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Richard L. Marcus

UC Hastings College of the Law, marcusr@uchastings.edu

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The Puzzling Persistence of Pleading Practice

Richard L. Marcus*

The draftsmen of the Civil Rules proceeded on the conviction, based on experience at common law and under the codes, that pleadings are not of great importance in a lawsuit.

. . . .
The keystone of the system of procedure embodied in the rules is Rule 8 The other procedural devices of the rules—broad joinder, discovery, free amendment, and summary judgment—rest on these provisions about pleadings.¹

Charles Alan Wright

It is clear that Professor Wright was correct about the tenor and content of the Federal Rules of Civil Procedure regarding pleading. The drafter of those rules—Charles Clark, who was Professor Wright’s mentor—initially favored abolishing pleading motions altogether under the new national procedures so that all merits dispositions would have to be by summary judgment.² Although the drafters declined such a radical course, they clearly intended to curtail reliance on the pleadings and minimize pleading practice. Therefore, Rule 8 only requires that the complaint set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”³ Pleading decisions, so prominent at common law and under the codes, were to wither and die except in extraordinary circumstances.⁴

* Distinguished Professor of Law, University of California, Hastings College of the Law. I am indebted to Cari Pinkowski, Hastings class of 1999, for research assistance on this essay. I am also indebted to the participants at the Symposium on October 31 and November 1, 1997 for a number of very helpful comments that I have appropriated for inclusion in this essay. All errors that remain are mine alone. Copyright 1998 by Richard L. Marcus.

1. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 66, at 456, § 68, at 467-68 (5th ed. 1994).

2. See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 927-28 (1976).

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

4. See WRIGHT, *supra* note 1, § 68, at 471 (stating that dismissal under Rule 12(b)(6) is allowed only in “the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief”).

At first, there was resistance from some quarters, and proposals were made for rewriting the rules to require more of the pleadings.⁵ But in 1957 the Supreme Court announced in *Conley v. Gibson*⁶ that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”⁷ Although somewhat hyperbolic,⁸ this decision was apparently intended to put the matter of deciding cases on the pleadings to rest, and proposals to tighten the pleading rules ceased.⁹

But pleading practice persisted. In some areas—notably securities fraud litigation and civil rights suits—the courts appeared to disinter fact pleading, which flourished under the codes and had been thought buried. A dozen years ago, I examined this trend in the reported cases¹⁰ and concluded that, even though it seemed a well-intended judicial response to

5. In 1952, for example, a recommendation issued from the Ninth Circuit judicial conference that Rule 8(a)(2) be amended to direct that the plaintiff allege “the facts constituting a cause of action.” See Judicial Conference of the Judges of the Ninth Circuit, *Claim or Cause of Action: A Discussion of the Need for Amendment to Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952). Also during the 1940s and 1950s, some district judges in New York undertook to upgrade pleading requirements in antitrust cases. See Archie O. Dawson, *The Place of the Pleadings in a Proper Definition of the Issues in the “Big Case,”* in PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES, reprinted in 23 F.R.D. 430, 433-35 (1958). Meanwhile, Professor McCaskill lobbied academically for a return to the old ways. See O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123 (1958).

6. 355 U.S. 41 (1957).

7. *Id.* at 45-46. In his contribution to this Symposium, Professor Hazard says that *Conley* “turned Rule 8 on its head.” Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Kept*, 76 TEXAS L. REV. 1665, 1685 (1998).

8. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.6, at 148 (4th ed. 1992) (noting that to some extent *Conley v. Gibson*'s language was hyperbole).

9. Even when invited to recommend changes to the pleading rules, critics of civil litigation declined. For example, in 1977 President Carter established a National Commission for the Review of the Antitrust Laws and Procedures in reaction to criticism of antitrust litigation. He directed that the Commission consider, among other things, “revision of pleading requirements in order to narrow as quickly and precisely as possible the scope of contested issues of fact and law.” Exec. Order No. 12,022 § 2(a)(1)(ii), 3 C.F.R. 154 (1978). The Commission made recommendations in a wide variety of areas—narrowing the scope of discovery, using time limits for pretrial activities, increasing sanctions for misbehavior in litigation, increasing judicial involvement to focus the issues in the case, and expanding use of summary judgment. But it did not propose changes to pleading requirements. See NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, reprinted in 80 F.R.D. 509, 515-20 (1979). But the staff of the Commission reported that “[t]here has been little testimony or comment presented to the Commission favoring increased specificity in antitrust pleadings.” National Comm'n for the Review of Antitrust Laws and Procedures, *The Early Narrowing and Resolution of Issues*, 48 ANTITRUST L.J. 1041, 1056 (1980).

10. Whether the tenor of reported pleading cases accurately reflected the overall handling of such problems in civil litigation remains uncertain. See THOMAS E. WILLGING, USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS 12 (1989) (examining “the Marcus thesis,” which proposed that the number of Rule 12(b)(6) motions had increased, by studying the frequency of motions in terminated cases in two districts between 1975 and 1988 and finding that the frequency of such motions in civil cases in general had decreased).

stresses of modern litigation, it often presented problems.¹¹ Although achieving merits decisions appeared a legitimate objective for pleadings motions, those motions produced reliable decisions only when more specificity was likely to disclose a fatal defect in the plaintiff's case or when the complaint contained sufficient detail to enable the court to make a reliable determination that the defendant did not violate the plaintiff's rights.¹² Unfortunately, however, many courts were using pleading scrutiny to probe the evidentiary basis for the plaintiffs' factual conclusions; for this purpose pleadings motions decisions appeared unable to provide a reliable basis for decisions.¹³ Summary judgment, though widely considered disfavored at that time, offered a seemingly preferable alternative, provided that discovery was controlled.¹⁴

In the dozen years since, a number of developments have occurred that bear on the role of pleading practice: (1) In 1986, the Supreme Court endorsed more vigorous use of summary judgment, bringing it out from under the cloud under which it labored;¹⁵ (2) In 1993, the Court disapproved heightened pleading requirements in some civil rights cases and appeared to re-embrace *Conley v. Gibson* in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*;¹⁶ (3) The Advisory Committee on Civil Rules has considered amending the pleading rules (which have remained essentially untouched until now) in rather contradictory ways: either abolishing the Rule 12(b)(6) motion to dismiss for failure to state a claim,¹⁷ or fortifying pleading requirements and motion practice in the wake of the Supreme Court's *Leatherman* decision;¹⁸ and (4) In 1995, Congress adopted the Private Securities

11. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986). For other commentary reporting a similar phenomenon at the same time, see David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 679-82 (1984).

12. See Marcus, *supra* note 11, at 459-65.

13. See *id.* at 466-71.

14. See *id.* at 484-91.

15. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . .").

16. 507 U.S. 163, 168 (1993). This case is discussed *infra* in text accompanying notes 93-114.

17. For this proposal, which was made by Paul Carrington, Reporter of the Committee, see WILLGING, *supra* note 10, at 1 n.1. In fairness, it is important to appreciate that one aspect of this proposal was to supplant summary judgment, directed verdict, and JNOV practice with a single motion for "judgment as a matter of law," in addition to abolishing the Rule 12(b)(6) motion. Eventually, only the change in name for Rule 50 motions was adopted. For an examination of the issues, see Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2105-07, 2109-12 (1989).

18. See Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17-18 (May 3-5, 1993) (on file with the Texas Law Review) (discussing the possibility of

Litigation Reform Act,¹⁹ which prescribes stringent pleading requirements for securities fraud cases.

Thus, not only has there been serious discussion about changing the pleading rules for the first time in forty years, but there have also been significant changes regarding pleading in two areas where pleading practice had emerged as important since *Conley v. Gibson*—civil rights and securities fraud suits. Prodded by these developments, this essay reflects in a non-exhaustive way²⁰ on the implications of these developments for the rules and for pleading practice. It begins by sketching the traditional pleading practice background and the Federal Rules' modification of that experience. Against that background, it explores the considerable latitude for pleading practice built into the rules already and the likely implications of recent changes in civil rights and securities fraud litigation for the rules. It concludes that these developments have not to date provided a reason for changing the rules from the model adopted in the 1930s.

I. The Federal Rules' Break with the Past

Had there never been pleading practice in the Anglo-American style, it is not clear that one would have to invent it; some refined legal systems forgo any such activities.²¹ Even in England, pleading began as a more relaxed affair involving oral exchanges before the judge.²² But those

heightened pleading requirements for certain types of cases); Judicial Conference of the United States, Advisory Committee on Civil Rules, Draft on Particularized Pleading (Sept. 17, 1993) (on file with the *Texas Law Review*) (suggesting a variety of possible amendments to Rules 8 and 9 to magnify their requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 5-8 (Oct. 21-23, 1993) (on file with the *Texas Law Review*) (continuing the discussion of possible amendments to restore heightened pleading requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17-18 (Apr. 20, 1995) (on file with the *Texas Law Review*) (discussing such possible changes but concluding that present action is not warranted).

19. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C. §§ 77-88 (Supp. II 1996)). For a discussion of the pleading provisions of this Act, see *infra* notes 115-31 and accompanying text.

20. A comprehensive examination of the multitude of cases involving these issues is beyond the scope of this paper.

21. See JAMES, *supra* note 8, § 3.2, at 140 ("The process of identifying and resolving the issues in controversy can be conducted largely by oral exchange . . ."); Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 410 (1960) (reporting that in German procedure the main focus is on conferences between counsel and the judge and that "no question arises as to the sufficiency of the pleadings as such, nor is there any motion practice directed to the pleadings themselves").

22. Two commentators described the process:

We may occasionally find long debates between the parties. Not only are they long, but, if judged by the standard of a later time, they are loose and irregular. The pleaders must be charged with many faults which would have shocked their successors; they habitually "plead evidence," they are guilty of argumentativeness and duplicity.

simple early days lie in the very distant past. Perhaps because of the need for a single question for the jury,²³ written pleadings were introduced.

