

The Replaying Game: Making the Case for Adopting the Fifth Circuit's Use of Particularized Replies in § 1983 Actions

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I. INTRODUCTION

Since the inception of the Federal Rules of Civil Procedure (the “Rules”) in 1938, a plaintiff attempting to avail herself of federal court has, in most circumstances, needed only to plead a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹ As the qualifier “in most circumstances” suggests, there are exceptions; the question is whether § 1983 actions² against government officials for civil rights violations should be one of those exceptions. Qualified immunity,³ a defense to § 1983 claims, often

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¹ See FED. R. CIV. P. 8(a)(2). This minimal pleading requirement is commonly referred to as “notice pleading.” See *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Reversing dismissal for failure to plead specific facts, the Supreme Court determined that “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.” *Id.* (internal quotation omitted); see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002). For a further exploration of notice pleading, see *infra* Part II.D.

² 42 U.S.C. § 1983 provides a private right of action against any “person” who, acting “under the color of” state authority, violates the constitutional or federal rights of a United States citizen. 42 U.S.C. § 1983 (1996). For a more in-depth description of § 1983 claims, see *infra* Part III. A *Bivens* action, the federal analog to a § 1983 action, may be brought by a citizen whose civil rights are violated by a federal, rather than state, official. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971). Although this Comment focuses on § 1983 actions, the logic, at least with regard to pleading standards, is equally applicable to *Bivens* actions. See, e.g., *Butz v. Economou*, 438 U.S. 478, 500-01 (1978) (acknowledging that there is no justification for treating *Bivens* claims different from § 1983 claims in most instances).

³ Qualified immunity is a judicially-created affirmative defense that must be raised by the government defendant in the answer to a § 1983 claim. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). It is available to government officials performing discretionary functions “insofar as

provides government officials total freedom from suit, rather than merely freedom from liability.⁴ Because of this, many lower federal courts have struggled to find ways to dispose of civil rights cases at an early juncture.⁵ Until recently, the majority of lower federal courts responded by requiring that the plaintiff plead in factual detail at the outset of the litigation; failure to do so resulted in a judgment on the pleadings, ending the plaintiff's action.⁶

Recent decisions by the United States Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*⁷ and *Swierkiewicz v. Sorema N.A.*⁸ have severely undermined the practice of demanding that the plaintiff plead specific facts in the complaint.⁹ In *Leatherman*, the Court unanimously rejected a heightened pleading standard when a § 1983 complaint is brought against a municipality.¹⁰ The Court expressly declined to decide, however, whether a heightened pleading standard was permissible in cases against

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a further examination of immunity defenses, see *infra* Part III.

⁴ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (describing qualified immunity as "an immunity from suit rather than a mere defense to liability").

⁵ See, e.g., *Harlow*, 457 U.S. at 818 (advocating the early use of summary judgment and holding that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed"); *Elliot v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied* 112 S. Ct. 1242 (1992) (rejecting a heightened pleading standard in favor of aggressive use of summary judgment); *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989) (holding that the court must be able at the outset of the litigation to ascertain with factual certainty what transpired).

⁶ See FED. R. CIV. P. 12(c); see also, e.g., *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992) (requiring plaintiff to meet a heightened pleading standard in the complaint in suits "in which an immunity defense can be raised"); *Hunter v. Dist. of Columbia*, 943 F.2d 69, 75-77 (D.C. Cir. 1991) (requiring particularized pleading in all § 1983 claims regardless of whether the qualified immunity defense is raised); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (adopting a "heightened pleading standard in [*Bivens*] cases in which subjective intent is an element of a constitutional tort action").

⁷ 507 U.S. 163 (1993).

⁸ 534 U.S. 506 (2002).

⁹ See *infra* Parts IV.C and D (discussing *Leatherman* and *Swierkiewicz*).

¹⁰ 507 U.S. at 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules"). Chief Justice Rehnquist, writing for the Court, explained that municipalities have neither absolute nor qualified immunity that would preclude a suit. *Id.* at 166. Rather, the primary issue in a § 1983 claim against a municipality is whether the municipality's officials were acting in accordance with a municipal custom or policy when the alleged constitutional injury occurred. *Id.*; see also *infra* note 232 (comparing § 1983 claims against municipalities with those against government officials). For a further discussion of *Leatherman*, see *infra* Part IV.C.

government officials.¹¹ Several courts have exploited this apparent loophole by continuing to require that the complaint be particularized in suits against officials.¹²

In *Swierkiewicz*, the Court revisited the permissibility of a lower court's imposition of a heightened pleading standard despite no express authority in the Rules, this time in the employment discrimination context.¹³ The Court in *Swierkiewicz*, as in *Leatherman*, did not directly address the appropriate level of specificity required in a plaintiff's complaint in a § 1983 suit against a government official.¹⁴ The Court's message, however, was unequivocal: absent a statute or a Rule to the contrary, a federal court cannot on its own authority insist on a heightened pleading standard.¹⁵

After *Leatherman* and *Swierkiewicz*, the loophole by which some lower federal courts have distinguished their heightened pleading practices from those discredited by the Supreme Court is closing, if not completely shut.¹⁶ The Fifth Circuit, in *Schultea v. Wood*,¹⁷ responded¹⁸ by devising a novel way of bringing to light specific

¹¹ *Leatherman*, 507 U.S. at 166-67.

¹² For courts that have continued, post-*Leatherman*, to require a heightened pleading standard in § 1983 actions against government officials, see, for example, *Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000) ("We have continued to apply this heightened pleading requirement to § 1983 claims alleging a conspiracy between private individuals and state officials even after *Leatherman* . . ."); *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1368 (11th Cir. 1998) ("[T]he heightened pleading requirement is the law of this circuit."). For courts that have rejected a heightened pleading standard after *Leatherman*, see, for example, *Atchinson v. Dist. of Columbia*, 73 F.3d 418 (D.C. Cir. 1996); *Wilson v. Town of Mendon*, 294 F.3d 1 (1st Cir. 2002); *Black v. Coughlin*, 76 F.3d 72 (2d Cir. 1996); *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994); *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002); *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002); *Harris v. St. Louis Police Dep't*, 164 F.3d 1085 (8th Cir. 1998); *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439 (9th Cir. 1994).

¹³ *Swierkiewicz*, 534 U.S. at 508.

¹⁴ *See id.*

¹⁵ *Id.* at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules and not by judicial interpretation.'" (quoting *Leatherman*, 507 U.S. at 168)). For a further exploration of *Swierkiewicz*, see *infra* Part IV.D.

¹⁶ The Eleventh Circuit, for example, has been particularly reluctant to relinquish its heightened pleading standard for complaints alleging § 1983 claims against government officials, but the circuit appears to have retrenched. *See Marsh v. Butler County*, 225 F.3d 1243, 1251, 1258 (11th Cir. 2000). For an excellent account of the enduring uncertainty in the Eleventh Circuit's jurisprudence in this area, see Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1504-10 (2002).

¹⁷ 47 F.3d 1427 (5th Cir. 1995) (en banc).

¹⁸ To be sure, *Swierkiewicz* was decided almost seven years after *Schultea* and, therefore, it is somewhat misleading to call the latter a "response" to the former.

factual allegations at the pleading stage: the “three-step” pleading scheme.¹⁹

According to the scheme, the plaintiff, in the complaint, first must plead a “short and plain statement” per Rule 8(a)(2),²⁰ alleging a § 1983 claim against the defendant government official.²¹ Second, if the defendant seeks to assert the affirmative defense of qualified immunity, she must do so in the answer.²² In the third step, the court directs the plaintiff to file a seldom-used Rule 7²³ reply that is “tailored to the assertion of qualified immunity and fairly engages its allegations.”²⁴

This Comment assesses the suitability of the three-step pleading scheme and ultimately concludes that the scheme strikes a desirable balance between the policies that underlie government immunity and notice pleading. Part II provides a brief history of pleading and procedural systems. Part III recounts the development of qualified immunity doctrine in § 1983 actions. Part IV explores the tense policy conflict between qualified immunity and notice pleading as demonstrated by recent Supreme Court jurisprudence. In Part V, this Comment analyzes the three-step pleading scheme presented in *Schultea*, in light of *Leatherman* and *Swierkiewicz*, and determines that the Fifth Circuit has exceeded the authority conferred by the Rules. Nevertheless, this Comment advocates the three-step scheme as a middle-ground solution that preserves qualified immunity as a threshold barrier against meritless litigation and helps to maintain a

Nonetheless, *Schultea* was a direct response to *Leatherman*, which was in turn reaffirmed and arguably broadened by *Swierkiewicz*. Compare *Schultea*, 47 F.3d at 1333 (presenting the three-step scheme as the Fifth Circuit’s “answer to *Leatherman*”), with *Swierkiewicz*, 534 U.S. at 513 (reaffirming *Leatherman*).

¹⁹ See *Schultea*, 47 F.3d at 1432-33. Although Circuit Judge Higginbotham referred to the scheme as having only two steps, the complaint and the reply, *id.* at 1433-34, this Comment will refer to the practice as the three-step scheme. This is because the government defendant must file an answer (i.e., the second step) between the complaint and reply. *Id.* at 1434.

²⁰ FED. R. CIV. P. 8(a)(2).

²¹ *Schultea*, 47 F.3d at 1433.

²² See *id.* at 1433. This presumes, of course, that the defendant will plead qualified immunity in the answer. See *id.* If the defendant does not do so, there would generally be no need for a Rule 7 reply. See *infra* Part V.C (recommending that the three-step scheme only be triggered “where the defense of qualified immunity is raised in the answer”). But see *infra* notes 116-21 and accompanying text (describing the uses of the reply under the current pleading regime, including mandatory replies in response to counterclaims). Thus, when a defendant does not assert qualified immunity, there would be no need to apply the three-step scheme at all. See *infra* Part V.C.

²³ FED. R. CIV. P. 7(a).

²⁴ *Schultea*, 47 F.3d at 1433.

uniform and functional pleading regime. To ensure that the practice complies with the Court's mandate in *Leatherman* and *Swierkiewicz*, this Comment concludes by endorsing the adoption of a version²⁵ of the three-step pleading scheme. This Comment maintains, however, that this can only be accomplished legitimately by amending the Rules rather than by imposing the scheme through independent judicial implementation.

II. THE EMERGENCE OF THE NOTICE PLEADING REGIME

Legal procedure in the United States has always been a moving target, albeit a somewhat slow one.²⁶ Over the last four hundred years, the trappings of traditional sources of procedure have seemingly been shaken off in the name of reform, only to reemerge as problematic but enduring features of the reformed alternatives.²⁷ During this fitful evolution, pleadings, while still required, have greatly diminished in importance.²⁸ Under modern civil procedure, the pleading stage is no longer permeated by legal pitfalls and meaningless technicalities; at the very least, the pleadings themselves are not required to contain some "magical words," the exclusion of which may result in immediate and permanent disposition of the lawsuit.²⁹

A liberalized pleading regime has produced estimable benefits

²⁵ See *infra* notes 380-84, 388, and accompanying text (proposing a mandatory reply to a qualified immunity assertion rather than a permissive reply under the current *Schulte* scheme).

²⁶ Although an understanding of the change from distinct common law and equity procedural systems to various combined forms, culminating with the Federal Rules of Civil Procedure, is helpful to appreciate the complexities and consequences of different pleading regimes, a truly thorough account is outside the scope of this Comment. Instead, this Comment provides only a summary version. See *infra* Part II. For a further exploration of the history of the current federal pleading regime, see generally DAVID W. LOUSELL ET AL., PLEADING AND PROCEDURE 18-29 (6th ed. 1989); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 6-18 (1997); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040-45 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure*, 135 U. PA. L. REV. 909 (1987).

²⁷ See Subrin, *supra* note 26, at 931-43; see also *infra* Parts II.B, C, and D (discussing how successor procedural systems have retained remnants of common law pleading).

²⁸ See LOUSELL ET AL., *supra* note 26, at 28 (describing the Rules as requiring "little more than broad and vague statements of claim and defense").

²⁹ See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); see also, e.g., FED. R. CIV. P. 15(a) (providing liberal rules for amending pleadings).

for the American legal system.³⁰ Nevertheless, some of the discarded and discredited practices of the previous era—particularly an increased role for pleadings like the reply—can perhaps again be useful in certain instances, especially when substantive immunity rights collide with countervailing modern procedural devices.³¹ Understanding how the *Schulte* three-step pleading scheme can alleviate the tension between qualified immunity and notice pleading³² requires a brief review of the history of pleading and procedure in the United States.

A. Common Law Pleading and Procedure

Prior to the adoption of the Rules, the early American legal system was largely dominated by the procedural system inherited from English common law.³³ Suits at law shared three main features: the writ system, the use of juries, and technical pleading.³⁴ Initiating a lawsuit required obtaining the issuance of an administrative order, or writ.³⁵ Each writ attempted to integrate substance, procedure, and remedy into a single form; the particular writ chosen by the aggrieved party determined the single claim brought before the court, the method by which the case was heard, and the available relief should that party prevail.³⁶ By selecting a writ, the plaintiff was required to

³⁰ See Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 4-6 (1989) (recounting scholars' statements in support of the Rules and providing examples of scenarios where procedural liberalization has improved the litigation process).

³¹ See *infra* Parts IV and V; see also Robert L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463-64 (1986) (asserting that additional pleading of facts may help dispose of meritless civil rights claims at an early point); Subrin, *supra* note 26, at 992-94, 1000-02 (highlighting criticism of the Rules' "overworked" procedural flexibility and reminding the legal community that "there is another rich tradition [common law] to draw upon" for refining civil procedure).

³² See *infra* Part V (explaining the three-step scheme's potential role in resolving issues of qualified immunity that arise in a notice pleading regime).

³³ See, e.g., Subrin, *supra* note 26, at 926-28.

³⁴ *Id.* at 914; see also LOUSELL ET AL., *supra* note 26, at 22-24 (providing an overview of the features of common law procedures); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 60-81 (2d ed. 1981) (same).

³⁵ LOUSELL ET AL., *supra* note 26, at 22.

