature of the qualified immunity test, the *Harlow* Court clearly expressed concern that the costs incurred by allowing extensive discovery against local governments would outweigh the benefits of allowing every § 1983 suit to proceed. The Court also found that advocating the summary dismissal of frivolous suits would not hinder the overall operation of § 1983: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."[135] Thus, the Court certainly is attuned to the interest in efficiently dismissing frivolous civil rights suits—contrary to an overly broad interpretation of *Leatherman*.

Following the lead of *Harlow*, the Fifth Circuit in *Elliott*[136] adapted the Court's rationale in a seemingly appropriate situation—one where a defense of qualified immunity was involved.[137] Acknowledging that *Harlow* came down on the side of protecting officials from frivolous suits, *Elliott* employed a heightened pleading standard as the best means of accomplishing that task.[138] This standard was struck down by *Leatherman* when it was employed in a suit involving no defense of qualified immunity.[139] Assuming that the policy reasons for dismissing frivolous § 1983 suits articulated in *Harlow* are still valid, the question then becomes whether the *Elliott* standard is allowed in a case similar to the one in which it originated. In other words, would a heightened pleading standard correspond to what the *Harlow* opinion called for in cases involving qualified immunity?

131. 457 U.S. 800 (1982).

132. *See supra* notes 75-76 and accompanying text.

133. *Harlow*, 457 U.S. at 807, 815-19.

134. *Id.* at 817-18.

135. *Id.* at 819.

136. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

137. *See supra* notes 85-97 and accompanying text.

138. *Elliott*, 751 F.2d at 1478.

139. *Leatherman*, 113 S. Ct. at 1162.

The *Harlow* opinion indicated that the main tool for the removal of frivolous § 1983 cases would be summary judgment motions under Rule 56(c):

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.[140]

The *Elliott* court clearly went beyond the use of summary judgment to dispose of claims perceived as frivolous. The heightened standard, as its name suggests, raised the requirements of Rule 8(a) for certain cases: "[W]e, and other courts, have tightened the application of Rule 8 when the very nature of the litigation compels it. In the now familiar cases involving 42 U.S.C. § 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations."[141] It is doubtful that the *Harlow* Court would have condoned a heightened standard even when qualified immunity was involved because it only spoke in terms of summary judgment. *Leatherman* also referred to summary judgment as the preferred method of disposing of meritless cases.[142] Therefore, a heightened pleading standard appears to be too drastic a procedural measure even when the immunity doctrine is involved.

Use of a heightened pleading standard may be impermissible in qualified immunity cases because even the significant interest in limiting exposure to § 1983 suits does not merit cursory dismissal. Although the Court has accorded great importance to protecting officials from liability, it is difficult to see how a heightened standard could be justified under the reasons given for "qualified immunity." First, a heightened standard would not significantly aid in the prevention of " 'the injustice . . . of subjecting to liability an officer who is required . . . to exercise discretion.' "[143] This end seems to be adequately served by requiring strict adherence to *Harlow*'s admonition that the availability of an immunity defense be a threshold question, with no discovery being awarded until a violation of a recognized right has been proven.[144] In *Siegert v. Gilley*[145] the Court took this approach and

140. *Harlow*, 457 U.S. at 818.

141. *Elliott*, 751 F.2d at 1479.

142. *Leatherman*, 113 S. Ct. at 1163.

143. Owen v. City of Independence, 445 U.S. 622, 654 (1980) (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

144. *Harlow*, 457 U.S. at 818.

145. 111 S. Ct. 1789 (1991).

held that the court below did not need to dismiss a § 1983 claim by the use of a heightened standard:

> We think the Court of Appeals should not have assumed without deciding this preliminary issue in this case, and proceeded to examine the sufficiency of the allegations of malice. In *Harlow* we said that "[u]ntil this *threshold* immunity question is resolved, discovery should not be allowed." A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.[146]

This approach has two virtues. It protects the defendant from personal liability and guards against the threat of having to defend against meritless suits.[147] First, unlike the heightened standard, the *Siegert* approach also accomplishes all of the purposes of the immunity doctrine without violating the spirit of the Rules. The *Siegert* approach merely calls for courts to ensure that all the elements in the cause of action have been pleaded, and not to award discovery until this occurs.[148] The paradox of the heightened pleading standard is avoided because the court bases its decision on a purely legal question and not on the plaintiff's ability to allege facts that are as yet unknown.

Second, a heightened pleading standard, far more than "qualified immunity," unnecessarily deters liability to the extent that an official might be encouraged to disregard violations of constitutional rights in the exercise of his duties.[149] "Qualified immunity" only prevents the personal liability of officials, whereas a heightened standard would decrease the total number of

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146. *Id.* at 1793 (alterations in original) (citations omitted).

147. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id.*

148. In effect, the majority opinion of *Siegert* strips the heightened pleading standard of one of its main bases of support: Justice Kennedy's concurrence in the same opinion. Justice Kennedy maintained that the court of appeals properly used a heightened pleading standard to dismiss the claim by virtue of holding the plaintiff's allegations of malice insufficient. *Id.* at 1795 (Kennedy, J., concurring). Malice was required to avoid the suit being barred by qualified immunity. Justice Kennedy opined that a court should look to the arguably simpler task of determining the sufficiency of the malice claim before moving on to the constitutional question of whether a violation of a clearly established constitutional or federal right had been established. *Id.* (Kennedy, J., concurring); *see also supra* note 107 and accompanying text. Although this view has merit, it is at odds with the Court's distaste for the heightened requirement voiced in *Leatherman.*

149. The two "mutually dependent rationales" that form the basis of the doctrine of immunity are:

§ 1983 suits because plaintiffs would be halted before they gained enough access to the facts to discover whether an official actually had deprived them of their rights. This distinction is significant because the extension of qualified immunity was not intended to cause the courts to turn a blind eye on official misbehavior. Imposition of a heightened pleading standard therefore would go beyond the purpose of the immunity doctrine and allow judicial investigation of constitutional violations to be dropped prematurely.

In addition, even if the fear of personal liability might deter citizens from holding public office, it is an insufficient reason for imposing a stricter pleading standard.[150] Because the removal of the threat of personal liability would seemingly end this concern, extension of qualified immunity is an adequate remedy. A heightened standard does not end the threat of personal liability, it only makes it harder for such claims to get into court.

The reactions of the lower federal courts to *Leatherman* have been varied and provide little guidance as to the true scope of the decision. Some of the district courts apparently interpret the decision as holding that no pleading standard beyond the requirements of Rule 8(a) is permissible in any type of civil rights case. For example, in *Gibson v. Adult Probation-Parole Department of Montgomery County*,[151] a federal district court cited *Leatherman* for the following proposition:

> While this court in the recent past has required a modicum of factual specificity in civil rights actions brought pursuant to 42 U.S.C. § 1983, this is no longer the rule. A federal court may not apply a heightened pleading requirement in a civil rights action that is more stringent than the normal pleading requirements of Rule 8(a).[152]

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(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion;
(2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgement [sic] required by the public good.

Owen v. City of Independence, 445 U.S. 622, 654 (1979) (citing Scheuer v. Rhodes, 416 U.S. 232, 240 (1974)). Neither of these rationales necessarily require that all claims alleging official wrongdoing be cut off early in the pleading stages. It is arguable that the possibility of a suit against a public official would provide a healthy deterrent to the possible misuse of power, even though the doctrine of qualified immunity would probably limit possible remedies to injunctions. *See id.* at 657 n.41 (explaining how threat of government liability is a "wholesome deterrent" to irresponsible acts by government employees).

150. *Id.* at n.38 (citing Wood v. Strickland, 420 U.S. 308 (1975)).

151. Gibson v. Adult Probation-Parole Dep't of Montgomery County, 1993 U.S. Dist. LEXIS 11427 (E.D. Pa. 1993).

152. *Id.* at *2-*3 (citing *Leatherman*, 113 S. Ct. at 1163).

Similarly, another federal district court interpreted *Leatherman* as holding that "[u]nless otherwise provided by Rule 9 of the Federal Rules of Civil Procedure, facts need not be set out with particularity."[153]

A few courts have used the reasoning in *Leatherman* to strike down heightened standards in contexts other than § 1983 actions. For example, *Pape v. Great Lakes Chemical Co.*[154] involved a claim under a federal environmental statute.[155] Although the defendants argued that a heightened pleading standard should be applied to the complaint, the court refused, reasoning that "[t]he Supreme Court . . . has noted that Federal Rule 9(b) provides only two exceptions to notice pleading . . . . The Court has held that any other exceptions 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[156] Courts in other districts have also refused to extend heightened pleading standards to other areas.[157] Apparently, *Leatherman* has eradicated heightened standards in several districts, thereby indicating a trend among courts to interpret *Leatherman* as a blanket prohibition on all pleading standards not explicitly authorized by the Rules.

Not all district courts, however, have interpreted *Leatherman* so broadly. Some have declined to read *Leatherman* as holding anything more than that heightened pleading standards are inappropriate in § 1983 actions

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153. Carney v. Fairman, 1993 U.S. Dist. LEXIS 11289, *3 (N.D. Ill. 1993) (citing *Leatherman*, 113 S. Ct. at 1163). The decision continued:

> *Hossman*'s statement of the pleading standards governing section 1983 claims has been implicitly overruled by *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, which held that courts may not impose heightened pleading requirements in section 1983 actions. *Leatherman* struck down the Fifth Circuit's requirement that section 1983 plaintiffs plead their actions with factual detail and particularity. *Leatherman* squarely held that section 1983 plaintiffs need only satisfy Fed. R. Civ. P. 8(a)(2)'s requirement of "a short and plain statement of the claim."