These written pleadings became increasingly intricate and ornate in their pursuit of a single issue to present before a jury. Pleading lay at the heart of litigation to a degree difficult for one in the late twentieth century to grasp, for no other litigation activity rivaled it in importance. But because pleading practice was littered with arcana, by the early nineteenth century it seemed often to produce decisions entirely unrelated to the merits. As a consequence, pleading was held up to public ridicule.²⁴ In both England and the United States, mid-nineteenth century reform movements sought to bury this history by confining the pleading requirements to the basic facts of the case and abolishing the multilayered pleading extravaganza that had typified common law procedure.²⁵ In this country, the Field Code provided the principal vehicle for this change.²⁶

Whether or not the English reform effort achieved its objectives, by the first third of this century it was widely believed that the American one had fallen short.²⁷ The chief difficulty seemed to result from terminology and habit. The Field Code's directive that the plaintiff include the facts on which the suit was based²⁸ afforded myriad opportunities to debate what was a "fact," for the pleading was insufficient if limited to conclusions and was improper if packed with evidence. This debate appealed to judges trained in the old ways, and pleading decisions continued to multiply.

The Federal Rules broke with this past, and Rule 8 was the principal vehicle because it made no reference to "facts" and did not call for stating a "cause of action." As Judge Wald says in her contribution to this Symposium, Rule 8 was the "jewel in the crown of the Federal Rules."²⁹

6 (1952) ("The introduction of written pleadings served to install a measure of rigidity wholly absent from the previous practice of oral altercation.").

23. "[T]he development of the jury system in England led to a substitution of formal written demands and answers in place of the earlier simple oral statements of counsel in response to the questions of the court, as we find them in the early Year Book cases." Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942).

24. See Kevin M. Teeven, *A History of the Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 66 (1995) (recounting the injustices resulting from the strict pleading requirements of the Hilary Rules in England, and the subsequent movement for sweeping reform of special pleading in favor of fact pleading).

25. See, e.g., CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 67-83 (Cincinnati, W.H. Anderson & Co. 1897).

26. See *id.* at 87-172 (delineating the impact of the Field Code on the American metamorphosis away from formalistic pleading).

27. See MILLAR, *supra* note 22, at 187-95.

28. As originally adopted, the Field Code required the pleader to provide "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." See Marcus, *supra* note 11, at 438.

29. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEXAS L. REV. 153 (1987), 1917 (1998).

Although abolishing pleading motions altogether might have been a fuller break, a profound culture change has surely occurred even without that final step. Far from enthusing about pleading decisions, courts routinely denounce this means of ending litigation.³⁰ But that does not mean that the Rules abolished pleading practice.

II. The Role of Pleading Practice Under the Federal Rules

Perhaps it would be a good thing were somebody to calculate the likely fate of Rule 12(b)(6) dismissals on appeal. In 1984, Judge Schwarzer provided analogous figures concerning review of district court orders granting summary judgment,³¹ thereby somewhat defusing the widespread belief that granting summary judgment invited reversal. The Supreme Court's endorsement of summary judgment two years later, citing Judge Schwarzer's article,³² confirmed his conclusion that summary judgments can survive. After *Conley v. Gibson*, dismissing a case on the pleadings seemed an even greater provocation to a court of appeals than granting summary judgment. As Professor Wright himself has pointed out, shortly after that decision an empirical study showed that pleading motions led to final termination in only about 2% of all cases,³³ and more recent work by the Federal Judicial Center suggests figures in the 3% to 6% range.³⁴

Certainly these percentages do not approach the frequency of pleadings dispositions under the common law or even code pleading regimes, which is proof of the culture change that has occurred. That does not mean that pleadings decisions are unimportant under the Rules, however. Small though these figures seem, they should be compared to the rate of trial in civil cases, which is not much higher.³⁵ Rule 12(b)(6) motions thus

30. See, e.g., *Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997) ("A motion to dismiss under rule 12(b)(6) 'is viewed with disfavor and is rarely granted.'" (quoting *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982))).

31. See William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 & n.9 (1984) (finding that summary judgments are reversed less frequently than most judgments in the Ninth Circuit).

32. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Given the tenor of the Supreme Court's decision, it is perhaps ironic that the district court's grant of summary judgment in this case was held improper on remand. See *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 40 (D.C. Cir. 1997).

33. WRIGHT, *supra* note 1, § 66 at 462 (describing the results from a 1962 sampling).

34. See WILLING, *supra* note 10, at 5-8 (describing a 1975 study showing a 6% dismissal rate and a 1988 study showing a 3% rate). Judge Wald's article in this Symposium cited considerably higher figures for the District of Columbia District Court, see Wald, *supra* note 29, at 1915 & n.111, but it is not clear how many of these are for dismissals under Rule 12(b)(6).

35. For such a comparison, see Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986) (reporting, based on a study of several district courts and state courts, that there was a 7% trial rate as opposed to a 15% termination rate through some other form of adjudication, and a 9% settlement rate following a ruling on a significant motion).

afford litigants a disposition on the merits approximately as frequently as trials. Because access to a judicial decision is an important value, these figures suggest that pleadings decisions still play an important role, albeit lacking the central importance of the past. Pleadings motions are not so moribund as might be expected.

Pleadings motions have persisted in part because the rules themselves authorize them and to some extent foster them. Rule 8(a)(2) is the centerpiece in downplaying pleadings, but it does say that the "short and plain statement of the claim" should be one "showing that the pleader is entitled to relief," something the Supreme Court conveniently overlooked in *Conley v. Gibson*.³⁶ And the rules do not stop there. They also prescribe conciseness and directness in pleadings³⁷ and instruct that there should be separate paragraphs for each assertion.³⁸ If exhibits are attached to a pleading, they become a part of the pleading for all purposes, including the decision of a motion to dismiss.³⁹ Rule 9 adds heightened pleading requirements for certain matters. These prescriptions contain teeth, too. Contrary to Clark's original preferences, the rules include a motion to dismiss for failure to state a claim.⁴⁰ They also authorize a motion for judgment on the pleadings,⁴¹ a motion for a more definite statement,⁴² and a motion to strike.⁴³ Added to this array, perhaps, is the reply authorized by Rule 7.⁴⁴ Even when the problem is one of form rather than substance, a court can dismiss if the plaintiff refuses to plead properly.⁴⁵

These provisions are not self-actualizing, however, and their operation depends largely on the purposes for including them in the rules. Essentially, there appear to be three. First, the pleading motions may serve to assure the defendant of notice of the basis for the suit. The criteria for the motion for a more definite statement⁴⁶ are keyed precisely

36. See *infra* text accompanying notes 111-13.

37. See FED. R. CIV. P. 8(e)(1).

38. See FED. R. CIV. P. 10(b); see also *infra* notes 55-67 and accompanying text (describing the consideration of materials submitted by defendants even though not attached as exhibits by plaintiffs).

39. See FED. R. CIV. P. 10(c).

40. See FED. R. CIV. P. 12(b)(6).

41. See FED. R. CIV. P. 12(c).

42. See FED. R. CIV. P. 12(e).

43. See FED. R. CIV. P. 12(f).

44. See FED. R. CIV. P. 7(a). See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1185, at 20-24 (2d ed. 1990). A description of a novel use of Rule 7 occurs *infra* notes 176-79 and accompanying text.

45. For example, in *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996), the plaintiff persisted in loading up the complaint with irrelevancies "designed to provide quotations for newspaper stories," despite the district court's order that the complaint be refined. *Id.* at 1178. The district court dismissed with prejudice, pursuant to Rule 41(b), *id.* at 1177, and the court of appeals affirmed, *id.* at 1180.

46. See FED. R. CIV. P. 12(e) ("If a pleading . . . 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 . . .").

to this objective, which also corresponds to the notice pleading rhetoric of *Conley v. Gibson*.⁴⁷ But as a goal for pleadings requirements or pleadings motions, this goal still seems insufficient.⁴⁸ Even with the 1993 fortification of Rule 11 regarding denials,⁴⁹ it is hard to believe that defendants will find it difficult to deny plaintiff's allegations because the complaint is vague, and defendant's ability to assert affirmative defenses turns little on the clarity of the complaint.

Second, pleadings set the parameters for the ensuing litigation of the case. The scope of discovery and relevance rulings at trial depend on what the pleadings place in issue. But the Federal Rules of Evidence do not require that a matter be in dispute for evidence on that topic to be admissible.⁵⁰ More significantly, increased judicial management means that pretrial orders often supersede the pleadings,⁵¹ and the liberality of amendment also shows that setting outside limitations for the scope of litigation is not an important objective for pleading practice.

What pleading actually does, then, is to serve the third purpose—disposition on the merits. Although possible in only a small percentage of cases,⁵² merits disposition provides a principal reason for retaining pleading motions in the scheme of the rules. And it should not be thought that pleading motions further this goal only when they lead to a complete dismissal. A motion to dismiss that whittles a complaint with twenty claims down to two viable claims has not been a failure in terms of merits dispositions.⁵³ Neither is a motion that strikes a legally unjustified prayer for huge punitive damages or a legally unwarranted affirmative defense. None of these would show up as final disposition by pleading practice, but none should be dismissed as “another instance of judicial haste which in the long run makes waste.”⁵⁴

The courts appear to have grasped this point despite their rhetoric about limiting pleading practice to providing notice of the general basis for the claim. Indeed, one innovation in the rules that recognizes this

47. See *infra* text accompanying note 111.

48. See Marcus, *supra* note 11, at 451-54 (asserting that the notice pleading argument turns into a chimera under analysis).

49. See FED. R. CIV. P. 11(b)(4) (providing that, by denying an allegation, a defense counsel certifies that the denial either is based on evidence or reasonably based on lack of information or belief).

50. See FED. R. EVID. 401 advisory committee's note (“The fact to which the evidence is directed need not be in dispute.”).