³⁶ See *id.* at 19-20; STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 387-88 (5th ed. 2000); Subrin, *supra* note 26, at 914-18, 929. In addition to rigidly fixing substance and remedy to a given procedure, every writ had a different procedure. LOUSELL ET AL., *supra* note 26, at 20. The variation in procedure existed for many reasons, including the diverse sources of writs and the historical period when a writ emerged. *Id.* Accordingly, the common law writ system and its enduring legacy in the English and American legal systems have been characterized in part as "the result of a historical accident." TEPLY & WHITTEN, *supra* note 26, at 6. For a further exploration of various

make a claim that fit within that writ's subject matter and could not bring another claim under another writ.³⁷

After the writ had been issued, the parties exchanged a series of pleadings in an attempt to refine the suit to a single issue.³⁸ The pleadings were intended to ferret out the facts to determine whether, if true, they would allow the pleader to recover and whether there were any facts in dispute.³⁹ In a typical action, the plaintiff would first submit a "declaration": a factually detailed account of the circumstances underlying the writ.⁴⁰ The plaintiff's declaration could not, at this point, deviate from the writ; alternative and cumulative claims or "counts" were not permitted.⁴¹ Next, the defendant might have responded with a "general demurrer," which admitted all of the plaintiff's factual allegations and challenged a point of law.⁴² Or the defendant could have filed a "traverse," forgoing a challenge of the law and instead denying a fact (but then only *one* fact).⁴³ If the defendant chose either to demur or to traverse, the suit was effectively reduced to a single issue of law or fact, respectively.⁴⁴

Instead, however, the defendant could have issued a plea in "confession and avoidance," admitting the allegations contained in a prior pleading in an attempt to avoid the legal consequences of those allegations by introducing "new matter."⁴⁵ By pleading in confession and avoidance, the defendant did not reduce the suit to a single issue; the plaintiff, therefore, was required to respond.⁴⁶ In response, the plaintiff could either demur to the defendant's new matter (raising a single legal issue) or file a "replication."⁴⁷ The plaintiff's replication either traversed one of the defendant's facts (raising a single fact issue) or acted as a confession and avoidance itself,

writs, their historical origins, and reasons for selecting a particular writ, see *id.* at 6-9.

³⁷ LOUSELL ET AL., *supra* note 26, at 22.

³⁸ TEPLY & WHITTEN, *supra* note 26, at 10-11.

³⁹ Subrin, *supra* note 26, at 916.

⁴⁰ TEPLY & WHITTEN, *supra* note 26, at 10. In early English common law, declarations were oral. *Id.* Over time, for convenience and other reasons, oral declarations were replaced by written pleadings. *Id.*

⁴¹ LOUSELL ET AL., *supra* note 26, at 22.

⁴² The modern analog to a demurrer is typically known as a motion to dismiss, though some court systems retain the old moniker. TEPLY & WHITTEN, *supra* note 26, at 11.

⁴³ *Id.* at 10. The traverse is analogous to a simple denial. *Id.* at 11.

⁴⁴ *Id.* at 10.

⁴⁵ *Id.* The modern equivalent of entering a plea in confession and avoidance is pleading an affirmative defense. *Id.* at 11.

⁴⁶ TEPLY & WHITTEN, *supra* note 26, at 10.

⁴⁷ *Id.*

admitting the defendant's allegations and again raising a new matter.⁴⁸ If the replication raised a new matter of confession and avoidance, the defendant was obligated either to respond with a demurrer (again, reducing the suit to single legal issue) or to file a "rejoinder," which operated like a replication by either traversing a fact (isolating a single fact issue) or raising another new matter of confession and avoidance.⁴⁹ This continued until the lawsuit was refined to a single issue.⁵⁰

As this brief example demonstrates, common law pleading often became dizzyingly complex.⁵¹ Attempting to reach a single issue in order to secure easier adjudication, the pleading rules instead created a morass where a false step could easily cost a party the case for entirely technical reasons.⁵² Additional restrictions were imposed on lawsuits to keep them relatively simple; parties, for example, were deemed so inherently conflicted that they were generally not permitted to testify.⁵³ Common law also restricted the joinder of parties, an offshoot of the single issue rule for claims.⁵⁴ Historian Frederic W. Maitland characterized the writ system by stating that "discretion is entirely excluded; all is to be fixed by iron rules."⁵⁵ Dissatisfaction with the harshness of common law procedure grew in the United States,⁵⁶ and popular reform movements sprung up with the goal of disentangling procedure from substance.⁵⁷

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* This portion of the Comment borrows a great deal from an excellent sample pleading exchange provided by Professors Teply and Whitten. *See id.* at 10-11.

⁵¹ Subrin, *supra* note 26, at 917.

⁵² *Id.* Although the convoluted English writ system was never imported wholesale into American procedure, early informal colonial practices did eventually give way to a greater prevalence of English procedural rules and forms. *Id.* at 927.

⁵³ *See id.* at 919.

⁵⁴ *See id.*

⁵⁵ FREDERIC W. MAITLAND, EQUITY ALSO, THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 298 (A.H. Chaytor & W.J. Whittaker eds., 1920).

⁵⁶ Subrin, *supra* note 26, at 929-31. Reformers "complained that the common law, and methods designed to circumvent that law, had resulted in a system that obscured facts and legal issues, rather than distilling and clarifying them." *Id.* at 932-33.

⁵⁷ *Id.* Among the factors that provided pressure to integrate law and equity during the nineteenth century, Professor Subrin cites separation of powers issues that arose as legislators (at the expense of common law judges) became more involved with the process of law-making, the advent of the law school model over the apprenticeship model for the instruction of law, and issues of federalism that emerged after the establishment of a separate federal court system. *Id.* at 929-31.

B. Equity Pleading and Procedure

Equity courts, with their own procedure, jurisdiction, substantive field, and remedies, developed distinctly but in parallel to common law courts.⁵⁸ Although equity never took hold in early American legal history as strongly as it did in England,⁵⁹ it was nevertheless imported into most American states.⁶⁰ Typically, law judges were allowed to hear special cases in equity⁶¹ or, as in England, the state created an equity court system entirely distinct from the common law court system.⁶²

From the outset, equity contrasted starkly with common law.⁶³ Because equity emerged as an alternative to common law, petitioners sought the intervention of the King's Council (and later specifically the Chancellor) when the rigid common law writ system appeared to offer inadequate or nonexistent relief.⁶⁴ Consequently, equity, unlike common law, was not fixated on pinning down and resolving a single issue between only two parties; rather, equitable actions encompassed multiple issues and parties.⁶⁵ Additionally, the Chancellor had the authority to fashion specific remedies rather than simply award the ordinary legal remedy, monetary damages.⁶⁶ Court orders in equity frequently involved affirmative commands compelling the losing party to right past wrongs (and prevent future ones) by performing

⁵⁸ LOUSELL ET AL., *supra* note 26, at 24-25; Subrin, *supra* note 26, at 918-19. Pinpointing precisely when, in English history, equity established a distinct court system has confounded historians and legal scholars. See MILSOM, *supra* note 34, at 82 ("Few beginnings are so elusive as that of the chancellor's equitable jurisdiction . . ."). Records, though disjointed and incomplete, nevertheless suggest that equity courts may have been distinct from law courts as early as the fourteenth century. See TEPLY & WHITTEN, *supra* note 26, at 12 ("[Equity] was recognized as a separate court in about the middle of the fourteenth century.").

⁵⁹ See LOUSELL ET AL., *supra* note 26, at 26; see also Subrin, *supra* note 26, at 926 (reporting that "many colonists distrusted separate equity courts . . . [because equity] represented uncontrolled discretion and needless expense and delay").

⁶⁰ TEPLY & WHITTEN, *supra* note 26, at 14.

⁶¹ LOUSELL ET AL., *supra* note 26, at 26; Subrin, *supra* note 26, at 928.

⁶² LOUSELL ET AL., *supra* note 26, at 26; Subrin, *supra* note 26, at 928. Pennsylvania, for example, did not establish equity courts until after 1800. LOUSELL ET AL., *supra* note 26, at 26. In New York, state trial courts simply assumed the dual powers of equity and common law. *Id.*

⁶³ LOUSELL ET AL., *supra* note 26, at 24-25.

⁶⁴ TEPLY & WHITTEN, *supra* note 26, at 12; see also 27A AM. JUR. 2D *Equity* § 3 (2003) ("[T]he primary character of equity . . . [is] that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent so to do.").

⁶⁵ Subrin, *supra* note 26, at 919-20.

⁶⁶ *Id.* at 919.

or not performing specific acts.⁶⁷

Equity actions, like lawsuits, involved pleadings.⁶⁸ A petitioner initiated an action in equity by filing a “petition” or bill.⁶⁹ The defendant was then required to submit an “answer.”⁷⁰ If further pleadings were needed to clarify the parties’ positions, the plaintiff would file a rejoinder to which the defendant would respond with a replication.⁷¹ Although superficially similar to the writ system, equity pleading was not nearly so rigidly formulaic.⁷² The petition, for instance, needed not contain the specific facts that, if true, would satisfy an ill-fitting cause of action that existed under a writ; rather, the petition often contained more background information, including details of the petitioner’s sympathetic circumstances.⁷³ The petitioner included this background information in an attempt to convince the Chancellor that leaving the petitioner to an unforgiving common law system would result in an injustice.⁷⁴

Pleadings, however, were not equity’s predominant mode of winnowing issues before trial.⁷⁵ Rather, the Chancellor had the power to compel (with “subpoenas” and “interrogatories”) either party to appear and respond under oath to every allegation contained in the other party’s pleadings.⁷⁶ Additionally, the Chancellor could compel either party to answer other specific questions put forward by the other party or the Chancellor himself.⁷⁷ Equity did not permit testimony in open court, but rather parties provided documentary answers.⁷⁸ The power to ask specific questions—and to receive compelled answers—allowed the questioning party (typically the plaintiff) to obtain admissions of fact that at law were unavailable.⁷⁹

⁶⁷ *Id.*

⁶⁸ LOUSELL ET AL., *supra* note 26, at 25.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* *But cf.* Subrin, *supra* note 26, at 921 (questioning the purported distinctions between equity and legal procedure and noting that “equity often developed its own formal rules of both substance and process”).

⁷³ Subrin, *supra* note 26, at 919.

⁷⁴ *See id.*

⁷⁵ *See* LOUSELL ET AL., *supra* note 26, at 25.

⁷⁶ Subrin, *supra* note 26, at 919.

⁷⁷ LOUSELL ET AL., *supra* note 26, at 25; Subrin, *supra* note 26, at 919. Professor Subrin identifies these compelled documentary answers as “the precursor to modern pretrial discovery.” *Id.* The process usually focused on the defendant, whose “conscience” was searched. *Id.*; LOUSELL ET AL., *supra* note 26, at 25. This led to equity courts being labeled “courts of conscience.” *Id.*

⁷⁸ Subrin, *supra* note 26, at 919.

⁷⁹ LOUSELL ET AL., *supra* note 26, at 25.

This dynamic allowed equity to develop substantive doctrines that were foreign to common law.⁸⁰ Claims of fraud or breach of fiduciary duty, for example, would be difficult if not impossible to prove if, as in suits at law, the plaintiff could neither testify on her own behalf nor compel the defendant to answer direct questions.⁸¹ The Chancellor's power to craft remedies that compelled further action or inaction first enabled and then enhanced the creation of these new doctrines.⁸² There would be no satisfactory method of enforcing a trust, for example, if equity could not issue orders requiring "specific performance."⁸³

Equity, despite its flexibility and goal of justice, was not without its critics; overwhelmingly, equity cases were exceptionally costly, slow, and unwieldy.⁸⁴ The general exclusion of juries as fact-finders caused concern that too much discretion (and the potential for abuses of that discretion) resided in the Chancellor (and later in law judges sitting in equity).⁸⁵ Notwithstanding these enduring criticisms, principles of substantive and procedural equity would nonetheless influence the reform movements that followed.⁸⁶

C. Code Pleading and Procedure

In an attempt to blend law and equity into a unified and standardized procedural system, reformers developed code pleading systems as replacements for American common law procedure.⁸⁷ Most notable among these was the Field Code (the "Code").⁸⁸

⁸⁰ *Id.*

⁸¹ *Id.*; see also MILSOM, *supra* note 34, at 85-86 (describing how the difficulties of bringing claims such as the "tort of deceit" in common law courts were alleviated by equity).

⁸² LOUSELL ET AL., *supra* note 26, at 25.

⁸³ Subrin, *supra* note 26, at 919.

⁸⁴ LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 47-48 (1972); see also LOUSELL ET AL., *supra* note 26, at 26 (stating that by the nineteenth century equity "suits took decades or more to reach finality"); Subrin, *supra* note 26, at 937 ("[C]omplaints about the expense, delay, and unwieldiness of equity cases were legion."). In addition to the inherent demands on time and resources that larger and more complex suits imposed, Professor Subrin also assigns blame for the often inexorable delay on the Chancellor "who resolved—often in a most leisurely manner—issues of both law and fact." *Id.* at 920.

⁸⁵ See Subrin, *supra* note 26, at 926-27, 928.

⁸⁶ See *id.* at 956.

⁸⁷ Subrin, *supra* note 26, at 931.

⁸⁸ Developed primarily by (and named after) David Dudley Field, the Field Code was adopted by New York in 1848. Alexander Holtzoff, *Origin and Sources of the Federal Rules*, 30 N.Y.U. L. REV. 1057, 1061 (1955). The Code was eventually adopted in around half of the states, covering more than half of the United States population.