Id. at *7 (citations omitted) (discussing Hossman v. Blunk, 784 F.2d 793 (7th Cir. 1986)).

154. No. 93-C-1585, 1993 U.S. Dist. LEXIS 14674 (N.D. Ill. Oct. 19, 1993).

155. The suit was brought under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, which provides for the cleanup of hazardous waste sites and allows violators to seek contribution from one another. *See* 42 U.S.C. § 9607(a) (1988).

156. *Pape*, 1993 U.S. Dist. LEXIS 14674 at *20 n.5 (citing *Leatherman*, 113 S. Ct. at 1163); *see also* Warwick Admin. Group v. Avon Prods., Inc., 820 F. Supp. 116, 120 (S.D.N.Y. 1993) ("While there appears to be some case law support for requiring a heightened pleading standard, we find that the *Leatherman* reason applies with equal force here.").

157. *See, e.g.*, Garus v. Rose Acre Farms, Inc., 1993 U.S. Dist. LEXIS 13328 (N.D. Ind. 1993). The *Garus* court applied *Leatherman* to invalidate a heightened pleading requirement in actions involving Title VII claims:

> Although *Leatherman* concerned the narrow question of § 1983 complaints against municipal corporations, its reasoning in this regard applies equally to Title VII actions, such as the one here: had the rules foreseen heightened pleading requirements for such actions, they would have so provided—they did not. Accordingly, the court concludes that no heightened particularity is required in pleading Title VII claims.

Id. at *11 (citations omitted).

against municipalities. For example, in *Luedke v. Pan Am Corp.*, the federal district court for the southern district of New York heard a § 1983 claim involving a qualified immunity defense alleged by a government appointed official.[158] The court declared that *Leatherman* "explicitly left open the question of whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."[159] The opinion went on to state, however, that because of the Supreme Court's reluctance to recognize any type of heightened standard in *Leatherman*, such standards should probably only apply in rare instances involving important officials:

> Even if a heightened pleading standard is required in actions brought against officials performing core governmental functions, the Supreme Court's expressed preference in *Leatherman* for limiting stringent pleading requirements to situations contemplated by the Federal Rules of Civil Procedure indicates that the heightened standard is unlikely to be extended to actions brought against persons, such as the Committee and its members, appointed by government officials to look after their own private interests and the interests of those similarly situated.[160]

Thus, *Luedke* illustrates the ambiguity that the district courts attach to *Leatherman*'s holding and the extent to which district court judges are forced to speculate on how the Court would address a case involving the immunity doctrine.[161]

The decline of the use of heightened pleading standards should be viewed favorably by all concerned because the Federal Rules of Civil Procedure provide an accurate way of sifting through claims while conserving judicial resources. A motion for summary judgment, pursuant to Rule 56,[162] is arguably better suited to disposing of frivolous claims than a heightened pleading standard. The Supreme Court itself has expressed an affinity for the use of Rule 56 to dispose of cases on several occasions.[163]

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158. 1993 U.S. Dist. Lexis 11598 at *3 (S.D.N.Y. 1993).

159. *Id.* at *20.

160. *Id.* at *21. It is unclear whether the court contemplated a two-tiered structure of officials based on the importance of their duties, with a heightened standard available to one but not the other.

161. Another case involving a public official who claimed an immunity defense is Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), in which the court held that *Leatherman* did not apply. "[B]ecause the [*Leatherman*] Court did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit." *Id.* at 794; *see also* McDonald v. City of Freeport, 834 F. Supp. 921, 929 (S.D. Tex. 1993) (holding the heightened standard applicable to suits against individual officials).

162. FED. R. CIV. P. 56.

163. In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court said:

> 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

The *Leatherman* Court expressly mentioned that summary judgment is one of the procedures that federal courts have to rely on in lieu of a heightened standard, further supporting the idea that summary judgment is the preferred manner to screen cases.[164] Proper use of Rule 56 would provide a more accurate method of screening out meritless cases while still conserving judicial resources. Summary judgment motions would dispose of claims based on a review of their merits, whereas the heightened standard merely focuses on the degree to which the plaintiff can plead with particularity. Dismissal under Rule 56, at a minimum, offers a plaintiff a chance to present the merits of a claim, whereas a chance to amend a complaint before dismissal under a heightened standard only presents a plaintiff with the vain task of alleging with particularity facts that may not be known or obtainable at the time.[165]

Because a defendant may make a motion for summary judgment at the commencement of a suit, a plaintiff could be placed in the same situation presented by the heightened standard—i.e., compelled to allege facts that are as yet unknown. Rule 56(f), however, gives a court the means to allow the plaintiff to discover the existence of any necessary elements of the claim.[166] After postponing a summary judgment decision under 56(f), a court could allow sufficient discovery to determine the merits of the

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> 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.