51. See FED. R. CIV. P. 16(e) (directing that pretrial orders “shall control the subsequent course of the action”).

52. See *supra* notes 33-34 and accompanying text (describing data on the percentage of cases finally resolved on a motion to dismiss).

53. See Kritzer, *supra* note 35, at 163-64 (describing the percentage of cases settled after ruling in pretrial motions).

54. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). Judge Charles Clark authored this famous phrase.

pragmatic orientation was designed to *expand* opportunities for pleadings dispositions. The common law and code pleading approaches outlawed the "speaking demurrer."⁵⁵ But as Rule 10(c)'s provision for consideration of exhibits shows, and as the final sentence of Rule 12(b) suggests,⁵⁶ under the Federal Rules courts can go beyond the pleader's allegations in pursuit of merits decisions at the pleading stage. Courts have energetically seized this opportunity and permitted defendants to bring a range of materials to bear on the complaint in support of motions to dismiss, even where not attached as exhibits.⁵⁷

At first blush, the whole idea of deciding pleadings motions on the basis of extraneous materials rather than the allegations of the complaint not only deviates from the prior practice but startles legal sensibilities. Surely the plaintiff in a defamation case does not, by attaching the allegedly defamatory letter to the complaint, admit the truth of the statements in the letter.⁵⁸ Similarly, attachment of erroneous documents as exhibits should not irrevocably bind the pleader to accept their contents.⁵⁹ These obvious points underscore the evaluative nature of this review of exhibits.⁶⁰

55. A "speaking demurrer" is one that "alleges affirmative matter which, taken with the allegations in the complaint, shows that no cause of action is stated." 2 JAMES M. KERR, *KERR'S PLEADING AND PRACTICE IN THE WESTERN STATES* § 874, at 1245-46 (1919). *See, e.g., id.* ("A demurrer must be directed at the complaint only."); ROGER O'DONNELL, *PROCEDURE AND FORMS: COMMON LAW PLEADING* 197 (1934) (arguing that the speaking demurrer "is a prostitution of the objects and purposes of a demurrer").

56. The text of the final sentence of Rule 12(b) is reproduced *infra* note 61.

57. *See, e.g., CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1508-09 & n.5 (1st Cir. 1996) (allowing evidence of unattached informational brochures); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 113 (3d Cir. 1984) (Becker, J., concurring) (arguing that the district court's consideration of an unattached partnership agreement was proper because "the allegations of [the] complaint [were] based on [the] underlying written documents, and the authenticity of those documents was unchallenged"); *Greene v. Term City, Inc.*, 828 F. Supp. 584, 586 n.1 (N.D. Ill. 1993) (finding an EEOC charge to be part of the pleadings, even though it was not attached to the complaint). *Bur see Cipollone v. University of Pa.*, No. CIV.A.97-6565, 1998 WL 47285, at *1 n.1 (E.D. Pa. Feb. 3, 1998) (limiting Rule 12(b)(6) review to the "complaint, pertinent matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint"); *Dalissio v. DePuy, Inc.*, No. CIV.A.96-5295, 1998 WL 24330, at *4 n.8 (E.D. Pa. Mar. 24, 1998) (prohibiting court review of unattached depositions as part of its consideration of a motion to dismiss).

58. *See Davis v. Ross*, 754 F.2d 80, 86 (2d Cir. 1985) (finding that the district court erred in dismissing a defamation action on the basis that statements made by the defendant in a letter attached as an exhibit to the complaint were not defamatory as a matter of law because they were merely statements of opinion).

59. *See Banco Del Estado v. Navistar Int'l Transp. Corp.*, 942 F. Supp. 1176, 1179 (N.D. Ill. 1996) (ruling that the attachment of exhibits that contained erroneous translations did not constitute a binding judicial admission that they were correct where the original, untranslated document was also attached to the complaint).

60. Professor Wright's treatise explains:

The court is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given the material. When a disparity exists

More notable for our purposes, however, is the willingness of courts to consider materials *not* attached to the complaint while ruling on a Rule 12(b)(6) motion. Even though such consideration seems to contravene the final sentence of Rule 12(b),⁶¹ and even though it is agreed that the plaintiff is not required to attach exhibits to the complaint,⁶² numerous decisions reject plaintiff's claims on the basis of such materials because defendants have attached them to a motion to dismiss. Different formulations exist for explaining when this activity is warranted. Generally, courts look to whether the materials are referred to in plaintiff's complaint,⁶³ whether they are "central" to the claim,⁶⁴ and whether any legitimate ground exists for disputing their authenticity.⁶⁵ In addition to publicly-filed documents, which may be particularly suitable for consideration,⁶⁶ courts may also refer to facts susceptible to judicial notice.⁶⁷ Careful examination of this body of precedent would be a worthwhile inquiry, but is beyond the scope of this essay. The basic point is to recognize why

between the written instrument annexed to the pleadings and the allegations in the pleadings, the written instrument will control.

5 WRIGHT & MILLER, *supra* note 44, § 1327, at 766-67 (footnotes omitted).

61. The sentence provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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

62. "[T]here is no requirement that the pleader attach a copy of the writing on which his action or defense is based." 5 WRIGHT & MILLER, *supra* note 44, § 1327, at 762.

63. See *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (relying on a document referred to in the complaint and central to the claim); *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (stating that it was proper to consider a document whose contents were alleged in the complaint that is not challenged on authenticity grounds).

64. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (holding that a court may refer to a defendant's annual report because the claims were based on it even though it was not cited in the complaint); *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (allowing the consideration of plan documents in an ERISA action because the plaintiff's claims were based on them); *Venture Assocs. v. Zenith Data Sys.*, 987 F.2d 429, 431-32 (7th Cir. 1993) (characterizing documents as "central" to the plaintiff's claims and representing "the core of the parties' contractual relationship").

65. See *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (observing that "courts have made narrow exceptions for documents the authenticity of which [is] not disputed by the parties"). Compare with *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997) (stating that the alleged transcripts of telephone conference calls that were referred to in the complaint should not be considered because plaintiffs denied their authenticity).

66. See *In re STAC Electronics Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (recognizing the suitability of a prospectus used in connection with a stock offering for consideration by the court); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (allowing the consideration of documents filed with the SEC, but only to determine the content of the documents, not the truth of statements contained therein).

67. See 5A WRIGHT & MILLER, *supra* note 44, § 1363, at 464-65.

courts have taken this step—to decide cases on the merits when that can be done accurately at the pleading stage.

Another symptom of the courts' focus on merits disposition can be found in the motion for a more definite statement. As suggested above,⁶⁸ this motion seems a pointless exercise for its stated purpose. But as a means for ferreting out a fatal fact in the plaintiff's claim, it can foster merits decisions. Thus, despite statements that such motions should not be used to "flesh out" the complaint and pave the way for a motion to dismiss,⁶⁹ the current edition of Professor Wright's multivolume treatise recognizes that the prospect of a dismissal presents a legitimate reason for granting a motion for a more definite statement,⁷⁰ and there is at least some indication that courts will entertain a motion for a more definite statement as a prelude to dismissal.⁷¹

The problem, then, is to determine when pleading practice serves to further the goal of merits pleading dispositions. The proper focus remains where it was a dozen years ago—on cases in which a fatal fact defeats plaintiff's claim or the court can reliably determine from the pleadings that the claim has no merit.⁷² Yet, just as was true a dozen years ago, courts appear to stretch when they fear litigation otherwise may be abused.

A prime example is the Second Circuit's handling of securities fraud suits. In a 1979 decision, *Ross v. A.H. Robins Co.*,⁷³ the court decried the risk that such cases would afford an "*in terrorem* increment" to

68. See *supra* text accompanying notes 46-49.

69. *United States v. Board of Harbor Comm'rs*, 73 F.R.D. 460, 462 & n.2 (D. Del. 1977).

70. The Treatise observes that:

[S]ome cases state that it always is improper to use a Rule 12(e) motion to obtain admissions from the claimant in the hope of clearing the way for a later Rule 12(b)(6) motion to dismiss. Although judicial statements of this type arguably are consistent with the wording of Rule 12(e), they probably go too far in limiting the availability of the motion. The courts need not completely refrain from using Rule 12(e) as an aid in achieving the summary adjudication of certain cases; it merely is necessary to act with caution to keep its use within proper bounds.

Consequently, there should be a bias against use of the Rule 12(e) motion as a precursor to a Rule 12(b)(6) motion or as a method for seeking out a threshold defense A request for a more definite statement for either of those purposes should not be granted unless the movant shows that there actually is a substantial threshold question that may be dispositive.

5A WRIGHT & MILLER, *supra* note 44, § 1376, at 597-98.

71. For example, in *Fleming v. AT&T Information Services, Inc.*, 878 F.2d 1472 (D.C. Cir. 1989), the defendant moved to dismiss because the plaintiff's complaint failed to rebut the presumption of at-will employment. *Id.* at 1473. The district court treated that motion as a motion for a more definite statement, which it granted. After the plaintiff complied, the court granted a motion to dismiss for failure to state a claim. *Id.* at 1473; accord *Marx v. Gumbinner*, 855 F.2d 783, 792 (11th Cir. 1988) (approving as proper the district court's treatment of a motion to dismiss as a motion for a more definite statement).