Codification, however, produced mixed results at best.⁸⁹ The Code, for example, incorporated many features of equity by eliminating the writ system in favor of a single mode of procedure for all legal and equitable actions and by liberalizing the choice of remedy.⁹⁰ The Code reduced pleadings to the “complaint,” the “answer,” and the “reply,” reformed the rules of party and claim joinder, and made amending pleadings easier.⁹¹ But the Code also differed from equity in important ways: discovery devices were severely limited and juries were given prominent roles.⁹² Significantly, the Code also eliminated directed verdicts.⁹³ In general, flexibility and discretion, the hallmarks of equity, were in large part removed from the province of the judge.⁹⁴

Although reducing the pleadings in number, the Code laid the groundwork for renewed technical pleading.⁹⁵ A complaint was required to contain “facts constituting the cause of action.”⁹⁶ David Dudley Field, the principal architect of the Code, regarded “facts” or “ultimate facts” as the objective, determinable truth;⁹⁷ pleadings, therefore, were not to contain “evidence” or “conclusions.”⁹⁸ These terms, however, were hardly clear to litigants, lawyers, and jurists; much time and energy was spent not only trying to distinguish facts from evidence and conclusions but also trying to simply agree on the definition of the terms themselves.⁹⁹ The term “cause of action” likewise suffered from definitional problems.¹⁰⁰ Derived from and

LOUSELL ET AL., *supra* note 26, at 27; Subrin, *supra* note 26, at 932, 939.

⁸⁹ See Subrin, *supra* note 26, at 931-39.

⁹⁰ LOUSELL ET AL., *supra* note 26, at 27.

⁹¹ *Id.*

⁹² Subrin, *supra* note 26, at 934.

⁹³ *Id.* at 937.

⁹⁴ *Id.* at 934, 937. Field and other codification proponents believed that “to say that law is expansive, elastic, or accommodating, is as much to say that it is no law at all.” DAVID DUDLEY FIELD, INTRODUCTION TO THE COMPLETED CIVIL CODE (1865), reprinted in SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 323, 330-31 (A. Sprague ed., 1884), quoted in Subrin, *supra* note 26, at 934.

⁹⁵ Subrin, *supra* note 26, at 939-40.

⁹⁶ *Id.* at 935.

⁹⁷ *Id.*

⁹⁸ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218 (1990).

⁹⁹ *Id.*; Subrin, *supra* note 26, at 941. Professors Wright & Miller explain that “it was difficult, if not impossible, to draw meaningful and consistent distinctions among ‘evidence,’ ‘facts,’ and ‘conclusions.’ These concepts tended to merge to form a continuum and no readily apparent dividing markers developed to separate them.”

5 WRIGHT & MILLER, *supra* note 98, § 1218.

¹⁰⁰ Subrin, *supra* note 26, at 935.

evocative of the old writ system, “cause of action” implied that a specific set of facts existed that would prompt judicial action and mandate a remedy.¹⁰¹

Ultimately, despite the goal of demystifying the litigation process, the Code and the other codifications suffered from much the same defects as common law: they fostered the creation of “traps for the unwary or the inexperienced pleader and tactical advantages for the adroit pleader that were unrelated to the merits of his cause.”¹⁰² Piecemeal enactment and repeated amendments in many jurisdictions created systems every bit as arcane and complex as the writ system.¹⁰³ One code pleading regime, bloated by inexorable amendments, was disdainfully described as “too long, too complicated, ‘too minute and technical, and lack[ing] elasticity and adaptability.’”¹⁰⁴ If nothing else, however, the failure of the code pleading system buttressed the subsequent reform movement that would finally succeed in breaking American civil procedure away from its common law roots.¹⁰⁵

D. Notice Pleading Under the Federal Rules of Civil Procedure

In 1934, after years of attempted reform, Congress planted the seeds of a radical alteration of the procedural landscape by enacting the Rules Enabling Act (the “REA”).¹⁰⁶ The REA permitted the Supreme Court “to prescribe, by general rules, for the District Courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.”¹⁰⁷ In accordance with the REA, the Supreme Court appointed an Advisory Committee to draft new uniform procedural rules for federal courts.¹⁰⁸ The Committee largely adopted the goal of Charles E. Clark, a committee member and proponent of a less restrictive

¹⁰¹ *Id.*

¹⁰² 5 WRIGHT & MILLER, *supra* note 98, § 1218.

¹⁰³ Subrin, *supra* note 26, at 940. The Throop Code, for example, expanded the New York Code of Civil Procedure from an original 392 provisions to 3441 provisions as amended. *Id.* In addition to sheer mass, the Throop Code was also plagued by endemic disorganization: “unrelated matters were side by side—a ‘patent lack of arrangement and symmetry.’” *Id.* at 941 (quoting President’s Address by J. Newton Fiero (Jan. 18, 1893), reprinted in 16 N.Y. ST. B.A. REP. 48, 50 (1893)).

¹⁰⁴ *Id.* (quoting *Report of the Committee on Code Revision (1898)*, 22 N.Y. ST. B.A. REP. 170, 175 (1899)) (alteration in original).

¹⁰⁵ *See id.* at 940.

¹⁰⁶ Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1990)).

¹⁰⁷ *Id.*

¹⁰⁸ Subrin, *supra* note 26, at 970-74.

American legal system, to create “a really unified procedure [that] would not involve repudiation of the present satisfactory equity rules, but merely an expansion of them to all actions.”¹⁰⁹

By successfully merging equity and common law, the Federal Rules of Civil Procedure, formally adopted in 1938,¹¹⁰ dramatically liberalized the early segments of litigation.¹¹¹ The Rules represented a remarkable change in civil practice that was manifested by three major developments: the advent of minimal pleadings, the reliance on liberal discovery, and the diminishment of juries in favor of judge-controlled adjudication.¹¹² The overarching goal of the new system was that the underlying bases of claims and defenses should be brought to light at the discovery stage rather than primarily by the pleadings.¹¹³ Instead of forcing a set of facts to fit imperfectly into the unyielding cause of action prescribed by a particular writ, the complaint needs only to contain a brief account of the incident showing that the plaintiff has stated a claim that invokes a cognizable body of law.¹¹⁴ The Rules hold the defendant to substantially the same standard in the answer.¹¹⁵

Unlike common law and code pleading,¹¹⁶ however, the presentation of “new matter” does not automatically trigger another round of responsive pleading.¹¹⁷ Although the Rules retained the reply (in Rule 7),¹¹⁸ it is mandatory only if the defendant pleads a

¹⁰⁹ Charles E. Clark, *The Charles E. Clark Papers*, Sterling Memorial Library of Yale University, Manuscripts & Archives, Box 108, Folder 40, *quoted in* Subrin, *supra* note 26, at 971.

¹¹⁰ TEPLY & WHITTEN, *supra* note 26, at 16.

¹¹¹ Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 986 (1998).

¹¹² *Id.* at 986-88.

¹¹³ *Conley*, 355 U.S. at 47; *see also* FED. R. CIV. P. 8(f) (mandating that “[a]ll pleadings shall be so construed as to do substantial justice”); 2A JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 7.01[1] (2d ed. 1996) (“The broad discovery provisions of Rules 26 to 37, together with the pretrial conference under Rule 16, have considerably relieved the pleadings of much of the burden of formulating issues.”).

¹¹⁴ *See* FED. R. CIV. P. 8(a)(2).

¹¹⁵ *See* FED. R. CIV. P. 8(b). Rule 8(b) requires a party to “state in short and plain terms the party’s defenses to each claim asserted.” *Id.*

¹¹⁶ *See infra* Parts II.A and C (discussing common law and code pleading).

¹¹⁷ *See* FED. R. CIV. P. 7(a).

¹¹⁸ Rule 7 is derived from the Federal Equity Rules of 1912, a liberalized but non-merged system that served as a precursor to the Federal Rules of Civil Procedure. 2A MOORE ET AL., *supra* note 113, ¶ 7.03. Equity Rule 31, upon which Rule 7 is based, reduced mandatory responsive pleadings to the answer and a reply when the answer contained a set-off or counterclaim. *Id.* Otherwise, the court retained discretion to order a reply. *Id.*

counterclaim.¹¹⁹ Otherwise, the plaintiff can file a reply only with leave of the court.¹²⁰ Requiring a reply has been deemed extraordinary under modern civil procedure:

[A] reply to an affirmative defense should not be ordered unless there is a *clear and convincing factual showing of necessity* or other extraordinary circumstances of a compelling nature. . . . [A] reply is *not to be utilized as a substitute for discovery* and inspection or for a pre-trial hearing.¹²¹

The Rules also preserved a heightened pleading standard in limited instances: Rule 9(b) requires that “the circumstances constituting fraud or mistake shall be stated with particularity.”¹²² Rule 9(b) complaints, therefore, must allege each element of fraud or mistake.¹²³ For illustration, the Supreme Court has held that the elements of fraud are: (1) a false representation (2) regarding a material fact (3) made with both knowledge of its falsity (4) and an intent to deceive (5) resulting in acts made in reasonable reliance on the representation.¹²⁴ The complaint need not contain specific facts on each element or present detailed evidentiary matter.¹²⁵ Rather, the “complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.”¹²⁶ Although requiring heightened pleading, Rule 9(b) is nonetheless considered an extension of the notice pleading regime; the goal of particularity is not to reduce the suit to a single factual or legal issue, but rather to give notice where “slightly more is needed.”¹²⁷

The objective of this minimal pleading requirement is to give

¹¹⁹ See FED. R. CIV. P. 7(a) (“There shall be . . . a reply to a counterclaim denominated as such . . .”).

¹²⁰ See *id.* (“No other pleading shall be allowed, except the court may order a reply to an answer or a third-party answer.”). The plaintiff should not file a reply without being ordered to do so by the court. 2A MOORE ET AL., *supra* note 113, ¶ 7.03. If the plaintiff files voluntarily anyway, the court will ignore the unauthorized reply except that the court may consider statements by the pleader as admissions against that party’s interests, if applicable. *Id.*

¹²¹ *Moviecolor Ltd. v. Eastman Kodak Co.*, 24 F.R.D. 325, 326 (S.D.N.Y. 1959) (emphasis added).

¹²² FED. R. CIV. P. 9(b).

¹²³ 2A MOORE ET AL., *supra* note 113, ¶ 9.03[2].

¹²⁴ *Pence v. United States*, 316 U.S. 332, 338 (1942).

¹²⁵ 2A MOORE ET AL., *supra* note 113, ¶ 9.03[1].

¹²⁶ *Cosmas v. Hassett*, 868 F.2d 8, 11 (2d Cir. 1989).

¹²⁷ *Davis & Cox v. Summa Corp.*, 31 Fed. R. Serv. 2d 281, 284 (9th Cir. 1981).

the receiving party “notice” of the pleader’s claims or defenses and the grounds upon which they rest.¹²⁸ Then, liberal discovery follows, permitting both sides access to the litigants, witnesses, and documentary and other evidence.¹²⁹ This access in turn helps refine the claims and defenses and clarify the factual setting from which they arise.¹³⁰ Finally, if, after sufficient discovery, there remains no genuine issue of material fact, the judge can forgo a costly and time-consuming trial by rendering summary judgment where it is appropriate.¹³¹

Many legal scholars consider notice pleading to have been a huge success.¹³² If nothing else, it has finally achieved the most thorough disengagement of procedure and substance and the most stable merger of law and equity.¹³³ Having been adopted wholesale by the federal court system and in large parts by most of the states, liberalized civil procedure based on the Rules has accumulated intellectual and judicial inertia; it is *the* American procedural system.¹³⁴ It is in this context that recent developments in qualified immunity doctrine have emerged. Before reviewing case law where notice pleading and qualified immunity came into direct conflict, tracing the sources and examining the contours of prior qualified immunity jurisprudence is required.

III. THE EVOLUTION OF QUALIFIED IMMUNITY IN § 1983 CASES

Section 1983, on its face, creates liability for any person who acts under state authority to deprive a citizen of rights guaranteed under federal law or the United States Constitution.¹³⁵ Nowhere does the

¹²⁸ *Conley*, 355 U.S. at 47.

¹²⁹ *See, e.g.*, FED. R. CIV. P. 26(b) (defining the broad scope of discovery by providing that “parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons”); FED. R. CIV. P. 37 (providing for sanctions the court may impose against parties failing to comply with discovery orders).

¹³⁰ *Conley*, 355 U.S. at 47.

¹³¹ *See* FED. R. CIV. P. 56(c). *But cf.* *Molot*, *supra* note 111, at 988 (arguing that summary judgment has proven to be an inadequate device to reduce the number of cases from going to trial).

¹³² *See, e.g.*, Subrin, *supra* note 30, at 4 (“The Federal Rules . . . have been a major triumph of law reform.”).

¹³³ *Id.* at 5 (“The Federal Rules have not just survived; they have influenced procedural thinking in every court in the land (and some in other lands) . . .”).

¹³⁴ *Id.* (“[The Rules] have indeed become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.”).

¹³⁵ *See* 42 U.S.C. § 1983.

statute mention an immunity defense for government officials.¹³⁶ Indeed, the Civil Rights Act of 1871,¹³⁷ section 1 of which was codified at § 1983, was originally enacted primarily to target state governmental officials and agencies specifically.¹³⁸ Despite this distrust of state governments that underlies § 1983, the Supreme Court has repeatedly held that immunity of some type is available for every government official's discretionary actions.¹³⁹

A. A Doctrinal Shift Toward Cost Avoidance and Early Disposition

The policies behind official immunity appear relatively straightforward. Because government officials often have to do the "dirty work" of public service, the Court recognized that it would be an "injustice, particularly in the absence of bad faith, [to subject] to liability an official who is required by the legal obligations of his position, to exercise discretion."¹⁴⁰ The Court was also reluctant to allow the threat of § 1983 actions to deter officials from exercising that discretion.¹⁴¹

Significantly, the justification for official immunity has shifted away from concerns about unfairness to officials and overdeterrence of official discretion to instead focus on the costs § 1983 actions impose on governments and government officials and, therefore, on society.¹⁴² These social costs include the actual monetary expenses of defending against such lawsuits, the potential distraction of officials

¹³⁶ See *id.*

¹³⁷ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1996)).

¹³⁸ See *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (stating that the passage of the Civil Rights Act of 1871 was in response to apprehension that "the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies"); see also ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 8.2, at 453-55 (3d ed. 1999) (providing a brief history of § 1983). Some commentators have insisted that the Court has either misinterpreted or ignored the legislative history of § 1983. See, e.g., David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497 (1992) (contending that the Court's recent qualified immunity decisions have created an unstable doctrine that does not reflect Congress' intent); Gene R. Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987) (discussing the Supreme Court's erratic account of the history of § 1983).