Id. at 327. *See generally* Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L. J. 171 *passim* (1988) (reviewing the Court's pro-summary judgment jurisprudence in the 1986 session); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1041-52 (1989) (discussing the effects of *Celotex*). For a criticism of the Court's efforts to make summary judgment a more effective way of dismissing cases, see Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 *passim* (1988).

164. *Leatherman*, 113 S. Ct. at 1163.

165. Some courts have utilized this type of limited discovery in claims involving the immunity doctrine. *See, e.g.*, Gutierrez v. Municipal Court, 838 F.2d 1031, 1053 (9th Cir. 1988).

166. Rule 56(f) reads:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f). The *Leatherman* plaintiffs argued in district court that summary judgment should not be awarded because they had not had a reasonable opportunity for discovery pursuant to Rule 56(f). Leatherman v. Tarrant County, 755 F. Supp. 726, 734 (1991), *aff'd*, 954 F.2d 1054 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993). The court was unsympathetic to this request, noting that "[t]his suit was filed in December 1989, and plaintiffs have had ample opportunity to engage in full discovery since then." *Id.*

claim.[167] The discovery granted need not have the same debilitating effects that summary judgment seeks to avoid. First, a plaintiff is not automatically entitled to a Rule 56(f) motion.[168] The plaintiff must convince the court that the information sought could not have been obtained earlier and that the requested discovery is likely to unearth sufficient facts to defeat the summary judgment motion. A defendant could then serve depositions on the plaintiff to discover any deficiencies of the plaintiff's allegations on the immunity question, and successfully move for summary judgment if the allegations are insufficient. In this way, Rule 56(f) would allow courts to tailor discovery to the minimum amount necessary to determine the merits of a claim.

Rule 11 is also frequently used to discourage frivolous suits and could be employed by courts to fulfill many of the same functions as a heightened pleading standard while remaining within the Rules' authority. Rule 11 states that the signature of an attorney or party on a pleading attests that the pleading is made in good faith and is not frivolous.[169] The Rule also provides that "an appropriate sanction" is available if the party or attorney fails to meet the obligation thereby imposed.[170] Judicious use of Rule 11 could conceivably deter meritless § 1983 suits to the point that courts would be more inclined to hear the merits of § 1983 suits brought despite the threat of Rule 11 sanctions. If Rule 11 sanctions are used too frequently, however, there is a potential for a "chilling effect" on § 1983 suits that could prevent the submission of many justified actions.[171] The use of Rule 11 as a substitute for the heightened standard therefore would need to be combined with an overall examination of the factual basis of the claim, especially when, as

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167. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 484-91 (1986). Professor Marcus provides an excellent discussion of how Rule 56(f) provides courts with a far more precise tool than a heightened pleading standard.

168. The Rule states that a court "*may* refuse the application for judgment or *may* order a continuance to permit affidavits to be obtained . . . or *may* make such other order as is just." FED. R. CIV. P. 56(f) (emphasis added). The broad discretion accorded by the Rule allows courts to tailor the amount of discovery awarded to the circumstances of the case.

169. The relevant portion of Rule 11 reads:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

170. *Id.*

171. *See* Blaze, *supra* note 80, at 988.

in most civil rights claims, many material facts were in the exclusive control of the defendant at the commencement of the suit.[172]

Although the *Leatherman* decision expressly avoided the question of whether a heightened standard of pleading could be applied in a situation involving immunity concerns, the Court probably has turned its back on the dubious merits of a heightened standard. The Supreme Court, by holding the standard invalid on the basis of the Rules only—rather than on policy grounds—implied that any standard outside the authority of the Rules is invalid. It is also arguable on policy grounds that courts should not resort to a heightened standard even in cases involving immunity defenses when there is a compelling incentive to prevent frivolous suits. The careful application of the Federal Rules of Civil Procedure, under the directive of *Leatherman*, can provide a fairer means of disposing of plaintiff's § 1983 claims while still adequately protecting the government's interest.

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172. *See id.* Many § 1983 suits could conceivably be filed in good faith after a "reasonable inquiry," even when undisclosed facts held by the defendant would clearly reveal that the suit was groundless. To prevent unnecessary deterrence of § 1983 claims, courts might need to employ a looser definition of Rule 11's "reasonable inquiry" in recognition of the special problems faced by § 1983 plaintiffs.