72. See Marcus, *supra* note 11, at 459-65.

73. 607 F.2d 545 (2d Cir. 1979).

settlements in groundless cases.⁷⁴ Accordingly, it insisted that the plaintiffs “specifically plead those events which they assert give rise to a strong inference that the defendants had knowledge of the facts” plaintiffs claimed were wrongfully omitted from public statements.⁷⁵ In part, this insistence was rooted in the heightened pleading requirements for fraud cases contained in Rule 9(b), but the second sentence of that rule⁷⁶ precludes requiring specifics about the state of mind or knowledge of the defendant. Not only did it contradict the rule, the Second Circuit’s approach also thrust upon the courts the difficult problem of defining a “strong inference” of scienter.⁷⁷

More recently, distinguished courts have gone further afield. A leading example is *Cash Energy, Inc. v. Weiner*,⁷⁸ a 1990 CERCLA case in which Judge Robert Keeton attempted to cobble together authority for demanding pleading requirements to combat a perceived risk of abuse of the litigation process.⁷⁹ The judge, surely a towering figure,⁸⁰ was at the time of this decision the Chair of the Judicial Conference’s Standing Committee on the Rules of Practice and Procedure. But even his efforts to find authority in the rules fell short.⁸¹ The suit sought to recover cleanup costs that were allegedly caused by corporate defendants who had used chemical solvents on sites adjacent to the land in question.⁸² The judge found plaintiffs’ claims against the corporations sufficient, but balked at their addition of claims against several officers of the corporate defendants.⁸³ Plaintiffs alleged quite generally that these individuals

74. *Id.* at 557 (quoting *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975))).

75. *Id.* at 558.

76. “Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” FED. R. CIV. P. 9(b).

77. For criticism of this aspect of the Second Circuit formulation, see Marcus, *supra* note 11, at 469-71.

78. 768 F. Supp. 892 (D. Mass. 1991).

79. *See id.* at 896-99. Judge Keeton later produced another disquisition on heightened pleading requirements. *See Boston & Me. Corp. v. Town of Hampton*, 987 F.2d 855, 862-70 (1st Cir. 1993).

80. Before his appointment to the bench, Judge Keeton was the Langdell Professor at Harvard Law School and the author of many books and articles. Of perhaps greater interest to readers of this journal, the judge is also the younger brother of another titan—Page Keeton, longtime dean of the University of Texas School of Law.

81. Besides Rule 9(b), *see infra* text accompanying notes 87-91, the judge also invoked Rule 12(e) and Rule 8(f). It is apparent, however, that he had no concern about the ability of defendants to frame an answer, so that Rule 12(e) seems irrelevant. Although Rule 8(f) does say that pleadings should be construed to do “substantial justice,” that language is a carry-over from the Field Code designed to avoid hypertechnical grounds for rejecting complaints, not to justify more exacting scrutiny of them. *See* 5 WRIGHT & MILLER, *supra* note 44, § 1286, at 14; WRIGHT, *supra* note 1, at 68 (noting that doing “substantial justice” means that a court will not require technical exactness in the pleading as required by the old rules, but will construe it in the pleader’s favor).

82. *Cash Energy*, 768 F. Supp. at 893.

83. *Id.* at 900.

“actually participated in and exercised control over the affairs of one or more” of the corporate defendants.⁸⁴ Finding that these individuals could be held personally liable only if they personally participated in the release of toxic materials, the judge directed that, as to them, plaintiffs must plead a factual basis rather than mere conclusions.⁸⁵

It may be that a straightforward application of Rule 8’s directive that the complaint show that the pleader is entitled to relief would warrant this requirement. But Judge Keeton chose to approach the problem from the perspective of a scholarly general review of pleading provisions, noting that “by the fiftieth anniversary of the Federal Rules of Civil Procedure in 1988, the rules of pleading had become less generous and forgiving than they were in 1938.”⁸⁶ In particular, he explained that Rule 9(b)’s pleading requirements had been “extended to a number of analogous areas . . . where the original concern about opportunities for abuse inherent in the freedom to plead conclusions rather than facts applies with like force.”⁸⁷ Thus, Rule 9(b) was extended from securities fraud to areas of securities law not involving fraud, and from there made the “short leap” to claims under RICO.⁸⁸ He also found that “[i]n several areas that do not involve fraud, or even analogies to fraud by any stretch of the imagination, courts have nonetheless emerged higher standards of particularity in pleading.”⁸⁹ He concluded that “[a]lthough an analogy to fraud is strained, CERCLA involves many of the circumstances that have led courts to invoke higher standards of specificity in other contexts.”⁹⁰ But Rule 9(b) in no sense seeks to isolate cases presenting risks of abuse of litigation,⁹¹ and these “analogies” do not rely on features that are analogous. Nonetheless, Judge Keeton announced that “[u]nless and until guidance to the contrary appears in legislation or precedent, I will so rule.”⁹²

III. *Leatherman* and the Securities Reform Act

Both legislation and precedent have emerged since Judge Keeton spoke, but they cut in opposite directions. In *Leatherman v. Tarrant*

84. *Id.* at 896.

85. *Id.* at 900.

86. *Id.* at 899-900.

87. *Id.* at 897.

88. *Id.* at 898.

89. *Id.* at 899. A prime possible example of such an area would be civil rights cases, which the judge discussed at some length. *See id.* at 898.

90. *Id.* at 900.

91. *Cf.* Marcus, *supra* note 11, at 479-80 (describing the difficulty of identifying a “strike suit”).

92. *Cash Energy*, 768 F. Supp. at 900. Other courts have declined to follow Judge Keeton’s lead. *See* B.F. Goodrich v. Betkoski, 99 F.3d 505, 521 (2d Cir. 1996); Warwick Admin. Group v. Avon Prods., Inc., 820 F. Supp. 116, 121 (S.D.N.Y. 1993); United States v. Azrael, 774 F. Supp. 376, 379 n.6 (D. Md. 1991) (all refusing to apply heightened pleading requirements in CERCLA actions).

County Narcotics Intelligence & Coordination Unit, the Supreme Court appeared to re-embrace *Conley v. Gibson's* lax view of pleadings.⁹³ Plaintiffs in *Leatherman* claimed that defendant's officers had violated the Fourth Amendment by making unjustified forcible entries into plaintiffs' homes. Because respondeat superior does not create municipal liability in such cases,⁹⁴ plaintiffs alleged that the municipality failed to provide proper training.⁹⁵ The Fifth Circuit dismissed the complaint under what it called a "heightened pleading standard" for such cases.⁹⁶ Unlike some other circuits,⁹⁷ it refused to accept as sufficient an allegation that the officers' conduct conformed to municipal policy.

In a very brief opinion, the Supreme Court reversed, holding that courts could not embrace "heightened pleading" requirements for certain types of cases. Noting that the rules do prescribe heightened pleading for certain types of cases in Rule 9(b), it intoned that "[e]xpressio unius est exclusio alterius."⁹⁸ Chief Justice Rehnquist said that the proper route for upgrading pleading requirements would be rule amendments:

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). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. 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.⁹⁹

Leatherman left considerable confusion in its wake. Judge Keeton was uncertain whether it was the precedent he had been awaiting, and he declared in 1994 that "[t]he federal law regarding particularity-of-complaint requirements is currently quite unsettled."¹⁰⁰ Certainly *Leatherman* altered the result in some cases, as lower courts recognized.¹⁰¹ But the

93. See *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993).

94. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 663-64 (1978).

95. *Leatherman*, 507 U.S. at 165.

96. *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992), *rev'd*, 507 U.S. 163 (1993).

97. See *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988) ("[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.'" (citing *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986))).

98. *Leatherman*, 507 U.S. at 168.

99. *Id.* at 168-69.

100. *Feliciano v. Dubois*, 846 F. Supp. 1033, 1042 (D. Mass. 1994).

101. For example, in *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 687 (1998), the magistrate judge twice found the complaints to be inadequate before

actual reach of the decision is at least debatable, and even those who favor broad application of the case are uncertain about its scope.¹⁰²

In at least one area closely analogous to the situation in *Leatherman*, the lower courts have continued to insist on heightened pleading. The Court observed that it had “no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual governmental officials.”¹⁰³ That immunity jurisprudence is sometimes opaque on such issues,¹⁰⁴ and the Court’s avoidance of this question seems curious in light of its intonation regarding the negative pregnant of Rule 9(b).¹⁰⁵ Nevertheless, seizing on the Court’s observation, numerous courts persist in demanding that complaints against individual officials contain particularized allegations.¹⁰⁶ Indeed, the D.C. Circuit even persisted for a time in its remarkable requirement that in cases involving state of mind of the official, the pleadings show “direct” rather than “circumstantial” evidence of that intent,¹⁰⁷ although it has since

Leatherman was decided, but deemed the third amended complaint adequate due to the Supreme Court’s intervening decision curtailing specificity requirements. *Id.* at 291. *See also* MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 976-77 (7th Cir. 1995) (refusing, after *Leatherman*, to require particularized allegations regarding market definition in an antitrust case); Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995) (noting that *Leatherman* rejected heightened pleading standards in § 1983 cases); Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994) (noting that the nascent movement to expand pleading particularity requirements was scotched by *Leatherman*). *Cf.* Johnson v. Hondo, Inc., 125 F.3d 408, 417 (7th Cir. 1997) (stating that *Leatherman* makes it clear that federal courts may not impose heightened pleading requirements, so it was error for the district judge to apply “heightened pleading requirements” based on state law).

102. *See* Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357, 372 (1994) (“Whether *Leatherman* prohibits enhanced pleading in environmental litigation is not obvious from the Court’s opinion.”).

103. *Leatherman*, 507 U.S. at 166-67.

104. For an examination of these difficulties, see generally Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989).

105. *See supra* text accompanying note 98 (“*Expressio unius est exclusio alterius*.”).

106. For example, in *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), the court agreed that under *Conley v. Gibson* the complaint would suffice but refused to change its earlier ruling that it lacked sufficient particulars in light of the decision in *Leatherman*. *Id.* at 455; *accord* Lanigan v. Village of E. Hazel Crest, 110 F.3d 467, 479 n.6 (7th Cir. 1997) (“*Leatherman* only held that there is no heightened pleading standard in civil rights cases pursuant to § 1983 *against municipalities*.” (emphasis in original)); Edgington v. Missouri Dep’t of Corrections, 52 F.3d 777, 779 n.3 (8th Cir. 1995) (stating that because *Leatherman* did not decide the question, the existing heightened standard for complaints seeking damages from municipal officials would continue to apply); Jordan v. Jackson, 15 F.3d 333, 340 (4th Cir. 1994) (“*Leatherman* is a case concerned solely with the pleading requirement of the Federal Rules of Civil Procedure as they relate to actions against municipalities.”); *cf.* Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996) (holding that heightened pleading requirements would continue to apply to claims against a police officer, but not to those against the police chief, which are tantamount to actions against the city and therefore governed by *Leatherman*).