¹³⁹ E.g., *Schuer v. Rhodes*, 416 U.S. 202, 240 (1974).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 60-77 (1983) (arguing that personal liability for officials will lead to harmfully timid behavior).

¹⁴² See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a description of this doctrinal shift, see Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 15-20 (1997).

from their governmental duties, and the deterrence of individuals from even serving as public officials.¹⁴³ The Court has determined that these costs are likely to be substantial, especially in light of the presumption that the majority of § 1983 claims are meritless.¹⁴⁴ Mere limitations on liability, therefore, are insufficient to further this policy of cost prevention.¹⁴⁵ Consequently, the avoidance of social costs achieved by the early disposal of claims has become the main thrust of the policy for official immunity.¹⁴⁶

The Court's focus on cost avoidance, rather than on unfairness or overdeterrence from action, represents a crucial turning point in the development of qualified immunity.¹⁴⁷ Arguably, an immunity defense that shields officials from liability, rather than entirely from suit, can adequately placate the fairness and overdeterrence concerns.¹⁴⁸ Indeed, it is hardly unfair if the lawsuit does not result in liability where there rightly should be none.¹⁴⁹ Similarly, it is uncertain at best that officials would be overly deterred by the mere threat of suit if they knew that they would not ultimately face staggering damage awards.¹⁵⁰ But, if the imperative is to avoid litigation expenses and their collateral social impact completely, rather than merely to avert an adverse judgment, then qualified immunity becomes much more than freedom from liability or even freedom from trial; instead, as the Court has repeatedly held, qualified immunity requires total *immunity from suit*.¹⁵¹ This fixation on cost avoidance and early disposition has forced courts to navigate the complicated interrelationship between qualified immunity and notice pleading.¹⁵²

B. Immunity Analysis Reexamined in Light of the Doctrinal Shift

The Court has carved two official immunity defenses out of §

¹⁴³ *Harlow*, 457 U.S. at 818.

¹⁴⁴ *Id.* *But cf.* Chen, *supra* note 142, at 19 n.92 (disputing the Court's assumption that § 1983 claims are often meritless).

¹⁴⁵ *Harlow*, 457 U.S. at 818.

¹⁴⁶ *See id.*; Chen, *supra* note 142, at 15-20.

¹⁴⁷ *See* Chen, *supra* note 142, at 21.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 652-53 (1987) (Stevens, J., dissenting)).

¹⁵⁰ *Id.* at 25.

¹⁵¹ *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

¹⁵² *See infra* Part IV (recounting the Supreme Court's recent qualified immunity jurisprudence).

1983: absolute immunity and qualified immunity.¹⁵³ In determining which immunity applies to a given government official, the court looks to the “immunity historically accorded the relevant official at common law and the interests behind it.”¹⁵⁴ Absolute immunity is available to a relatively small number of positions held by government officials and only when those officials perform a few prescribed functions.¹⁵⁵ Judges, for example, are protected by absolute immunity for conduct within the scope of their judicial authority.¹⁵⁶ In contrast, judges are not absolutely immune for actions pursuant to their administrative or executive authority; they are, however, still accorded qualified immunity for those actions.¹⁵⁷

Qualified immunity is generally available to those officials whose discretionary official actions are not absolutely immune.¹⁵⁸ Initially,

¹⁵³ *Harlow*, 457 U.S. at 807. Absolute immunity, by definition, provides a complete exemption from suit for certain types of specified conduct. See *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). In contrast, qualified immunity only precludes litigation if a certain set of conditions is present; in the § 1983 context, an official is entitled to qualified immunity for her discretionary actions unless she violates a citizen’s federal or constitutional rights which were clearly established at the time of the violation. See *infra* note 167 and accompanying text; see also Susan Zinn & Javier Maldonado, *Civil Rights*, 31 TEX. TECH L. REV. 481, 488-89 (2000) (summarizing immunity defenses available to government defendants).

¹⁵⁴ *Imbler*, 424 U.S. at 421. The Court has consistently reaffirmed the common law approach to deciding questions of immunity. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 594-95 (1998); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). For a summary of the common law approach and some frequent criticisms of it, see CHEMERINSKY, *supra* note 138, § 8.6.1, at 494-97.

¹⁵⁵ See *Forrester v. White*, 484 U.S. 219, 229 (1988) (advising courts to assess the “nature of the function performed, not the identity of the actor who performed it”); CHEMERINSKY, *supra* note 138, § 8.6.2, at 500 (“In applying absolute immunity . . . the focus is on the *function* performed, rather than the title possessed.”).

¹⁵⁶ See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). In addition, members of Congress and their aides are absolutely immune for their legislative functions. See, e.g., *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975) (holding that legislative immunity is derived from the Speech and Debate Clause of Article I of the Constitution). State and local legislators, when acting in their legislative capacity, receive an analogous absolute immunity protection derived from common law. *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719 (1980). A prosecutor’s conduct during an actual prosecution (rather than, say, an investigation) is shielded by absolute immunity. See, e.g., *Mitchell*, 472 U.S. 511; *Imbler*, 424 U.S. 409. Police officials are absolutely immune for testimony they give as witnesses. *Briscoe v. LaHue*, 460 U.S. 325 (1983). Finally, the president of the United States is absolutely immune from monetary liability for conduct performed “while he is in the discharge of the duties of his office.” *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). For a further discussion of the nuances of absolute immunity, see CHEMERINSKY, *supra* note 138, § 8.6.2, at 500-12.

¹⁵⁷ See *Forrester*, 484 U.S. at 228, 230.

¹⁵⁸ See *Harlow*, 457 U.S. at 806-07; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 273

in *Schuer v. Rhodes*,¹⁵⁹ the Supreme Court held that a plaintiff could overcome qualified immunity by showing that either: (1) the official had no reasonable grounds to believe her conduct comported with the law (the objective prong); or (2) that the official subjectively did not have a good faith belief that her conduct was lawful (the subjective prong).¹⁶⁰ The subjective prong could be fulfilled if the official was motivated by bad faith to deprive the victim of constitutional or statutory rights.¹⁶¹ Satisfying either prong, however, merely allowed the plaintiff to defeat qualified immunity; proof at trial (or sufficient for the plaintiff to prevail at summary judgment) of an actual constitutional or statutory violation that caused the plaintiff's alleged damages was still required for recovery.¹⁶²

Due to the policy shift to cost avoidance, *Schuer's* alternative objective/subjective test was replaced in *Harlow v. Fitzgerald*¹⁶³ to more easily achieve early disposition of suits.¹⁶⁴ In *Harlow*, A. Ernest Fitzgerald, an Air Force analyst, lost his job in a department reorganization.¹⁶⁵ Fitzgerald sued two presidential aides, among others, claiming that his dismissal was in retaliation for his testimony before the Senate a year earlier, where he revealed \$2 billion in defense department cost overruns, and that the dismissal violated his constitutional and statutory rights.¹⁶⁶ Determining that absolute immunity did not protect the aides, the Supreme Court held that officials performing discretionary functions are generally qualifiedly immune "insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known.*"¹⁶⁷

(1993) (stating that qualified immunity "represents the norm" for executive officials (internal quotation omitted)); Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U. L.Q. 221, 221 (1984) (stating that qualified immunity is available to the majority of executive officials).

¹⁵⁹ 416 U.S. 232 (1974).

¹⁶⁰ See *id.* at 247-48.

¹⁶¹ *Wood v. Stickland*, 420 U.S. 308, 321-22 (1975); CHEMERINSKY, *supra* note 138, § 8.6.3, at 514.

¹⁶² See *Wood*, 420 U.S. at 321-22.

¹⁶³ 457 U.S. 800 (1982).

¹⁶⁴ *Id.* at 815-16.

¹⁶⁵ *Nixon*, 457 U.S. at 734-35, 739. Because *Nixon* is the companion case to *Harlow*, the underlying facts were the same in both cases and the Court recited them in detail in *Nixon* only. *Harlow*, 457 U.S. at 802. Unlike the defendants in *Harlow*, however, the President received absolute immunity for his actions in office. Compare *Harlow*, 457 U.S. at 802-03, with *Nixon*, 457 U.S. at 747. See also *supra* note 156 (including presidential immunity among the available absolute immunity defenses).

¹⁶⁶ *Nixon*, 457 U.S. at 734.

¹⁶⁷ *Harlow*, 457 U.S. at 818 (emphasis added).

In one fell swoop, *Harlow* eliminated the subjective “good faith” prong available under the *Schuer* test.¹⁶⁸ Because the inquiry into the subjective motive of an official almost invariably involved a fact dispute that Rule 56 summary judgment¹⁶⁹ ordinarily could not resolve, the Court acknowledged that many courts were therefore unable to dispose of such claims early on using summary judgment.¹⁷⁰ The Court concluded that the subjective test was “incompatible with our admonition . . . that insubstantial claims should not proceed to trial.”¹⁷¹ The Court refused to allow a litigant to impose the social costs of § 1983 litigation, including the “burdens of broad-reaching discovery,”¹⁷² by bringing forth “bare allegations of malice.”¹⁷³ The doctrinal shift toward cost avoidance had clearly tipped the balance away from the protection of individual citizens’ rights.¹⁷⁴ Essentially, the removal of the subjective prong means that an official can conduct herself with bad faith or malice, even egregiously so, as long as she does not violate a clearly established constitutional or federal right.¹⁷⁵

Since *Harlow*, the Court has steadily rendered pro-defendant decisions that have further strengthened the qualified immunity defense for government officials.¹⁷⁶ For example, a plaintiff may not

¹⁶⁸ *Id.* at 817-18.

¹⁶⁹ FED. R. CIV. P. 56(c). Rule 56 authorizes the court to render summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*

¹⁷⁰ *Harlow*, 457 U.S. at 816.

¹⁷¹ *Id.* at 815-16 (internal citation omitted).

¹⁷² *Id.* at 818.

¹⁷³ *Id.* at 817.

¹⁷⁴ *See id.* at 816.

¹⁷⁵ PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 871 (2d ed. 1983) (arguing that by removing the subjective prong, the effect of *Harlow* “may be to allow an unscrupulous official to engage in malicious misuse of public authority whenever the relevant legal standards are objectively unclear”).

¹⁷⁶ CHEMERINSKY, *supra* note 138, § 8.6.3, at 521. The Court’s pro-defendant jurisprudence has come under heavy criticism. *See, e.g., id.* (“Although a strong case can be made for protecting officers, it is troubling to do so unless liability of governmental entities is correspondingly expanded.”); Chen, *supra* note 142, at 99 (characterizing the litigation battles between plaintiffs and defendants over qualified immunity as “an elaborate sideshow . . . that in many cases will do little to advance or accelerate resolution of the legal claims”); Achtenberg, *supra* note 138, at 549 (positing that the current qualified immunity doctrine is too broad and reflects “the will of the current Court” rather than “the will of the enacting Congress”). Whatever merit these and other criticisms of the Court’s conception of qualified immunity may have, this Comment’s main focus is not to justify or discredit the Court’s policy

rely on state law to ascertain whether a federal or constitutional right was clearly established at the time of the official's conduct, even though the state right may be analogous to, or even derived from, a federal statute or the Constitution.¹⁷⁷ In addition, when examining the reasonableness of an official's conduct, the Court has fallen short of demanding exact factual identity but nonetheless has required that the conduct be considered at a rather low level of generality.¹⁷⁸ Indeed, the Court has focused quite narrowly on the *specific* conduct of the official when asking whether a "reasonable official would understand that *what he is doing* violates that right."¹⁷⁹ Finally, the Court has held that determinations of qualified immunity are usually questions of law that are immediately appealable in order to better protect defendants' immunity from suit.¹⁸⁰ All of these decisions have reinforced the goal of limiting or eliminating the social costs of allowing the discovery and trial stages of litigation to proceed against government officials facing meritless § 1983 claims.¹⁸¹

IV. QUALIFIED IMMUNITY CONVERGES ON NOTICE PLEADING—THE IRRESISTIBLE FORCE MEETS THE IMMOVABLE OBJECT

Given the potential for tension between a notice pleading system, whose default position allows for relatively easy access to courts and liberal discovery, and an immunity doctrine that encourages the speedy resolution of claims, it is not surprising that many lower courts have relied on judicial innovations such as independently created heightened pleading standards.¹⁸² By

determinations; rather, this Comment seeks to reconcile, to the extent possible, the conflicting policies behind qualified immunity and notice pleading. *See infra* Parts IV and V. Thus, this Comment's final conclusion that the three-step scheme should be implemented is not intended to be a value-driven recommendation; instead, it is merely a reasoned compromise solution to a vexing divergence of policies. *See infra* Parts V.A, B, and C.

¹⁷⁷ *Davis v. Scherer*, 468 U.S. 183, 194-96 (1984). *But see id.* at 193 n.11 (stating that "[s]tate law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law").

¹⁷⁸ *See Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

¹⁷⁹ *Id.* at 640 (emphasis added).

¹⁸⁰ *Mitchell*, 472 U.S. at 526-30. For a more detailed account of when and why denials of qualified immunity are immediately appealable, see Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3 (1998).

¹⁸¹ *See* CHEMERINSKY, *supra* note 138, § 8.6.3, at 521.