107. *See* Kimberlin v. Quinlan, 6 F.3d 789, 793 (D.C. Cir. 1993) (requiring, despite *Leatherman*, “specific *direct* evidence of [the defendants’] intent in order to defeat a motion to dismiss” (emphasis in original)), *vacated on other grounds*, 515 U.S. 321 (1995).

retreated from that view¹⁰⁸ and there has been further instruction on the proper handling of qualified immunity from the Supreme Court.¹⁰⁹ Accordingly, it is hardly clear that *Leatherman* has actually scotched all heightened pleading requirements.

More to the point, *Leatherman*'s message about Rule 8 is murky. Despite his sensitivity in other areas to the problems that prompted lower courts to develop heightened pleading requirements,¹¹⁰ Chief Justice Rehnquist parroted Justice Black's incomplete version of Rule 8(a)(2) from *Conley v. Gibson*: "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."¹¹¹ Although that rule requires that the complaint include allegations "showing that the pleader is entitled to relief,"¹¹² the Court's opinion only brushed up against that topic. The Court did note that "[a]ccording to respondents, the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law,"¹¹³ but it nowhere addressed this idea directly or related it to Rule 8's requirements. Since *Leatherman*, lower courts have continued to require sufficient allegations in analogous cases.¹¹⁴ In sum, *Leatherman*

108. See *Crawford-El v. Britton*, 93 F.3d 813, 818-19 (D.C. Cir. 1996) (en banc) (retracting the direct-circumstantial distinction regarding an official's state of mind), *rev'd on other grounds*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998).

109. As this essay went to press, the Court held, in *Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998), that the D.C. Circuit improperly announced a rule requiring plaintiffs asserting constitutional claims based on improper official motive to prove their cases by clear and convincing evidence. It explained that this requirement was not authorized by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), on which the lower court had relied. See *Crawford-El*, at *11.

In passing, the Court noted that the court of appeals had already "disavowed its prior direct-evidence rule" for pleadings. *Id.* at *5 n.5. It also said that "various procedural mechanisms already enable trial judges to weed out baseless claims," *id.* at *11, and explained that "the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a) or grant the defendant's motion for a more definite statement under Rule 12(e)." *Id.* at *14.

110. Chief Justice Rehnquist wrote the Court's opinion in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), which denounced the "in terrorem" power of groundless claims, *id.* at 741, and was invoked by the Second Circuit to justify its demanding standards in securities fraud cases, see *supra* notes 74-77 and accompanying text.

111. *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

112. FED. R. CIV. P. 8(a)(2).

113. *Leatherman*, 507 U.S. at 167.

114. In *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996), the plaintiff argued that it was improper to require heightened pleading in his civil rights action. *Id.* at 34-35. Assuming that *Leatherman* would apply, the court nevertheless found that the plaintiff had failed to allege essential elements of his claim. *Id.* at 35. For a contrasting example, consider *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996), in which the plaintiff alleged he was shot by a police officer due to a failure of the municipality to train the officer adequately, *id.* at 419, exactly the claim made in *Leatherman*. The court concluded that the allegation of a municipal practice must rest on some factual basis, but found sufficient the circumstances alleged. *Id.* at 422-24. Plaintiff alleged that he

has been a nudge, not a hammerstroke, against high pleadings requirements.

The Private Securities Litigation Reform Act of 1995,¹¹⁵ passed over the President's veto, pushes in the opposite direction. Heartened by the Second Circuit's demanding attitude toward pleading requirements,¹¹⁶ Congress sought at least to impose the Second Circuit's rule nationwide and perhaps to fortify it as well.¹¹⁷ As adopted over the President's veto, the Act requires that the complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind" if scienter is an element of the claim, and directs the court to dismiss the complaint unless this standard is satisfied.¹¹⁸ In addition, the Act adopts more exacting pleading standards for alleging false or misleading statements by requiring that the complaint:

specify each statement alleged to be misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement is based on information and belief, the complaint shall state with particularity all facts on which that belief is formed.¹¹⁹

The pleadings provisions of the Act were the first thing that President Clinton raised in his veto message.¹²⁰

Unquestionably, these statutory pleading requirements addressed alleged abuses occurring in securities litigation.¹²¹ Somewhat in keeping with that purpose, the requirements stay all discovery pending resolution of a motion to dismiss.¹²² The extent to which the Act achieves this objective is uncertain, however. At a minimum, the requirements clearly replace the more relaxed attitude toward Rule 9(b) that prevailed in some circuits.¹²³ The standard that Congress meant to adopt for alleging

was shot in broad daylight immediately after the officer ordered him to freeze. *Id.* at 419. Although plaintiff would have to offer more to prevail at trial, this sufficed at the pleadings stage. *Id.* at 423.

115. Pub. L. 104-52, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. (Supp. I 1995)).

116. For a description of this, see *supra* text accompanying notes 73-77.

117. See Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675, 675 (1996). For a description of the Second Circuit's standard, see *supra* text accompanying notes 73-77.

118. 15 U.S.C. § 78u-4(b)(2).

119. *Id.* § 78u-4(b)(1).

120. See WILLIAM J. CLINTON, VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 104-150, at 1 (1995).

121. See generally David C. Mahaffey, *Pleading Standards and Discovery Stays Under the Private Securities Litigation Reform Act: An End to Fishing Expeditions?*, INSIGHTS, Feb. 1996, at 9.

122. 15 U.S.C. § 77z-1(b)(1). It has been held that this moratorium applies to initial disclosure under Rule 26(a)(1) as well as to formal discovery. See *Medhekar v. United States Dist. Court*, 99 F.3d 325, 328-29 (9th Cir. 1996).

123. See, e.g., *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994) ("We conclude that plaintiffs may aver scienter generally, if it is, simply by saying that scienter existed."). As the court recognized in *Marksman Partners, L.P. v. Chantal Pharm. Corp.*, 927 F. Supp. 1297 (C.D.

scienter, however, remains unclear. The Second Circuit had specified what it thought was necessary,¹²⁴ and the Senate version of the bill adopted those standards.¹²⁵ But the Conference Committee deleted them from the Act for the stated purpose of further strengthening the statutory standard.¹²⁶ As a consequence, the legislative history left a question about how the courts should implement the new standard.¹²⁷

Against that tangled background, it should hardly be surprising that the impact of the Act's new pleading regime has been ambiguous. The Securities and Exchange Commission undertook a comprehensive study of the Act's first year of operation and found disagreement among courts on whether the Second Circuit's requirements, or more stringent ones, should be employed. But one thing *is* clear from the SEC study—a year after the Act went into effect, no case had been dismissed without leave to amend for failure to satisfy the new pleading requirements¹²⁸—although dismissals have occurred since then.¹²⁹ Accordingly, measured in terms of effectiveness,¹³⁰ and given the fact that dismissals occurred in securities fraud cases before the Act was adopted, this change has not had a cataclysmic impact on pleading practice. Moreover, as the Act's tightening of pleading requirements takes effect, it may also *increase* the settlement value of cases that survive motions to dismiss:

Though lax pleading requirements made the nuisance value of a suit much more difficult to address through pretrial motions, it must also be understood that the Reform Act's heightened pleading standard

Cal. 1996), the Act "leaves little doubt . . . that the lenient *GlenFed* standard can no longer be said to constitute the sum of scienter pleading." *Id.* at 1309.

124. See *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268-69 (2d Cir. 1993) (specifying two ways of pleading scienter: alleging facts that establish a motive to commit fraud and an opportunity to do so, or alleging circumstantial evidence of either reckless or conscious behavior).

125. See 141 Cong. Rec. S9170 (daily ed., June 27, 1995).

126. SEE H.R. CONF. REP. NO. 104-369, at 41 (1995) ("Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard.").

127. The ambiguity of Congress's standard has provoked commentary:

While Congress borrowed the "strong inference" standard from Second Circuit case law, Congress did not say how this standard could be satisfied and it is not at all clear from the language alone that Congress intended to import the Second Circuit's two-part test as the means for satisfying this new standard.

MELVIN R. GOLDMAN, *THE REFORM ACT—ONE YEAR LATER: THE NEXT GENERATION* 11 (24th Annual Securities Regulation Institute, Jan. 22-24, 1997); see also Weiss, *supra* note 117, at 681-83 (suggesting that application of the new law will parallel to a large extent the Second Circuit standard).

128. OFFICE OF THE GENERAL COUNSEL, U.S. SEC. AND EXCH. COMM'N, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at 2 (1997).

129. See, e.g., *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997) (dismissing claims with prejudice, pursuant to the Act).

130. See *supra* notes 33-34 and accompanying text (describing the frequency of dismissals on motions to dismiss).

credentials suits that survive pretrial motions so that [they] will have greater settlement value than such suits had on average before the Reform Act. . . . [C]ounsel should feel more confident in the case after satisfying the new pleading requirements than the counsel who previously had to know less and plead less to withstand a challenge to the pleadings.¹³¹

IV. Pleading Practice at Century's End

Determining with empirical certainty whether a widespread change in pleading practice has occurred would require efforts beyond the scope of this essay,¹³² but a review of recent published decisions suggests that no dramatic shift has occurred. Before turning to this experience, however, it is worthwhile to pause and reflect on why pleadings practice has endured despite over a half century of reforms designed in large measure to suppress the activity.