¹⁸² *See infra* Parts IV.A, B, and C; *see also Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (holding that lower courts cannot impose a heightened evidentiary standard on § 1983 claims); Chen, *supra* note 142, at 74 ("Once the Supreme Court

requiring that the complaint be particularized, some courts have admittedly weeded out claims.¹⁸³ The Supreme Court, however, has consistently demonstrated that it is even more reluctant to act contrary to the Rules than it is zealous in protecting qualified immunity.¹⁸⁴

A. Establishing the Defendant's Pleading Burden and Setting the Stage for the Fight to Come

In *Gomez v. Toledo*,¹⁸⁵ the Court established that qualified immunity is an affirmative defense that the defendant must raise in the answer.¹⁸⁶ In *Gomez*, police agent Carlos Gomez brought a § 1983 action against the police superintendent, claiming a violation of his procedural due process rights.¹⁸⁷ Gomez alleged that he had been discharged for testifying in a criminal proceeding about misconduct committed by other officers.¹⁸⁸ The district court dismissed the claim, concluding that because the superintendent was entitled to qualified immunity for discretionary official actions carried out in good faith,¹⁸⁹ the plaintiff failed to state a claim by not alleging bad faith.¹⁹⁰ The Court of Appeals for the First Circuit affirmed the dismissal.¹⁹¹

The Supreme Court reversed, holding that the plaintiff in a § 1983 case must allege merely that some person deprived her of a federal right and that the person was acting under the color of state law.¹⁹² Furthermore, the Court found that the plaintiff is under no obligation to anticipate the defense of qualified immunity by pleading that the official was motivated by bad faith.¹⁹³ Rather, the Court pointed out, the Rules place the burden squarely on the

acknowledged . . . that discovery would be necessary to adjudicate some qualified immunity claims, it laid the groundwork for substantial confusion among the lower courts.”).

¹⁸³ See, e.g., *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).

¹⁸⁴ For an exploration of *Leatherman* and *Swierkiewicz*, see *infra* Parts IV.C and D.

¹⁸⁵ 446 U.S. 635 (1980).

¹⁸⁶ *Id.* at 640-41.

¹⁸⁷ *Id.* at 636.

¹⁸⁸ *Id.* at 637.

¹⁸⁹ At the time of *Gomez*, the inquiry into qualified immunity was governed by the subjective/objective *Schuer* test. *Gomez*, 446 U.S. at 641. The subjective “good faith” portion was eliminated in *Harlow*, two years after *Gomez* was decided. See *Harlow*, 457 U.S. at 818; *supra* text accompanying notes 167-70.

¹⁹⁰ *Gomez*, 446 U.S. at 637-38.

¹⁹¹ *Id.* at 638.

¹⁹² *Id.* at 640.

¹⁹³ *Id.*

defendant to plead any “matter constituting an avoidance or affirmative defense.”¹⁹⁴

Although *Gomez* did not address the imposition of a particularity requirement, the Court recognized the fundamental incongruity of requiring the plaintiff to respond in advance to a legal argument that had not yet been presented.¹⁹⁵ In a notice pleading regime, a plaintiff can hardly be expected to anticipate a response to a claim of which the defendant has not been given *notice*.¹⁹⁶ Later holdings that dealt specifically with a judicially imposed heightened pleading standard in the complaint would echo this untenable premise.¹⁹⁷

B. Clarifying the Plaintiff's Pleading Burden

In *Siegert v. Gilley*,¹⁹⁸ the Supreme Court passed on an opportunity to determine the propriety of a heightened pleading standard in qualified immunity cases.¹⁹⁹ Instead, the Court sidestepped the heightened pleading issue, concluding that the complaint in *Siegert* failed to satisfy even the minimal pleading burden established in *Gomez*.²⁰⁰ In *Siegert*, plaintiff Frederick Siegert, a clinical psychiatrist employed by the federal government, initiated a *Bivens* action²⁰¹ against his former supervisor for writing an allegedly defamatory recommendation letter.²⁰² Specifically, the plaintiff alleged that his supervisor's letter was motivated by bad faith in contravention of his Fifth Amendment “liberty interests.”²⁰³

The defendant moved to dismiss and alternatively for summary judgment, maintaining that Siegert's factual allegations did not amount to the violation of any constitutional right.²⁰⁴ The defendant further contended that, in any event, he was protected by qualified immunity.²⁰⁵ The district court denied the motions and instead

¹⁹⁴ *Id.* (quoting FED. R. CIV. P. 8(c)).

¹⁹⁵ *See id.*

¹⁹⁶ *See Gomez*, 446 U.S. at 640-41.

¹⁹⁷ *See infra* Parts IV.C and D (discussing *Leatherman* and *Swierkiewicz*).

¹⁹⁸ 500 U.S. 226.

¹⁹⁹ *Id.* at 231.

²⁰⁰ *Id.*; *see also supra* text accompanying notes 192-94 (describing the minimal allegations required under *Gomez*).

²⁰¹ For the purposes of this Comment, *Bivens* actions raise the identical pleading and qualified immunity issues as § 1983 actions. *See supra* note 2 (discussing *Bivens* actions).

²⁰² *Siegert*, 500 U.S. at 228-29.

²⁰³ *Id.* at 229.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

ordered limited discovery.²⁰⁶ When the defendant requested a stay of discovery pending determination of his assertion of qualified immunity, the court responded that Siegert's allegations constituted a violation of a clearly established constitutional right.²⁰⁷ Therefore, the court found qualified immunity inapplicable.²⁰⁸ The defendant immediately appealed the denial of qualified immunity.²⁰⁹

The Court of Appeals for the D.C. Circuit reversed and remanded, ordering the lower court to dismiss.²¹⁰ First, the court determined that, absent malice by the supervisor, the alleged conduct did not infringe on a constitutional right.²¹¹ Furthermore, to the extent that improper motive was an element of the defamation claim, the court held that the plaintiff failed to plead with sufficient particularity to overcome the qualified immunity defense.²¹²

Chief Justice Rehnquist, writing for a majority of the Supreme Court, ultimately affirmed the court of appeals' dismissal, but not because Siegert had failed to support his allegation of malice by pleading specific facts.²¹³ Rather, the Court pointed out that Siegert's allegations failed at an even earlier juncture because they did not state a claim of a constitutional violation.²¹⁴ The Court determined that while his allegations may have satisfied state law defamation claims, freedom from injury to reputation was not, by itself, a constitutional right.²¹⁵ The Court instructed that before even considering whether the alleged right was "clearly established," and thereby implicating the qualified immunity defense, the lower court should have first determined whether the government official violated a constitutional right at all.²¹⁶

The Chief Justice explained that such a "purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend

²⁰⁶ *Id.* at 229-30.

²⁰⁷ *Id.* at 230.

²⁰⁸ *Siegert*, 500 U.S. at 230.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 230-31.

²¹³ *Id.* at 232.

²¹⁴ *Siegert*, 500 U.S. at 231.

²¹⁵ *Id.* at 232; *see also* Paul v. Davis, 424 U.S. 693, 701-02 (1976) (asserting that there is "no constitutional doctrine converting every defamation by a public official into a deprivation of [a constitutional right]" and concluding that reputation by itself is not protected by the Due Process Clause of the Fifth or Fourteenth Amendments).

²¹⁶ *Siegert*, 500 U.S. at 232.

the suit on its merits.”²¹⁷ The Court indicated that the court of appeals incorrectly assumed that Siegert had indeed alleged a constitutional violation and, therefore, improperly reached the merits of the qualified immunity defense.²¹⁸ Although the D.C. Circuit was ultimately correct in dismissing the suit, the Court concluded that the manner in which the circuit reached that result deviated from the policy of cost avoidance.²¹⁹ According to the Court, by haphazardly presupposing a constitutional violation, the circuit failed to make the thorough threshold determination that would have halted the suit and avoided the costs that followed.²²⁰ In confining its holding to the initial determination of the existence of a constitutional right, the Court avoided addressing the court of appeals’ imposition of a heightened pleading standard.²²¹

Justice Kennedy, however, in a concurrence, found merit in the use of a heightened pleading standard to dispose of § 1983 cases where, as in defamation, the subjective intent of the defendant is an element of the claim.²²² Justice Kennedy recognized “the tension between [*Harlow’s* objective test] and the requirement of malice,” and opined that “the heightened pleading standard is the most workable means to resolve it.”²²³ Although the concurrence conceded that requiring a particularized complaint in § 1983 cases is not prescribed by the Rules, Justice Kennedy argued that protecting the substantive defense of qualified immunity demanded a departure from the normal pleading and summary judgment rules.²²⁴

Interestingly, Justice Kennedy’s recommended practice bears a striking resemblance to the practice devised in *Schulte*.²²⁵ After the plaintiff asserts that a constitutional or statutory right has been violated and the defendant responds by pleading qualified immunity, the Justice explained, “the plaintiff must put forward specific,

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*; see also *supra* Parts III.A and B (discussing the doctrinal shift to cost avoidance as the leading policy justification for qualified immunity).

²²⁰ *Siegert*, 500 U.S. at 232.

²²¹ See *id.* at 235 (Kennedy, J., concurring).

²²² *Id.* at 235-36 (Kennedy, J., concurring).

²²³ *Id.*

²²⁴ *Id.* at 236 (Kennedy, J., concurring) (“[A]voidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.”).

²²⁵ Compare *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring), with *Schulte*, 47 F.3d at 1433 (citing Justice Kennedy’s concurrence as support for the three-step pleading scheme).

nonconclusory factual allegations which establish malice, or face dismissal.”²²⁶ Justice Kennedy, however, conceded that his recommendation represents “a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b).”²²⁷ Nevertheless, as Justice Kennedy’s statements underscored, the very fact that judges have felt pressured into creating heightened pleading standards and other burdens in order to dispose of meritless § 1983 cases exposes the strain between qualified immunity and notice pleading.²²⁸ Eventually, a mechanism must be devised to replace, or at least compliment, the inadequate barriers to litigation provided by the *Gomez/Siegert* burden of pleading the violation of a clearly established constitutional statutory right.

C. The Supreme Court Unanimously Rejects a Heightened Pleading Standard . . . but Leaves a Loophole

A judicially imposed heightened pleading standard in a § 1983 action finally caught the direct attention of the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.²²⁹ In *Leatherman*, several homeowners alleged that local police officers conducted illegal searches during which they assaulted one homeowner and destroyed another’s property.²³⁰ The homeowners brought § 1983 actions against several officers and the county, claiming that the alleged misconduct violated their Fourth Amendment rights.²³¹ Additionally, the plaintiffs contended that the municipality should be liable for allegedly failing to properly train the officers.²³²

²²⁶ *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring).

²²⁷ *Id.*; cf. *infra* Part V.B (demonstrating that the *Schulte* scheme oversteps the judicial authority conferred by the Rules).

²²⁸ See *infra* Parts IV.C and D.

²²⁹ 507 U.S. 163 (1993).

²³⁰ *Id.* at 165.

²³¹ *Id.*

²³² *Id.* (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)). Oddly, whereas individual official liability has progressively been foreclosed upon by immunity doctrines, municipal liability has been treated much differently. Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 631 (1989). Initially, the Court held that a municipality was not a “person” under § 1983 and, therefore, could not be held liable for the actions of its officials. *Monroe v. Pape*, 365 U.S. 167, 191-92 (1961). Seventeen years later, in *Monell*, the Court overturned *Monroe* and reinstated municipal liability where an official’s injurious conduct was undertaken pursuant to the local government’s “official policies or established customs.” *Monell*, 436 U.S. at 707-08. Furthermore, the Court later held that although municipalities are not subject to respondeat superior liability, neither are they entitled to qualified immunity. *Id.* at 691; *Owen v. City of*

The district court dismissed the claims, and the Court of Appeals for the Fifth Circuit affirmed, because the plaintiffs failed to meet the heightened pleading standard required by Fifth Circuit precedent.²³³ The plaintiffs appealed and the Supreme Court granted certiorari.²³⁴ Finally, a judicially imposed particularity requirement was directly before the Court.²³⁵

After reaffirming the premise that municipalities, unlike officials, are not entitled to an immunity defense,²³⁶ the Court considered the municipality's argument that, out of necessity, the level of specificity required under the Rules should be greater where the underlying substantive law has grown more intricate.²³⁷ According to the defendant, plaintiffs "must do more than plead a single instance of misconduct" to establish municipal liability under § 1983.²³⁸ Consequently, the municipality contended, the Fifth Circuit's "heightened pleading standard" was mislabeled and was not actually a deviation of the Rules at all.²³⁹

Independence, 445 U.S. 622, 650 (1980). As a result, municipalities, unlike government officials, receive some immunity from *liability* rather than immunity from *suit*. *Leatherman*, 507 U.S. at 166. The Court's handling of municipal liability has been subject to criticism from both sides of the governmental liability debate. CHEMERINSKY, *supra* note 138, §§ 8.5.1, 8.5.3, at 477-78, 491. On one hand, restricting governmental liability reduces incentives for local government to ensure that their officials act lawfully. *Id.* On the other hand, if the goal of immunity is to avoid the costs of § 1983 litigation, it does not then make logical sense to allow proceedings against municipalities to reach discovery and trial. *Id.* For an exploration of the peculiar consequences caused by the disparity between municipal and individual liability and an argument for reform that would more closely align the two, see generally Brown, *supra*.

²³³ *Leatherman*, 507 U.S. at 165. For a further exploration of the development of the Fifth Circuit's heightened pleading standard, see *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir. 1989); *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985); *Morrison v. City of Baton Rouge*, 761 F.2d 242 (5th Cir. 1985). In *Morrison*, the Fifth Circuit summed up its heightened pleading standard:

[L]iberal notions of notice pleading must ultimately give way to immunity doctrines that protect us from having the work of our public officers chilled or disrupted. . . . [T]he complaint must allege "with particularity all material facts on which [the claimant] contends he will establish his right to recovery, which will include detailed facts supporting the contention that the pleas of immunity cannot be sustained."

761 F.2d at 244 (quoting *Elliott*, 751 F.2d at 1482 (alteration in original)).

²³⁴ *Leatherman*, 507 U.S. at 165.

²³⁵ *Id.*

²³⁶ *Id.* at 166; see also *supra* note 232 (describing municipal liability under § 1983).

²³⁷ *Leatherman*, 507 U.S. at 167.

²³⁸ *Id.*; see also *supra* note 232 (describing municipal liability under § 1983).

²³⁹ *Leatherman*, 507 U.S. at 167.