As a starting point, pleading clearly does not now occupy a position that approaches its centrality under the common law system. Some litigants may have pursued formalistic pleading requirements for their own value under prior systems, but in the current era they may be assumed to act for more practical and immediate objectives. Pleading requirements and motion practice generally favor defendants, who are more likely to profit from specifics in complaints and more likely to look on pleading motions as beneficial.¹³³ This feature does not make pleadings practice per se bad, however. Indeed, the objection of defendants that they are unable to wrest pretrial decisions of the merits from judges sufficiently often¹³⁴ reflects a legitimate desire that pleadings decisions may tend to satisfy.

But it is simplistic to assume that *only* defendants would employ or promote exactness in pleadings, or that plaintiffs would always disfavor pleadings motions. The motion for judgment on the pleadings, for instance, is essentially designed for plaintiffs—for the defendant, it raises the same question as a motion to dismiss.¹³⁵ Even under the most

131. James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 520 (1997).

132. For the results of some empirical efforts, see *supra* notes 33-34 and accompanying text.

133. See Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 815 (1981) (describing the innate advantages for defendants of demanding pleading requirements).

134. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 527-57 (1991) (describing the unavailability of adjudication prior to trial and the resulting incentives to avoid "bet the company" trials).

135. See Lynne C. Hermle, *Summary Judgment Motions in Discrimination Cases: Bringing, Defending and Appealing*, in 2 26TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 877, 948 (1997) ("A
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relaxed view of notice pleading, making the sort of precise allegations the rules contemplate potentially serves plaintiffs' interests.¹³⁶ Clark himself did not favor bare-bones complaints¹³⁷ even though he deplored motions directed to them,¹³⁸ and a plaintiff who includes rifle-shot allegations may be rewarded with precise admissions and denials that advance the case.¹³⁹ The recent addition of Rule 26(a)(1) directing initial disclosure when plaintiff pleads with particularity may sweeten the pot somewhat,¹⁴⁰ but it hardly provides the only stimulus toward precise and forthcoming pleading. In addition, in the event defendant does not respond, a clear and thorough complaint may pay dividends at the default stage. As Professor Hazard observes in his contribution to this Symposium, "ordinarily plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world. Doing so helps the judge understand what the case is about, and it incidentally helps the opposing side."¹⁴¹

Even motions to dismiss may not be anathema to plaintiffs to the extent one might suppose. The rules themselves partly recognize that plaintiffs might embrace them, for Rule 12(d) allows the plaintiff to insist on a decision before trial regarding defenses that the defendant has chosen to raise in the answer, rather than by motion to dismiss. With some issues, a resolution early in the litigation may favor the plaintiff more than the defendant. For example, an early adverse ruling regarding subject matter jurisdiction would allow the plaintiff to refile elsewhere. Even if some tolling principle guards against the bar of limitations should the defendant's objection later be sustained, that delay in establishing the validity of the defendant's objection to the suit does not benefit the plaintiff.

motion for judgment on the pleadings is governed by the same standards set forth in Rule 12(b)(6) for failure to state a claim.").

136. Cf. FED. R. CIV. P. 10(b) (requiring all the allegations to be separate paragraphs, each setting forth a single set of circumstances).

137. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 244 (2d ed. 1947).

138. See *id.* at 341-44 (arguing for the abolition of the motion for a bill of particulars and the motion for a more definite statement).

139. Consider one observer's recommendations:

Establish facts through the pleadings. The complaint is often the plaintiff's first discovery device. A carefully drafted complaint can streamline the discovery process by eliminating unnecessary time and expense. In order to do this, numbered individual paragraphs should generally contain only one central thought or factual allegation. Eliminate all unnecessary adjectives and adverbs. It is always tempting to use the complaint as a polemic, but it is almost always inappropriate and strategically wrong.

A nonargumentative and simple paragraph within a complaint may very well elicit an admission in the answer, thereby conclusively establishing the facts alleged in that particular paragraph.

Michael J. Fox, *Planning and Conducting a Discovery Program*, LITIGATION, Summer 1981, at 13, 14.

140. This assumes, of course, that the plaintiff *wants* disclosure to apply. If not, Rule 26(a)(1) may deter plaintiffs from pleading with particularity.

141. Hazard, *supra* note 7, at 602. Online -- 76 Tex. L. Rev. 1768 1997-1998

Granting these points, it still seems odd that plaintiffs would ever welcome or wish to accelerate the decision on whether they have stated a claim. In many instances, they may hope that discovery will unearth strong evidence of some perfidy that they only suspected when filing, or that discovery may reveal some entirely different misconduct that can be turned to advantage. Those prospects should incline them to resist any effort toward prompt resolution. The assumption that these incentives always exist explains the surprise of jurists like Judge Posner when confronted by plaintiffs who provide details not required:

We have expressed our puzzlement that lawyers insist on risking dismissal by filing prolix complaints. But nothing in the federal rules forbids the filing of prolix complaints. . . . If plaintiff's lawyers want to live dangerously—or want to find out sooner rather than later whether they have a claim—they can.¹⁴²

The willingness to “live dangerously” may, however, demonstrate counsel's rationality. At least some plaintiffs' attorneys will not wish to fly blind into massive discovery without knowing whether the court would sustain a claim on their version of events. Of course, if plaintiffs expect the evidence to affect the judge's interpretation of the law, they would want full discovery first.¹⁴³ But in a number of instances the prospective cost of discovery might prompt counsel to prefer an early ruling on whether their legal theory will satisfy the judge. Recent data indicating that discovery often costs plaintiffs (or their lawyers) as much as it costs defendants¹⁴⁴ suggests a reason for counsel to want an early resolution of that threshold question in a number of cases. Coupled with the possible value in advancing their own cases through precise pleading,¹⁴⁵ this urge could explain why plaintiffs in some cases set forth detail even if they are not required to do so.

Plaintiffs and defendants are not the only ones whose attitudes affect the vibrancy of pleading practice; if courts hewed rigidly to the line laid down in *Conley v. Gibson*, pleading practice would probably have vanished. One stimulus for courts is the rise in caseloads that might be nibbled down by dismissing more cases.¹⁴⁶ Surely that behavior would

142. *Jackson v. Marion County*, 66 F.3d 151, 154 (7th Cir. 1995) (citations omitted).

143. See Friedenthal, *supra* note 133, at 818-19 (arguing that broad discovery has affected the interpretation of the common law); cf. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (questioning the frequency of a relationship between substantive law development and broad discovery).

144. See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) (reporting that discovery costs are roughly equal for plaintiffs and defendants across a broad band of federal litigation).

145. See *supra* notes 139-41 and accompanying text.

146. One appellate court acknowledged this impact:

The pressure of heavy caseloads in the district courts . . . has placed strains on the Federal Rules of Civil Procedure. . . . Increasingly the rules are bent—Rule 56 to allow

be hard to justify if it involved taking significant shortcuts on the proper process for resolving cases. But even were judges inclined to take such shortcuts, caseload pressures would offer an incomplete explanation for promoting pleading practice. Most cases involve familiar issues inappropriate for disposition this way, so the courts are unlikely to make a sizable dent in their civil caseload in this manner. More significantly, a principled effort to manage the docket through pleadings motions would involve additional labor and uncertainty. Deciding a case on the merits takes considerable work. Subjecting most of the docket to active pleading practice would compound the work required to decide the significant number of cases that would survive pleading scrutiny.

Pleading practice could even impede ultimate resolution of the case. Most cases settle, but defendants encouraged to think that they could win on a pleadings motion could refuse to consider settlement until they found out if that would work. If clearing the docket is a court's goal, then, it might better refuse to consider any pleadings motions and instead set a short period for discovery and an early trial date. Indeed, this is essentially the prescription for problems of cost and delay that emerges from the recent RAND study of the operation of the Civil Justice Reform Act.¹⁴⁷

From the judge's perspective, as from the parties', pleading practice makes sense when it resolves the case or advances it toward resolution. A motion that only goes to the form of the complaint fails to accomplish either objective, explaining the suggestion that more definite statements be available to pave the way for a Rule 12(b)(6) motion only when they offer promise for a dismissal.¹⁴⁸ In the broad range of cases, pleadings cannot achieve this result.

Consider, for example, suits for negligence. In garden variety situations, such as automobile accidents, requiring more than a conclusory allegation that plaintiff may sue for her injuries because they were caused by defendant's negligence would serve no purpose. Official Form 9 embodies this point in the most straightforward way. It says that a plaintiff who is a pedestrian can state a claim against a defendant driver by alleging that at a certain date and place defendant "negligently drove a motor vehicle against plaintiff," causing plaintiff to be injured.¹⁴⁹ Requiring that plaintiff provide more detail about what defendant did or didn't do

cases that formerly would have gone to trial to be disposed of on summary judgment, Rules 8 and 12 to allow cases that formerly would have gotten at least as far as summary judgment to be decided on the pleadings.

Jackson v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995).

147. See generally JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 89 (1997) (finding that confining the period for discovery and setting early trial dates will reduce the time required for disposition of a case without increasing costs).

148. See *supra* note 70.

149. FED. R. CIV. P. app. Form 9.

(“failed to keep a proper lookout”) or the precise manner in which this delict led to plaintiff’s injuries would offer no promise of deciding whether plaintiff really has a claim against defendant.

But this conclusion need not obtain for all complaints for negligence; some complaints may provide grounds to challenge the implicit allegations of the Form as to duty and proximate cause. To take a classic example, *Palsgraf v. Long Island R.R.*,¹⁵⁰ consider whether the same simplicity would be appropriate: “Defendant negligently assisted another passenger onto the train, thereby causing plaintiff to be hurled to the ground and injured.”¹⁵¹ Even though *Palsgraf* was also a claim for negligence, such a delphic complaint cries out for inclusion of more details, not only to give defendant notice but also to permit the court to scrutinize the legal sufficiency of plaintiff’s claim in terms of the necessary elements of foreseeability and proximate cause.