The Court summarily rejected the municipality's argument and unanimously reversed the decision.²⁴⁰ Chief Justice Rehnquist, writing for the Court, recognized that "the [Fifth Circuit's] heightened pleading standard is just what it purports to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief."²⁴¹ The Court found the standard "impossible to square" with the prevailing notice pleading regime.²⁴² Although the Chief Justice acknowledged two instances, in cases of fraud or mistake, where the Rules require a particularized complaint,²⁴³ he also pointed out that the Rules did not contain any provisions for a similar particularity requirement for § 1983 complaints against municipalities.²⁴⁴ According to the Court, explicit authority provided in one instance necessarily implied that it was excluded in others, or "[e]xpressio unius est exclusio alterius."²⁴⁵ Moreover, the Court suggested that were the Rules to be rewritten, perhaps the drafters would include § 1983 claims against municipalities among those required to be plead with particularity, but "that is a result which must be obtained by the process of amending the Federal Rules, and *not by judicial interpretation*."²⁴⁶ In the meantime, the Chief Justice concluded, lower federal courts would have to rely on summary judgment and limited discovery to dispose of frivolous claims.²⁴⁷

Unfortunately, the Court expressly declined to address whether a heightened pleading standard is appropriate where individual government officials may be protected by qualified immunity.²⁴⁸ The Court even went as far as to follow the trajectory of the Fifth Circuit's pleading standard, tracing its origins from § 1983 cases against individuals²⁴⁹ to its extension over claims against municipalities.²⁵⁰ Nevertheless, the Court purposefully fell short of applying to all cases its prohibition against judicially imposed heightened pleading

²⁴⁰ *Id.* at 164.

²⁴¹ *Id.* at 167 (internal quotations omitted).

²⁴² *Id.* (citing FED. R. CIV. P. 8(a)(2)).

²⁴³ *Id.* (citing FED. R. CIV. P. 9(b)).

²⁴⁴ *Id.* at 168.

²⁴⁵ *Leatherman*, 507 U.S. at 168.

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ *Id.* at 168-69.

²⁴⁸ *Id.* at 166-67.

²⁴⁹ *Id.* at 167 (citing *Elliott*, 751 F.2d at 1473); *see also supra* note 233 (listing Fifth Circuit cases developing the heightened pleading standard ultimately struck down in *Leatherman*).

²⁵⁰ *Leatherman*, 507 U.S. at 167 (citing *Palmer*, 810 F.2d 517).

standards.²⁵¹ Some courts have read the *Leatherman* opinion as a fairly broad rejection of particularized pleadings,²⁵² especially focusing on where Chief Justice Rehnquist contrasted the authority under Rule 8(a)(2) to that under Rule 9(b).²⁵³ Many courts, however, have taken advantage of the *Leatherman* loophole to prolong their own practices of requiring a particularized complaint in § 1983 cases against government individuals.²⁵⁴ And so the intractable conflict has remained: courts, judges, attorneys, and litigants continued to find themselves caught between the immovable object of the notice pleading regime and the irresistible force that is the doctrine of qualified immunity.

D. The Final Bell Tolls for Judicially Imposed Heightened Pleading Standards

Judge-made heightened pleading standards met their ultimate demise in *Swierkiewicz v. Sorema N.A.*²⁵⁵ Although not a § 1983 case, *Swierkiewicz* made unmistakably clear that the Supreme Court would no longer countenance extra-authoritative tinkering with the Rules' pleading requirements.²⁵⁶

In *Swierkiewicz*, the plaintiff, a Hungarian native, filed suit against his former employer, a private reinsurance company, for allegedly terminating him because of his nationality in violation of Title VII of the Civil Rights Act of 1964,²⁵⁷ and because of his age in violation of the Age Discrimination in Employment Act of 1967.²⁵⁸ The district court dismissed the complaint because the plaintiff failed to allege facts with sufficient particularity that could lead to an inference of discrimination.²⁵⁹ The Court of Appeals for the Second Circuit affirmed, holding that the plaintiff's complaint failed to allege sufficient facts to make out a prima facie case of employment discrimination per the circuit's established requirement.²⁶⁰ On

²⁵¹ See *id.* at 166-67.

²⁵² See *supra* note 12 (listing courts).

²⁵³ See *Leatherman*, 507 U.S. at 168.

²⁵⁴ See *supra* notes 12, 16 (listing courts construing *Leatherman* narrowly to reach only § 1983 municipality cases).

²⁵⁵ 534 U.S. 506 (2002).

²⁵⁶ See *id.* at 513-14.

²⁵⁷ *Id.* at 509 (citing 42 U.S.C. § 2000e et seq. (1994)).

²⁵⁸ *Id.* (citing 29 U.S.C. § 621 et seq. (1994)).

²⁵⁹ *Id.*

²⁶⁰ *Id.* The Second Circuit had required that, to avoid dismissal, an employment discrimination complaint must allege: "(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination." *Swierkiewicz*, 534 U.S. at

appeal, the Supreme Court considered the propriety of heightened pleading standards in the employment discrimination context and, ultimately, in a broader spectrum of actions.²⁶¹

A unanimous Supreme Court soundly rejected the Second Circuit's imposition of a specificity requirement.²⁶² First, Justice Thomas, writing for the Court, explained that prior precedent establishing criteria for a prima facie employment discrimination claim was "an evidentiary standard, not a pleading requirement."²⁶³ Next, the Court declared that it was never appropriate for a federal court to go beyond the boundaries of the Rules when crafting pleading requirements.²⁶⁴ The Court reasserted that federal courts are subject to the notice pleading regime; admittedly, the Court noted, the Rules have a few special exceptions where particularity in the complaint is required, namely Rule 9(b) actions for fraud or mistake, but those exceptions are explicitly authorized.²⁶⁵ Justice Thomas emphasized that, like § 1983 actions against municipalities at issue in *Leatherman*, employment discrimination claims were not included in Rule 9(b).²⁶⁶ Also, as in *Leatherman*, the Court refused to extend the Rule 9(b) exceptions to any other context absent an amendment to the Rules.²⁶⁷

The *Swierkiewicz* case, and the cases that preceded it,²⁶⁸ demonstrate the uneasy tension that permeates the adjudication of the qualified immunity defense.²⁶⁹ By categorically forbidding lower federal courts to use a heightened pleading standard absent authorization from the Rules, the Court has made the extent of lower court authority very clear: if another method of disposing of § 1983 cases emerges, it must come from a source other than willful judges.²⁷⁰ Until the time when that method is made available, courts must utilize the procedures currently available, most notably

510 (citations omitted). The plaintiff was required to plead specific facts in support of each element. *Id.*

²⁶¹ *Id.* at 509-10.

²⁶² *Id.* at 510.

²⁶³ *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

²⁶⁴ *See id.* at 513.

²⁶⁵ *Swierkiewicz*, 534 U.S. at 512-13 (citing FED. R. CIV. P. 9(b)).

²⁶⁶ *Id.* at 513.

²⁶⁷ *Id.* at 513, 515.

²⁶⁸ *See supra* Parts IV.A, B, and C (detailing *Gomez*, *Siegert*, and *Leatherman*).

²⁶⁹ *See Swierkiewicz*, 534 U.S. at 514-15 (acknowledging that there may be practical arguments supporting a heightened pleading standard in some contexts but concluding that such a standard is impermissible under the current Rules).

²⁷⁰ *Id.*

summary judgment and restricted discovery.²⁷¹ Considering that courts juxtaposed between notice pleading and qualified immunity have been rather resourceful in devising a multitude of now discredited practices for easing the tension, it appears likely that something will have to give. The three-step pleading scheme could be an ideally pragmatic solution.

V. THE THREE-STEP PLEADING SCHEME—ANOTHER STEP IN THE AGE-OLD DANCE

The three-step pleading scheme can trace its beginnings to the city of Tomball, Texas in early 1992.²⁷² Joseph M. Schultea, then the police chief in Tomball, began looking into reports that councilman David Wood was engaged in criminal activity.²⁷³ Upon recommendations by Tomball's city manager and municipal counsel, Schultea reported the findings of his investigation to a state oversight agency.²⁷⁴ When Wood and some fellow council members discovered Schultea's actions, they proposed that the city council take adverse action against Schultea.²⁷⁵ After a closed council meeting, Schultea was demoted to assistant police chief.²⁷⁶

After several requests for an appeal were denied, Schultea filed a § 1983 suit.²⁷⁷ In his complaint, Schultea alleged that his demotion impaired his "property and liberty interests" in violation of his due process rights.²⁷⁸ Also, the plaintiff alleged that the council members infringed his First Amendment rights by retaliating against him for contacting the state agency.²⁷⁹ After the district court refused to dismiss the claims on qualified immunity grounds, the council members filed an interlocutory appeal.²⁸⁰

Although a panel of the Fifth Circuit affirmed the decision allowing the First Amendment claim to proceed, the panel diverged from the district court's handling of the alleged due process violation.²⁸¹ The panel held that, *inter alia*, Schultea's claims were insufficient to show an infringement of his liberty interest in his

²⁷¹ *Id.*

²⁷² *Schultea v. Wood*, 47 F.3d 1427, 1428 (5th Cir. 1995) (en banc).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1428-29.

²⁷⁶ *Id.* at 1429.

²⁷⁷ *Id.*

²⁷⁸ *Schultea*, 47 F.3d at 1429.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

employment.²⁸² Specifically, the court concluded that Schulte's claim that his constitutionally protected employment rights had been frustrated was inadequate because he failed to allege that he was a contract employee.²⁸³ In addition, the complaint did not state a claim for wrongful demotion without further allegations that the demotion resulted in decreased pay or the loss of fringe benefits.²⁸⁴ The panel remanded with allowances for Schulte to amend his complaint to state his "best case."²⁸⁵ In so holding, the panel concluded that because the Supreme Court had confined *Leatherman* to cases against municipalities, it did not displace the Fifth Circuit's requirement that "complaints [in § 1983 actions against individual officials] be pled with 'factual detail and particularity.'"²⁸⁶

Circuit Judge Higginbotham, writing for a divided Fifth Circuit sitting en banc, disagreed with the panel's decision.²⁸⁷ The Fifth Circuit ultimately reversed the district court on the due process claims but remanded with instructions to apply the newly created three-step pleading scheme.²⁸⁸ Although this Comment maintains that the Fifth Circuit's logic was flawed,²⁸⁹ it is probative to explore the path the court took to reach its conclusions. The court began by briefly recounting the recent history of qualified immunity doctrine.²⁹⁰ The court recognized that the particularity requirement it had imposed in *Elliott v. Perez*,²⁹¹ where it was applied to a § 1983 claim against a municipality, had been struck down in *Leatherman*.²⁹² Although Judge Higginbotham acknowledged that *Leatherman* did not reach § 1983 claims against individuals, he nonetheless announced that the Fifth Circuit would no longer rely on *Elliott* or the *Leatherman* loophole.²⁹³ Instead, the court of appeals decided it would employ the Rule 7 reply²⁹⁴ to take the next step in the "age-old

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Schulte*, 47 F.3d at 1429.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1430 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

²⁸⁷ *Id.* at 1434.

²⁸⁸ *Id.*

²⁸⁹ See *infra* Part V.B (discussing deficiencies in the Fifth Circuit's attempted validation of the three-step scheme).

²⁹⁰ *Schulte*, 47 F.3d at 1431-32.

²⁹¹ 751 F.2d 1472 (5th Cir. 1985).

²⁹² *Schulte*, 47 F.3d at 1430, 1432; see also *Leatherman*, 507 U.S. at 167; *supra* text accompanying notes 240-47.

²⁹³ *Schulte*, 47 F.3d at 1432; see also *supra* text accompanying notes 248-54 (describing the *Leatherman* loophole).

²⁹⁴ FED. R. CIV. P. 7(a) (providing that "the court may order a reply to an

dance of procedure and substance, here with the music of qualified immunity.”²⁹⁵

In the majority’s opinion, the reply could serve as the release valve for the conflict between notice pleading and qualified immunity.²⁹⁶ Although the Rules ushered in the notice pleading regime, the common law and code pleading reply was not eliminated;²⁹⁷ instead, as Judge Higginbotham pointed out, it was “preserved but put on the shelf, seldom to be used.”²⁹⁸ Nevertheless, the court determined that because qualified immunity doctrine had changed over time, so had “our perception of its practical demands upon the Civil Rules moved in tandem.”²⁹⁹ The court explained that in the three-step pleading scheme, the reply reemerges, now subject to a heightened pleading standard, to play a pivotal role as the third step.³⁰⁰

The three-step scheme begins when the plaintiff files a short and plain statement asserting a § 1983 claim that “rests on more than conclusions alone.”³⁰¹ At first blush, the latter part of the description of the first step might appear to call for *entirely* nonconclusory allegations in the complaint.³⁰² To the contrary, despite dictum suggesting otherwise,³⁰³ Judge Higginbotham’s point is that even the

answer”).

²⁹⁵ *Schultea*, 47 F.3d at 1430, 1432.

²⁹⁶ *See id.* at 1432 (stating that “[q]ualified immunity’s limits upon access to the discovery process creates a new and large role for the Rule 7(a) reply”).

²⁹⁷ *See supra* notes 116-121 and accompanying text (describing the reply retained by the Rules).

²⁹⁸ *Id.* at 1433. Judge Higginbotham described the Rule 7 reply as: a vestige of pre-1938 common law and code pleading expressly preserved in the Civil Rules. At the heart of the 1938 transition to the Civil Rules was the over-arching policy judgment that pleadings would henceforth play a far less important role in the winnowing process. This reduced role . . . came with the implicit direction to use the discovery processes to put flesh on claims and defenses.

Id. at 1432-33; *see also supra* Part II (describing the current pleading regime, the predecessor regimes, and their differing treatment of replies).

²⁹⁹ *Schultea*, 47 F.3d at 1434.

³⁰⁰ *Id.* at 1433, 1434.

³⁰¹ *Id.* at 1433. Judge Higginbotham maintained that the Rules have always “insisted on more than conclusions, and in this sense, have never been a system of notice pleading.” *Id.* at 1431. This assertion flies in the face of precedent too numerous to list; suffice it to say that the Supreme Court thinks differently. *See, e.g.,* Conley v. Gibson, 355 U.S. 41, 47 (1957). In any event, Judge Higginbotham’s characterization of the “notice pleading regime” as a misnomer has no effective bearing on the three-step scheme. *See infra* notes 302-05 and accompanying text.

³⁰² *See Schultea*, 47 F.3d at 1431.

³⁰³ *See id.*

simplest complaint must contain *some* facts that give the defendant notice of the grounds upon which the plaintiff claims to be entitled to relief.³⁰⁴ Essentially, this is a merely a restatement of the minimal requirements of the Rule 8(a)(2) and does not deviate from its precepts.³⁰⁵

Next, the defendant government official will presumably plead qualified immunity in the answer.³⁰⁶ Finally, “the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity.”³⁰⁷ The interplay between the second and third step forces both parties to bring forward the relevant facts about what actually took place.³⁰⁸ Certainly, the plaintiff will be required to divulge the nature of her claim by submitting a particularized reply that is “tailored to the assertion of qualified immunity and fairly engage[s] its allegations.”³⁰⁹ The court will insist that the reply contain specific facts, rather than general characterizations, “at least when those factual particulars of the alleged actions are known to the plaintiff and are not peculiarly within the knowledge of [the] defendants.”³¹⁰

The defendant’s answer, however, is what controls the reply.³¹¹

³⁰⁴ See *id.*

³⁰⁵ See *Swierkiewicz*, 534 U.S. at 513 n.4. The Rules specifically instruct that their additional appended forms “are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.” FED. R. CIV. P. 84. Form 9, for example, states a sample claim for negligence: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.” FED. R. CIV. P. Form 9, App. of Forms. Although the claim contains a conclusion of law—that the defendant was “negligent”—it nonetheless also contains such minimal facts as where and when the incident occurred and that driving was the underlying activity that gave rise to the claim. *Id.* Because Rule 8(a)(2)’s “short and plain statement” requirement applies to the complaint in the first step of the three-step scheme, these minimal allegations are required to give at least some notice to the defendant government official as to when and where the alleged conduct took place. See FED. R. CIV. P. 8(a); FED. R. CIV. P. Form 9, App. of Forms. Additionally, the complaint must at least state a claim that the defendant’s actions violated a federal or constitutional right. See *Siegert*, 500 U.S. at 231-32; *supra* text accompanying notes 214-16. Then, in the second step, the defendant has the opportunity to explain her role, if any, in the incident. See *infra* text accompanying notes 311-14.

³⁰⁶ See *Schultea*, 47 F.3d at 1433-34; see also *supra* note 22 (explaining that the defendant is not obligated to allege qualified immunity, but that the three-step scheme does not apply otherwise).

³⁰⁷ *Schultea*, 47 F.3d at 1433-34.

³⁰⁸ See *id.* at 1433.

³⁰⁹ *Id.* (emphasis added).

³¹⁰ *Id.* at 1432.

³¹¹ *Id.* at 1433.

Presumably, the defendant will want the plaintiff to bring forward all of the particulars of her claim without the need of discovery, therefore potentially avoiding significant pre-trial litigation costs.³¹² In the three-step scheme, the reply need only speak to the level of specificity of the operative allegations put forth in the answer.³¹³ Thus, the Fifth Circuit explained, the defendant is provided with “an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply.”³¹⁴

Once the allegations have been elaborated upon, the judge can render judgment as a matter of law if it is appropriate.³¹⁵ That is, the court should dismiss the complaint if the pleadings raise no genuine issue as to whether the defendant’s conduct amounted to a violation of a clearly established federal or constitutional right about which a reasonable person should have known.³¹⁶ If the plaintiff has indeed stated a claim that calls into question the legality of the defendant’s conduct, the court may order limited discovery confined to the qualified immunity defense.³¹⁷

Given the ability of the second and third step to clarify the nature of the allegations on both sides, Judge Higginbotham warned district courts to follow the three-step scheme in almost all § 1983 cases against a government official.³¹⁸ The court advised that protecting qualified immunity is of great importance, and, therefore, “a district court’s discretion not to do so is narrow indeed when greater detail might assist.”³¹⁹

The Fifth Circuit avoided *Leatherman* (and, in effect,

³¹² See *id.* at 1433; see also *supra* Part III.C (noting that cost avoidance for the defendant has become the dominant policy reason supporting qualified immunity).

³¹³ *Schultea*, 47 F.3d at 1433.

³¹⁴ *Id.*

³¹⁵ See *id.* at 1434.

³¹⁶ *Id.* Technically speaking, the defendant would seek a “judgment on the pleadings.” FED. R. CIV. P. 12(c). Rule 12(c), in turn, directs the court to treat the motion as if it were one for Rule 56(c) summary judgment only if “matters outside the pleadings are presented to and not excluded by the court.” Compare FED. R. CIV. P. 12(c), with FED. R. CIV. P. 56(c) (instructing the court to consider pleadings as well as “depositions, answers to interrogatories and admissions . . . [and] affidavits”). Naturally, unless some discovery is absolutely necessary, a court employing the three-step scheme will want to avoid that scenario. See *Schultea*, 47 F.3d at 1434. Of course, if the purpose of qualified immunity is to avoid litigation costs, then when rendering judgment as a matter of law, “it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery.” *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring).

³¹⁷ *Schultea*, 47 F.3d at 1434.

³¹⁸ See *id.* at 1433-34.

³¹⁹ *Id.*

Swierkiewicz)³²⁰ by circumventing the limitations of Rule 9(b).³²¹ Instead, the court maintained that the three-step scheme is valid because a heightened pleading standard is applied only to the Rule 7 reply.³²² According to Judge Higginbotham, the only restriction on the level of factual specificity that a court may demand in a reply is Rule 8(e)(1)'s specification "that '[e]ach averment of a pleading shall be simple, concise, and direct.'"³²³ Highlighting that Rule 9(b) particularized complaints are likewise governed by the same "simple, concise, and direct" standard, the court did not consider Rule 8(e)(1) as a limitation on Rule 7 replies.³²⁴

Next, the court asserted that Rule 8(a)(2)'s "short and plain statement" standard also did not apply to replies; instead, the court explained, "Rule 8 applies only to the subset of pleadings that 'set[] forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim.'"³²⁵ The court invoked the same principle that the Supreme Court relied on to strike down the heightened pleading standard in *Leatherman*—*expressio unius est exclusio alterius*.³²⁶ That is, Rule 8(a)(2)'s limitations were not germane because the list of pleadings did not specifically include Rule 7 replies.³²⁷

A. Why *Schultea* is Right

There are several reasons why the three-step pleading scheme is a desirable solution to the problem caused by qualified immunity converging on notice pleading.³²⁸ Admittedly, the reasons are based on policy considerations as opposed to a strict adherence to the Rules or to Supreme Court precedent.³²⁹ Nevertheless, the reasons present a compelling case for why the three-step pleading scheme, with a minor adjustment,³³⁰ ought to be adopted. First, the scheme furthers

³²⁰ See *supra* note 18 (noting that *Schultea* was decided prior to *Swierkiewicz*).

³²¹ *Schultea*, 47 F.3d at 1432, 1434.

³²² *Id.* at 1432-33.

³²³ *Schultea*, 47 F.3d at 1433 (quoting FED. R. CIV. P. 8(e)(1)).

³²⁴ *Id.*; see also *infra* note 370 (describing Judge Higginbotham's contention that Rule 8(e)(1) fails to provide a "relevant restriction" on Rule 7(a) replies).

³²⁵ *Id.* (quoting FED. R. CIV. P. 8(a)) (alteration in original).

³²⁶ *Id.*; see also *supra* text accompanying note 245 (quoting *Leatherman*).

³²⁷ *Schultea*, 47 F.3d at 1433.

³²⁸ For case law demonstrating the difficulty in reconciling qualified immunity and notice pleading, see *supra* Part IV.

³²⁹ See *infra* Part V.B (demonstrating that the *Schultea* scheme exceeds the boundaries of the Rules as interpreted by the Supreme Court).

³³⁰ See *infra* notes 380-84, 388, and accompanying text (advocating a mandatory rather than discretionary reply).

the overarching goal of cost avoidance by encouraging a determination of the qualified immunity issue at the earliest possible juncture, the pleading stage.³³¹ Second, although unequivocally more friendly to defendants,³³² the scheme treats both sides in § 1983 cases more fairly than do the alternatives, such as subjecting the defendant to even limited discovery³³³ or imposing a heightened pleading standard on complaints.³³⁴

When dealing with issues of qualified immunity, the primary consideration is social cost avoidance.³³⁵ In developing qualified immunity doctrine, the Supreme Court has clearly settled on avoiding the imposition of costs on government defendants (and thereby indirectly on society) who may face lawsuits as the result of performing their legally required job obligations.³³⁶ The current policy of disposing of frivolous claims early using limited discovery and summary judgment, however, creates a paradox: the Court has emphasized early termination of § 1983 cases while simultaneously demanding rigid adherence to the strictures of notice pleading.³³⁷ Unlike the current system, the three-step scheme has the advantage of making the qualified immunity determination a more reaching threshold inquiry.³³⁸ In fact, as Judge Higginbotham pointed out, the three-step scheme does not entirely displace the current tools of limited discovery and summary judgment.³³⁹ Rather, the scheme simply provides the judge another tool with which to weed out frivolous suits before the costly discovery process has commenced.³⁴⁰

The three-step pleading scheme is also desirable because it spreads the burden of pleading between both litigants; the specificity

³³¹ See *infra* notes 335-40 and accompanying text (discussing how the scheme can potentially dispose of meritless claims).

³³² See *infra* notes 359-62 and accompanying text (explaining that the scheme favors defendant government officials).

³³³ See *infra* notes and accompanying text 341-43 (describing the deficiencies of limited discovery).

³³⁴ See *infra* notes 344-46 and accompanying text (describing the deficiencies of a heightened pleading standard in the complaint).

³³⁵ See *supra* Part III.A (discussing qualified immunity's policy shift toward reducing litigation costs for government officials and society).

³³⁶ *Id.*

³³⁷ See Chen, *supra* note 142, at 98-99.

³³⁸ The Supreme Court stated that until the threshold immunity inquiry is resolved, discovery should not be allowed. See *Harlow*, 457 U.S. at 818. Notwithstanding, the current system of resolving the issue of qualified immunity relies on "summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168-69.

³³⁹ *Schulte*, 47 F.3d at 1434.

³⁴⁰ See *id.*

required in the plaintiff's reply depends upon, and is proportional to, the defendant's level of particularity in the answer.³⁴¹ Deciding between other alternatives—strictly following the notice pleading requirements of the Rules or requiring particularized complaints (assuming Rule 9(b) was amended to include § 1983 claims)—requires choosing one pole or the other on the spectrum between the policies underlying qualified immunity and notice pleading. Either extreme invariably favors one side of the suit at the expense of the other. The three-step scheme, however, is a choice that falls toward the middle of the spectrum, if decidedly nearer to the qualified immunity pole.³⁴²

The current choice, ubiquitous notice pleading, favors the plaintiff at the expense of the defendant government official because of its reliance on discovery. Specifically, the defendant often must relinquish some of her entitlement—freedom from suit—and submit to discovery to determine if the entitlement even applies, thereby derailing the goal of social cost avoidance. Such an inherently paradoxical relationship is difficult, and perhaps impossible, to logically reconcile with a defense that is intended to block pre-trial litigation. In contrast, the three-step pleading scheme fortifies the protections for the defendant against having to comply with costly discovery, even if it does not eliminate every instance where some discovery may be needed.³⁴³

Similarly, imposing a heightened pleading standard on the complaint by amending Rule 9(b) would inflict an undue burden on the plaintiff.³⁴⁴ The Court has made it abundantly clear that qualified immunity is an affirmative defense, not an element of a § 1983 claim.³⁴⁵ It is improper, then, to base the plaintiff's initial pleading burden on a defense that has not been, and might never be, pleaded by the defendant.³⁴⁶

The three-step scheme, however, does not present the same problems. If, for example, the defendant issues vague denials in the

³⁴¹ *Id.* at 1433; see also Gary T. Lester, Comment, *Schultea II—Fifth Circuit's Answer to Leatherman—Rule 7 Reply: More Questions than Answers in Civil Rights Cases?*, 37 S. TEX. L. REV. 413, 446-49 (1996) (describing the burden shifting in the three-step scheme).

³⁴² See *infra* text accompanying notes 359-62 (explaining that the scheme favors defendants).

³⁴³ See *Schultea*, 47 F.3d at 1434.

³⁴⁴ See *Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (explaining that there is “no basis for imposing on the plaintiff an obligation to anticipate . . . a defense” of qualified immunity).

³⁴⁵ See *id.*; *supra* Part IV.A (discussing *Gomez*).

³⁴⁶ See *Gomez*, 446 U.S. at 641.

answer, then the plaintiff faces a less onerous specificity obligation in the reply.³⁴⁷ In such a scenario, the judge may refuse to render judgment on the pleadings but instead may proceed to limited discovery.³⁴⁸ The defendant, therefore, has an incentive to explain her conduct using particular facts to forestall further proceedings.³⁴⁹ If the answer provides a detailed account of what occurred and why the defendant's conduct deserves qualified immunity, the plaintiff "must put forward specific, nonconclusory factual allegations which establish [a constitutional or statutory violation]."³⁵⁰

For illustration, consider the factual circumstances in *Schultea*.³⁵¹ Assume that the plaintiff had pleaded allegations in a relatively conclusory manner: "Defendant city council members violated my liberty and property interests by demoting me without due process of the law." Although the plaintiff's allegation that he was demoted is a factual allegation, the statements that his "liberty and property interests" were "violated" and that this violation occurred "without due process" are conclusions of law. This pleading would almost certainly satisfy Rule 8(a)(2)'s notice requirement; the defendants would have "fair notice of what the plaintiff's claim[s] [are] and the grounds upon which [they] rest[]." ³⁵²

Next, assume that the defendant council members respond by pleading qualified immunity supported by detailed factual allegations about the council meeting: where and when it occurred, who attended, the business that was discussed, whether legal formalities were observed, and the reason for the plaintiff's demotion. The plaintiff would then be required to file a reply that contained sufficiently specific allegations "establishing [the] plaintiff's right of recovery, including detailed facts supporting the contention that [a] plea of immunity cannot be sustained."³⁵³ Suppose, for example, that the plaintiff then alleged in the reply that because he was a contract employee, the demotion frustrated his constitutionally protected property interest in his employment.³⁵⁴ The trial judge would then evaluate the pleadings, taking the plaintiff's allegations as true, and

³⁴⁷ See *Schultea*, 47 F.3d at 1433; see also Marcus, *supra* note 31, at 452 (asserting that a party "hardly needs specificity to deny a vague allegation").