This tailoring of the pleading follows from the defendant’s argument in *Leatherman*—that the level of detail and type of allegations vary with the type of case.¹⁵² Even within legal categories, such as negligence, it may vary. The elements for this tailored scrutiny of the pleadings must be found in the substantive law, and they may sharpen over time so that pleadings dispositions are more workable.¹⁵³

At least in some recent reported decisions, this sort of tailored application of the substantive law has been possible at the pleading stage. In a breach of contract suit, for example, the Seventh Circuit upheld dismissal because the contract contained a limitation of remedies clause that precluded suit for the remedies plaintiff sought.¹⁵⁴ The court also upheld rejection of plaintiff’s proffered amendment alleging that the limitation on remedies was unconscionable:

Pursuant to [plaintiff’s] own allegations, the damage limitation provision here was included in a contract that two experienced commercial parties had negotiated over a period of ten months. . . . [B]ased on [plaintiff’s] own allegations, it does not appear that the bargaining positions of the parties are such that [defendant] could have forced the damage limitation provision on an unsuspecting adversary.¹⁵⁵

150. 162 N.E. 99 (N.Y. 1928).

151. I am indebted to my colleague David Jung for this example.

152. See *supra* text accompanying note 113.

153. See Marcus, *supra* note 11, at 460-62 (explaining how the emergence of substantive law elements could be emphasized in pleadings motions).

154. See *CogniTst Corp. v. Riverside Publ’g Co.*, 107 F.3d 493, 497-98 (7th Cir. 1997); see also *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 792 (7th Cir. 1995) (affirming the dismissal of a breach of contract action because the defendant did not violate the contract or its obligations under the Illinois law of good faith and fair dealing).

155. *CogniTst*, 107 F.3d at 499.

Similarly, the Eighth Circuit recently upheld dismissal of a securities fraud suit brought by purchasers of newly-issued stock in a computer firm.¹⁵⁶ Although this case was not governed by the new Private Securities Litigation Reform Act,¹⁵⁷ the district court reviewed the prospectus that accompanied the stock offering and held that the alleged misstatements were immaterial as a matter of law.¹⁵⁸ The appellate court agreed that the alleged overstatement of defendant's assets by \$6.8 million was immaterial because it was less than 2% of the company's total assets.¹⁵⁹ In addition, under the "bespeaks caution" doctrine¹⁶⁰ that alleged misrepresentations are immaterial as a matter of law if accompanied by sufficient cautionary statements, it found the prospectus to command dismissal:

A dismissal of a securities fraud complaint under Rule 12(b)(6) should be granted under the bespeaks caution doctrine only where "the documents containing defendants' challenged statements include *enough* cautionary language or risk disclosure that reasonable minds could not disagree that the challenged statements were not misleading."

Only by discarding common sense and ignoring the multitude of explicit and on-point warnings contained in [the company's] prospectus could investors have been misled by the misrepresentations allegedly made by the Defendants in [the company's] prospectus. Because a reasonable investor would not have ignored such warnings, these alleged misrepresentations are immaterial as a matter of law.¹⁶¹

In other situations, recent decisions find sufficient specifics to resolve only some claims. For example, in another 1997 case, plaintiff sued a

156. See *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 548 (8th Cir. 1997) (holding that the "defendant's alleged misrepresentations or omissions [were] immaterial as a matter of law [because they were] accompanied by sufficient cautionary statements").

157. See *supra* notes 115-31 and accompanying text.

158. See *Parnes*, 122 F.3d at 545. The Court of Appeals noted that usually the fact that a defendant had submitted the prospectus with its motion to dismiss would transform that motion into a summary judgment motion, but that reliance was nevertheless permissible because the plaintiff's complaint was based on the prospectus. See *id.* at 546 n.9. Such a position conforms with the general willingness of courts to consider material not attached to the complaint, see *supra* notes 61-67 and accompanying text.

159. See *Parnes*, 122 F.3d at 547.

160. For a description of this doctrine, see WILLIAM K.S. WANG & MARC I. STEINBERG, *INSIDER TRADING* § 4.2.3.2, at 141 n.59 (1996); Donald C. Langevoort, *Disclosures That "Bespeak Caution,"* 49 BUS. LAW. 481, 482-83 (1994).

161. *Parnes*, 122 F.3d at 548-49 (quoting *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996)) (emphasis in original).

number of police officers and the municipality after a traffic stop for an improper left turn.¹⁶² The plaintiff's complaint was unusually specific about what happened¹⁶³ and showed that the officer who stopped the plaintiff could reasonably have believed that the plaintiff violated the traffic code in making his turn. Accordingly, although plaintiff "did not have to plead with specificity to meet the requirements of Rule 8(a)," he did, and "those particulars show that he has no claim" against this officer.¹⁶⁴ As to a second officer, who administered one push and poke with his night stick, the court concluded that there might be a constitutional violation, depending on whether this use of force was "objectively reasonable" in view of the totality of the circumstances.¹⁶⁵ Given the rising level of confrontation portrayed in the complaint, the district court concluded that this single poke was reasonable.¹⁶⁶ The appellate court disagreed:

[W]e do not believe we know enough about the level of confrontation to make an informed judgment about the objective reasonableness of [the officer's] use of force. Because of the limited notice pleading standard in Rule 8(a) . . . we cannot say that [the plaintiff] has failed to allege a possible constitutional violation by [this officer].¹⁶⁷

Finally, as to the police chief, who did not intervene to stop the jostling, the court found the "fact-specific allegations in the complaint" sufficient to show that the encounter was so brief that the chief could not be liable for failure to intercede.¹⁶⁸

These cases show that merits dispositions are still possible under the rules. They do not show whether courts may or should often press for details to facilitate such dispositions. The need to proceed to summary judgment even in cases that include considerable details suggests that this avenue may often prove preferable. As I have argued elsewhere,¹⁶⁹ the summary judgment route offers the promise of more satisfactory dispositions based on evidence rather than mere allegations. The Supreme Court's

162. See *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 468-69 (7th Cir. 1997).

163. See *id.* (describing the minute detail regarding the incident included in the complaint).

164. *Id.* at 474. For another example, see *Thomas v. Farley*, 31 F.3d 557 (7th Cir. 1994), in which a prisoner alleged that the defendants' denial of his release request to attend his mother's funeral was cruel and unusual punishment. *Id.* at 558. But he also explained in his complaint that the problem involved a secretary forgetting to forward the order of release. *Id.* The court explained that the prisoner was not "saved by having pleaded a legal conclusion that if consistent with the facts would establish his right to relief, for he has shown that it is inconsistent with the facts." *Id.* at 559.

165. *Lanigan*, 110 F.3d at 475.

166. See *id.* at 470 & n.3.

167. *Id.* at 475.

168. *Id.* at 478.

169. See *Marcus*, *supra* note 11, at 484-91.

endorsement of more vigorous use of summary judgment in 1986¹⁷⁰ “revitaliz[ed] the summary judgment device.”¹⁷¹ Even though defendants have long shunned this alternative because it subjects them to discovery and imposes a more onerous burden in making the motion itself, these concerns have abated. It may not be true that “[s]omething close to a one page form motion by defendant can throw on the plaintiff the responsibility to dredge, structure, collate and cross-reference all materials in the file to make them available to the judge before trial,”¹⁷² but the willingness of courts to curtail discovery pursuant to Rule 56(f) after the making of such a motion takes a good deal of the sting out of proceeding to that stage.¹⁷³

Notwithstanding these inducements to rely on summary judgment, recent decisions also show that courts sometimes construct dubious new pleading barriers. In keeping with former efforts to borrow Rule 9(b)'s particularity requirements for areas considered “analogous” to fraud,¹⁷⁴ courts apparently still strain to justify the application of those requirements outside their natural sphere.¹⁷⁵ Beyond that, other inventive pleading requirements sometimes emerge. Most notably, in a 1995 case the Fifth Circuit hit upon the reply authorized in Rule 7—which the court recognized as “a vestige of pre-1938 common law and code pleading”¹⁷⁶—as a method of requiring a plaintiff to respond to the qualified immunity defense raised in the answer in a suit against municipal officers. Judge Higginbotham emphasized “the reality that what is short and plain is inseparable from the legal and factual complexity of the case at issue” and that the court’s prior “insistence on pleading with particularity translated to no more than an insistence that the complaint not plead conclusions.”¹⁷⁷ Faced with *Leatherman*, however, he found it necessary

170. See *supra* note 15 and accompanying text.

171. EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT 9 (1994).

172. D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 41 (1988).

173. Rule 56(f) permits the party opposing a motion for summary judgment to submit an affidavit supporting a request that the trial court postpone its decision until discovery or investigation can be completed. In the Second Circuit's view, leave to undertake discovery is anything but automatic: “The affidavit must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant has made to obtain those facts; and why those efforts were unsuccessful.” *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994).

174. See *supra* text accompanying notes 87-91.

175. See, e.g., *Chiron Corp. v. Abbott Lab.*, 156 F.R.D. 219, 221 (N.D. Cal. 1994) (applying Rule 9(b) to the affirmative defense of inequitable conduct in obtaining the patent in suit due to “public policy considerations” such as the cost of litigating such claims, the ease with which allegations of inequitable conduct can be made, and the temptation to use them as a delaying tactic or to justify a fishing expedition).

176. *Schultea v. Wood*, 47 F.3d 1427, 1432 (5th Cir. 1995) (en banc).

177. *Id.* at 1430.

to retrieve the reply as a vehicle for the same thing. Whether or not the case at hand needed the reply procedure,¹⁷⁸ it does seem something of a stretch.¹⁷⁹

V. Time to Amend the Federal Pleading Rules?

In *Leatherman*, the Supreme Court seemed to suggest that the pleading rules might properly be amended.¹⁸⁰ The recent acrobatics used by some courts to find alternative methods of doing what they did before that decision¹⁸¹ might indicate that the time has come to do so. Other recent examples of the successful use of pleadings motions could fortify that conclusion.¹⁸² Considering what those amendments might be, however, provides reason for caution.