³⁴⁸ *Id.* at 1434.

³⁴⁹ *Id.*

³⁵⁰ *Siebert*, 500 U.S. at 235 (Kennedy, J., concurring).

³⁵¹ See *Schultea*, 47 F.3d at 1428-29; *supra* text accompanying notes 272-79 (reporting the relevant facts of *Schultea*).

³⁵² *Conley*, 355 U.S. at 47.

³⁵³ *Elliot*, 751 F.2d at 1482.

³⁵⁴ See *Schultea*, 47 F.3d at 1429.

ascertain whether they made out a violation of the plaintiff's "clearly established" constitutional or statutory rights.³⁵⁵

Continuing the illustration, consider that despite the plaintiff's allegation in the reply that he was a contract employee, it was still unclear whether the defendants had violated the plaintiff's rights. For example, if the determination of a violation hinged on the veracity of the defendants' account of the council meeting and whether there was an irregularity of proper process (e.g., whether the plaintiff was wrongfully denied an appeal of the council decision), the plaintiff could not be expected without discovery to overcome those allegations.³⁵⁶ At this point, counseled Judge Higginbotham, limited discovery may be necessary because this determination of qualified immunity "turn[s] on facts peculiarly within the knowledge of the defendants."³⁵⁷ Without the reply, the fact that the plaintiff had an employment contract may not have surfaced until discovery had commenced. Were the plaintiff not a contract employee, the details of the meeting would have been irrelevant and discovery may have begun unnecessarily. Although, in this illustration, the three-step scheme did not entirely obviate the need for further proceedings, the reply narrowed the factual and legal issues to be determined.³⁵⁸ This obvious potential for weeding out meritless litigation (i.e., if there had been no employment contract) exemplifies why the three-step scheme has merit.

To be certain, as the previous illustration demonstrates, the three-step scheme is defendant-friendly; it will erect another barrier in the path of § 1983 claimants.³⁵⁹ Indeed, forcing the plaintiff to reveal more of her case at an early point in the suit, even forcing her

³⁵⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁵⁶ Cf. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (acknowledging that certain cases, such as those involving police searches, will often result in conflicting allegations making limited discovery possibly appropriate).

³⁵⁷ *Schultea*, 47 F.3d at 1432.

³⁵⁸ This, of course, is much like the old common law pleading regime. See *supra* Part II.A. The three-step scheme would stop at this point, however, rather than requiring an exhaustive exchange of responsive pleadings. See *Schultea*, 47 F.3d at 1434. So long as the plaintiff's reply "support[s] his claim with sufficient precision and factual specificity to raise a genuine issue of the illegality of defendant's conduct at the time of the alleged acts," limited discovery can commence. *Id.*

³⁵⁹ If the defendant can eliminate a claim at this early point, this will obviously benefit the defendant at the expense of the plaintiff. See *supra* text accompanying notes 341-58 (identifying cost avoidance as the predominant policy of qualified immunity). But see Lester, *supra* note 341, at 469-70 (pointing out that the incentive for the answer to be pleaded with particularity imposes a new burden on defendants and positing that the three-step scheme will "guarantee that lawsuits will take longer to complete, not reduce the time or costs for either the defendant or the plaintiff").

to confront the spectre of facts that may be “peculiarly within the knowledge and control of the defendant,”³⁶⁰ will often put the plaintiff at a decided disadvantage.³⁶¹ The three-step scheme, however, at least provides the plaintiff with the benefits of notice of the affirmative defense of qualified immunity and a detailed explanation of how and why it applies.³⁶² Requiring heightened pleading in the complaint deprives the plaintiff of even this explanation from the defendant. Despite the potential unfairness, the policy considerations behind the substantive right of qualified immunity demand this deviation from the ordinary notice pleading system.

B. Why Schulte is Wrong

The *Schulte* pleading scheme is certainly not immune to criticism.³⁶³ Most significantly, although the scheme is a desirable outcome, it ultimately relies on manipulating the Rules and ignoring the Supreme Court’s instruction that particularity requirements be mandated by the Rules’ amendment process, not created in the course of adjudication.³⁶⁴ Therefore, the scheme, like all of the other judicial innovations designed to resolve the conflict between qualified immunity and notice pleading, exceeds court authority.³⁶⁵ Also, even assuming that the scheme is permissible under the existing Rules, two additional unresolved issues remain. First, *Schulte* leaves uncertain what level of review appellate courts should apply to decisions whether to order a reply.³⁶⁶ Second, the lack of a uniform standard among the circuits cannot be justified.³⁶⁷

Although the Fifth Circuit concededly presented a clever argument in finding support in the Rules, the argument is flawed.³⁶⁸ Essentially, the court claimed that it could impose a heightened pleading standard, truly an exceptional power in a notice pleading

³⁶⁰ *Gomez*, 446 U.S. at 641.

³⁶¹ *Id.* (“There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does.”).

³⁶² *See Schulte*, 47 F.3d at 1433.

³⁶³ *See, e.g., Lester, supra* note 341, at 460-65.

³⁶⁴ *See Swierkiewicz*, 534 U.S. at 514-15.

³⁶⁵ *See infra* notes 368-79 and accompanying text (explaining that the Rules do not authorize the three-step scheme).

³⁶⁶ *See infra* notes 380-84 and accompanying text (discussing the uncertain level of appellate review after *Schulte*).

³⁶⁷ *See infra* notes 385-86 and accompanying text (discussing the lack of uniformity if only the Fifth Circuit employed the three-step scheme).

³⁶⁸ *See generally Lester, supra* note 341.

system, without express authority from the Rules.³⁶⁹ When searching for the standard that governs Rule 7 replies, the court focused on Rule 8(a)(2).³⁷⁰ The court pointed out that replies are not included in the discrete list of “pleading[s] that set forth a claim for relief.”³⁷¹ It is arguable, however, that a reply does, in fact, set forth a claim because it *supplements a complaint*, which by definition sets forth a claim. If so, replies would be subject to Rule 8(a)(2)’s “short and plain statement” restriction and, therefore, a particularity requirement would be improper.³⁷²

More distressing is the court’s assumption of a power that is not expressed in the Rules.³⁷³ As the review of the history of pleadings has demonstrated,³⁷⁴ a heightened pleading standard is clearly an extraordinary imposition in our current notice pleading regime.³⁷⁵ Although the court presumed that the Rules do not affirmatively govern the content of Rule 7 replies,³⁷⁶ it is something else altogether to presume that the void should be filled by a judicial whim.³⁷⁷ Because the Fifth Circuit could find no standard to restrict court-ordered replies, it decided to impose just such a “requirement of greater specificity” that *Swierkiewicz* found so objectionable.³⁷⁸ In a notice pleading regime, an exceptional practice requires an exceptional mandate: no pleading need be particularized without an express directive from the Rules.³⁷⁹

Further complicating the *Schultea* scheme are issues with its

³⁶⁹ See *Schultea*, 47 F.3d at 1434.

³⁷⁰ *Id.* at 1433. In the first part of his defense of the three-step scheme, Judge Higginbotham rightly pointed out that Rule 8(e)(1) does not place a “relevant restriction” on replies because Rule 8(e)(1) applies to particularized Rule 9(b) complaints as well. *Id.* Because this appears to be correct, this Comment will focus on the judge’s other justifications.

³⁷¹ *Id.*; FED. R. CIV. P. 8(a)(2).

³⁷² See *Swierkiewicz*, 534 U.S. at 513.

³⁷³ See *Schultea*, 47 F.3d at 1433 (opining that the Rules do not place any “relevant limitation upon the content” of a reply and that, therefore, the court is free to impose a specificity standard of its own creation); see also *supra* note 370 and accompanying text.

³⁷⁴ See *supra* Part II (reviewing the history of pleadings and procedure).

³⁷⁵ See *Swierkiewicz*, 534 U.S. at 513-14 (describing notice pleading as the norm and asserting that “Rule 8(e)(1) states that ‘[n]o technical forms of pleading or motions are required’”).

³⁷⁶ *Schultea*, 47 F.3d at 1433; see also *supra* note 370 and accompanying text.

³⁷⁷ See *id.* at 1437 n.3 (Garza, J., specially concurring) (noting that, despite the majority’s contentions, the Rules “do not empower the district court to require that a reply be ‘detailed’”).

³⁷⁸ *Swierkiewicz*, 534 U.S. at 515.

³⁷⁹ See *id.* at 513-14.

potentially inconsistent administration. Unresolved questions remain, for instance, regarding the applicable standard of review of a decision not to order a reply.³⁸⁰ Rule 7(a) provides that a court “*may* order a reply”;³⁸¹ this is the type of permissive judicial action that faces “abuse of discretion” review on appeal.³⁸² Judge Higginbotham, however, warned that “a district court’s discretion not to [order a reply] is narrow indeed when greater detail might assist.”³⁸³ What exactly the judge meant by “narrow” is unclear but the implication is unmistakable: a district court that decides not to require a Rule 7 reply will face close scrutiny, perhaps even de facto plenary review, of that decision.³⁸⁴ Notwithstanding the suspect propriety of a court of appeals transforming a discretionary practice into a mandatory one, clarification, at a minimum, would help to apprise courts and litigants of what level of review to expect when challenging a court’s decision whether or not to order a reply.

The final issue with *Schultea* is a common refrain whenever standards differ among the circuits: there is no logical reason why plaintiffs and defendants should face different procedures in different courts in the federal system.³⁸⁵ One of the main goals of the proponents of the Rules was, after all, to achieve procedural uniformity among the federal courts.³⁸⁶ The policies of cost avoidance are almost undoubtedly as relevant in all of the federal districts as they are in the Fifth Circuit. Lack of uniformity will continue to plague the three-step scheme until *Schultea* is either overturned or adopted into the Rules.

³⁸⁰ Circuit Judge Garza, in a concurrence, questioned the propriety of the majority’s apparent limitation on the district court’s discretion whether to order a Rule 7 reply. *Schultea*, 47 F.3d at 1437 (Garza, J., specially concurring). Judge Garza concluded that “[s]uch a limitation on the district court’s discretion is not contained in Rule 7(a).” *Id.* This concern is resolved by the proposed amendment to the Rules provided at the conclusion of this Comment. *See infra* Part V.C.

³⁸¹ FED. R. CIV. P. 7(a) (emphasis added).

³⁸² *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213, 216 (8th Cir. 1951) (holding that the trial court has discretion whether to order a reply); *see also supra* notes 116-21 and accompanying text (describing the Fifth Circuit’s admonition to lower courts to order a reply in § 1983 actions).

³⁸³ *Schultea*, 47 F.3d at 1434.

³⁸⁴ *See id.*; *see also Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999) (characterizing the standard of review as “abuse of discretion” but reiterating that that discretion is “narrow indeed”).

³⁸⁵ *See, e.g., LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 2002 UCLA J. L. & TECH. 1, 48 (2002) (asserting that “[i]ncreased uniformity and predictability in adjudication almost invariably leads to enhanced judicial credibility and the resultant desired effect of stabilization within a given body of law”).

³⁸⁶ Holtzoff, *supra* note 36, at 1062-63; Subrin, *supra* note 26, at 967.

C. Amending the Rules and Righting the Wrong

The three-step pleading scheme is not a perfect solution; when legal doctrines such as qualified immunity and notice pleading converge, there seldom are resolutions that please everyone.³⁸⁷ The three-step pleading scheme, however, represents a careful balancing of the policies involved and a guarded rejection of the other available options for resolving the conflict. Therefore, the scheme should be legitimized by amending the Rules. A proposed draft amendment might read like this:

In actions against a government official where the affirmative defense of qualified immunity is raised in the answer, the court shall order that the plaintiff file a reply that is tailored to the assertion of qualified immunity and fairly engages its allegations.

There are many reasons for adopting the amendment. It would eliminate the problem of the appropriate standard of review by making the particularized reply compulsory in § 1983 cases, guaranteeing *de novo* appellate review of decisions whether to order a reply.³⁸⁸ The circuits would no longer lack uniformity because the three-step scheme would be applied in all federal courts as a mandatory part of the Rules. Most importantly, however, judges trapped between the immovable object of notice pleading and the irresistible force of qualified immunity would have another method of resolving the dilemma before the next stage of pre-trial litigation.

Certainly, one criticism of the three-step scheme is only too obvious: it resembles the failed pleading regimes that the America legal system worked so diligently to escape from.³⁸⁹ A narrow resurrection of a past practice, however, is entirely justified when irreconcilable fundamental doctrines clash. Professor Subrin perhaps states it best:

Our infatuation with [the equity-dominated Rules] has helped us to forget the historic purpose of adjudication. Courts exist not only to resolve disputes, but to resolve them in a way that takes law seriously. . . . We have, however, largely failed at defining rights and providing methods for their efficient vindication.³⁹⁰

³⁸⁷ See, e.g., *Swierkiewicz*, 534 U.S. at 514-15. Another appropriate example of an ongoing conflict between doctrines is represented by the merger of law and equity; the predictability of the common law has not, and may never, mesh entirely with the flexibility of equity. See Subrin, *supra* note 26, at 1000-02.

³⁸⁸ See *supra* notes 380-84 (discussing the uncertainty of the standard of appellate review after *Schulte*).

³⁸⁹ See *supra* Part II (recounting the transition from prior pleading regimes to the Rules).

³⁹⁰ Subrin, *supra* note 26, at 1001.

Particularized replies may currently be in disfavor, but they can again serve an important purpose by helping to protect public officials' rights to qualified immunity.³⁹¹ If qualified immunity is truly to be immunity from suit, it should not take a lawsuit to make that determination; rather, the three-step pleading scheme should be formally adopted and implemented.

³⁹¹ *Schulte*, 47 F.3d at 1433.