Pursuing Charles Clark's original vision could lead to abolishing pleading motions altogether. The Advisory Committee once toyed with partial abolition by eliminating the Rule 12(b)(6) motion,¹⁸³ and it might make a clean sweep of pleading practice by eliminating the motion for judgment on the pleadings, the motion for a more definite statement, and the motion to strike on the grounds that pleading motions serve little purpose unless they are dispositive.¹⁸⁴ Merits dispositions would then require a motion for summary judgment.

The complete demise of pleadings motions might work only a modest change. One fly in the ointment is that in securities fraud cases it would seem entirely ineffective because the Private Securities Litigation Reform Act appears, by its own force, to command that the motion to dismiss continue to operate in cases in which it applies.¹⁸⁵ Although a rule abolishing pleadings motions might supersede that provision, that would be a curious way to nullify such a recent statute. Putting aside that difficulty, a motion for summary judgment might readily address, to an equivalent

178. Judge Jones concurred specially on the ground that in cases involving qualified immunity, the heightened pleading requirement continued to apply. *See id.* at 1434-36. Judge Higginbotham also suggested that the Fifth Circuit's prior pleading requirement was not the same as Rule 9(b). *See id.* at 1431.

179. The court appeared to say that district judges have little discretion to decline a defendant's request that the plaintiff be required to file a reply. *See id.* at 1434 ("[A] district court's discretion not to do so is narrow indeed when greater detail might assist."). Thus, the court contemplates that replies be routinely required. But as Professor Wright notes, "occasions when this power should be or has been exercised are extremely rare." WRIGHT, *supra* note 1, § 66 at 457. For a case in which the court upheld the adequacy of a reply, see *Warnock v. Pecos County*, 116 F.3d 776 (5th Cir. 1997).

180. *See supra* text accompanying note 99.

181. *See supra* notes 174-79 and accompanying text.

182. *See supra* notes 154-68 and accompanying text.

183. *See supra* note 17 and accompanying text.

184. *See supra* notes 52-72 and accompanying text.

185. *See supra* text accompanying note 118.

degree, many cases suitably resolved on the pleadings.¹⁸⁶ But despite recent relaxations in summary judgment practice, the moving party still must make an initial showing that the motion is justified.¹⁸⁷ Because the moving party must comply with Rule 11, some discovery could often be required, thereby hamstringing access to merits dispositions.¹⁸⁸ Hence, even if summary judgment provided an alternative, eliminating pleadings motions would work a meaningful change.

More significantly, the abolition of formal motions to challenge the sufficiency of plaintiff's claims would not eliminate the interest of judges in testing doubtful claims. To a significant extent, that desire explains the persistence of pleading practice,¹⁸⁹ and it will not disappear in an age of increasing judicial management of litigation. Judges will be inclined to engage more vigorously in informal policing through status conferences, an undertaking somewhat underwritten in the rules.¹⁹⁰ Active case managers have been doing so for some time.¹⁹¹ Other judges who are not so inclined can presently rely on motion practice to provide the parties a method for raising these issues. Denied that avenue, they might feel obliged to ensure that some meaningful screening of claims occurs. Judge Keeton's reaction to *Leatherman* is instructive in this regard—confronted with doubts about whether heightened pleading requirements could provide a vehicle for screening claims he viewed as dubious, he simply shifted gears to case management and ordered the parties to file a “written submission . . . stating with particularity at least an outline or summary of the facts and the legal grounds of each claim.”¹⁹²

One reaction to this impulse is that it represents an improper attempt to backtrack on notice pleading.¹⁹³ Yet judges inclined in this direction are not clinging to formalities, and Rule 16 provides alternative support to justify what they are doing.¹⁹⁴ Moreover, it resembles the free-form oral activities that antedated reliance on written pleadings, an exercise reflected

186. See, e.g., *supra* notes 154-68 and accompanying text.

187. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

188. This problem might not exist if the plaintiff's initial disclosure, pursuant to Rule 26(a)(1), suffices to provide the basis for the motion.

189. See *supra* text accompanying notes 146-48.

190. See FED. R. CIV. P. 16(c)(1) (authorizing the court to take action at a pretrial conference regarding “simplification of the issues, including the elimination of frivolous claims or defenses”).

191. See Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case From Filing to Disposition*, 69 CAL. L. REV. 770, 780 (1981) (“The informal outline of the issues at the outset of the status conference also helps the parties focus on possible grounds for dismissal or summary judgment.”).

192. *Feliciano v. Dubois*, 846 F. Supp. 1033, 1047 (D. Mass. 1994).

193. See Peckham, *supra* note 191, at 787 (“Many attorneys feel that such [pretrial] orders are, in effect, analogous to the much-maligned code and common-law pleadings systems that once prevailed in this country . . .”).

194. See FED. R. CIV. P. 16(c)(1).

in some modern judicial systems.¹⁹⁵ But proceeding in the informal manner of case management has drawbacks. At least a formal motion process involves the structure of moving papers, responding papers, and a subsequent hearing. The case management model need not unduly curtail that sort of careful inquiry, but it potentially creates a risk of improvident rulings.¹⁹⁶ Because there are virtues as well as vices to pleading practice,¹⁹⁷ requiring a shift to this mode of operation seems dubious.

The *Leatherman* decision itself may have blunted whatever force might have existed for further limiting pleading practice in this manner.¹⁹⁸ Although courts still entertain pleadings motions, they seem somewhat chastened by that decision in the very areas in which pleading practice is most dubious. Because heightened pleading requirements are most questionable when used to probe factual conclusions,¹⁹⁹ that is a positive development. Only a radical rule amendment would produce greater departure from undue insistence on pleading niceties.

Turning the foregoing on its head, *Leatherman* might provide a reason to expand the coverage of Rule 9(b) to include other types of claims. But this tightening of pleading requirements for certain types of cases would create considerable problems of substance-specific rulemaking.²⁰⁰ Of course, Congress may legislate this way, as it has with the Private Securities Litigation Reform Act. The rules process, however, is not supposed to craft special rules according to the substantive category of the case. One could criticize Rule 9(b) on this ground, but that is water under the bridge, and the rule itself was based on an assumption that judges would so require anyway.²⁰¹ It would therefore be more consistent with rulemaking to fortify the pleading requirements for all claims. But trying to spell out what must be shown for all types of cases constitutes a Herculean task—one that could never keep up with the legal developments it was attempting to capture. As an alternative, one might fortify Rule 8 with a reminder that, even though the Supreme Court seems not to have noticed,²⁰² it already requires that the complaint show that the pleader is

195. See *supra* notes 21-22 and accompanying text.

196. Cf. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 420 (1986) (reporting numerous incidents in which the author, a magistrate judge, reversed his tentative decision, consequently becoming "more sensitive to the dangers inherent in speedy and wholly oral proceedings").

197. See *supra* notes 133-44 and accompanying text.

198. See *supra* note 101 and accompanying text.

199. See Marcus, *supra* note 11, at 466-71.

200. Cf. Marcus, *supra* note 11, at 471-80 (discussing heightened pleading for "suspicious" claims); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993) (examining the transsubstantive nature of the rules).

201. See Clark, *supra* note 23, at 463-64 (characterizing Rule 9 as useful, but not essential, because it "probably states only what courts would do anyhow").

202. See *supra* text accompanying notes 111-13.

entitled to relief. But recognizing that the rule already says what needs to be said also highlights the problems attending amendments that go beyond announcing "We really mean it." That hardly seems productive.

What remains, then, involves a kind of common-law activity in which judges develop standards for assessing the complaints in different kinds of cases. Much as this process might be attacked as inconsistent with the transsubstantive orientation of the rules, it actually comports with the relatively loose wording of the rules. Even the official forms, spare though they are, vary in detail depending on the type of claim asserted.²⁰³ Perhaps it would be profitable to promote some additional attention to the adequacy of pleadings by upgrading Rule 12(e) to say that the motion for a more definite statement can properly serve the function the commentators view as appropriate,²⁰⁴ but that endorsement will not provide a guide to determining when requiring further specifics is warranted. As with the decision whether the case can be reliably resolved on the pleadings, that determination necessarily turns on some assessment of the individual case. That this may give the judge latitude for discretion is not a reason for lamenting, as current practice of judicial management shows, but it is a reason to be very cautious about rule amendments to foster this activity.

VI. Conclusion

For much of this century, the prevailing view has been that change in procedure tends always toward the more relaxed and away from the more rigid.²⁰⁵ That certainly describes the Federal Rules' treatment of pleadings. But one may doubt the universal attractiveness of unbridled flexibility.²⁰⁶ More to the point, what goes up can come down, and change may move toward constraint rather than latitude. In many ways, the last quarter century has produced changes in the rules that sought to constrain rather than to liberate.²⁰⁷

The pleading rules have not changed, and *Conley v. Gibson* would seem to have liberated litigants from pleading practice for all time. But that did not happen, and the recent assist in *Leatherman* does not seem to

203. Compare FED. R. CIV. P. app. Form 6 (illustrating a complaint for money lent in two paragraphs with a single paragraph demand), with *id.* app. Form 17 (illustrating a complaint for copyright infringement and unfair competition in ten paragraphs with a five paragraph demand).

204. See *supra* note 70.

205. See MILLAR, *supra* note 22, at 5-6 (positing a "law of procedural progress" pursuant to which "primitive" rigidities are discarded by more advanced systems).

206. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 1001-02 (1987) (describing how adoption of the equity model, with great latitude in the rules, caused difficulties due to formlessness in litigation).

207. See generally Marcus, *supra* note 143 (describing the orientation of recent amendments to the discovery rules).

have completed the task. To the contrary, pleading practice seems likely to continue in one guise or another for a variety of reasons. The temper of the practice probably owes as much to the temper of the times as to the specific provisions of the rules. Those provisions might be changed, but anything short of radical change would probably produce only inoderate change. So pleading practice is likely to persist in the future, as it did in the past.