Michigan Journal of Race and Law

Volume 7

2001

Purchasing While Black: How Courts Condone Discrimination in the Marketplace

Matt Graves
United States District Court for the District of Columbia

PURCHASING WHILE BLACK: HOW COURTS CONDONE DISCRIMINATION IN THE MARKETPLACE

*Matt Graves**

I. SUBSTANCE: THE GOALS OF §§ 1981 AND 1982 AND THEIR BURDENS OF PROOF 163
A. *The Historical Purpose of §§ 1981 and 1982* 163
B. *Building § 1981 and § 1982 Cases* 165
II. PROCEDURE: REVIVING FACT PLEADING TO DEFEND AGAINST "FRIVOLOUS" CIVIL RIGHTS LITIGATION 167
A. *A History of the Federal Rules Regarding Pleading* 167
B. *A History of the Federal Rules Regarding the 12(B)(6) Motion to Dismiss* 169
C. *The Revival of Fact Pleading in Civil Rights Claims* 170
1. Justifications for the Imposition of Heightened Pleading Requirements in Civil Rights Actions 171
2. The Arbitrariness of Heightened Pleading Requirements Creates the Appearance of Unfairness, Undermines the Consistency of the Law and Makes §§ 1981 and 1982 Actions Almost Impossible to Plead 175
D. *Hypothetical Cases of Discrimination* 177
III. CONTEXT: NEITHER THE FEDERAL JUDICIAL CASELOAD NOR THE STATE OF RACE IN CONSUMER AMERICA COULD JUSTIFY HEIGHTENED PLEADING REQUIREMENTS 178
A. *The Litigation Boom Justification* 179
B. *The Time-Savings/Management Justification* 181
C. *The Inherently "Frivolous" Rationale* 182
IV. THE INTERSECTION OF SUBSTANTIVE LAW, PROCEDURE, AND SOCIAL CONTEXT: THE EFFECT OF THE LAW UPON VICTIMS AND WHERE WE CAN GO FROM HERE 185
A. *The Effect of the Substantive Law and the "Procedural" Law of §§ 1981 and 1982 on Victims of Discrimination* 186
B. *The Need to Reinstate Courts as Viable Forums for §§ 1981 and 1982 Litigation* 187
C. *So Long as Heightened Pleading Requirements Exist, Courts Cannot Adequately Fulfill Their Role as Forums For People Whose Rights Have Been Violated* 189

---

* J.D., Yale Law School. Matt Graves is currently clerking for the Honorable Richard W. Roberts on the United States District Court for the District of Columbia. This note is in memory of Kathleen A. Sullivan—an amazing lawyer, mentor, and friend, who will be missed by all who have had the fortune of meeting her. The author would like to thank E. Donald Elliott, Brett Dignam, Michael Pinard, and Kathleen Rosenfeld for their help with the note and the case that gave rise to the note. A final, special thanks to Fatima Goss for her advice and her assistance.

1. The Supreme Court Should Eliminate Heightened Pleading Requirements for § 1981 claims, § 1982 Claims, and All Other Civil Rights Actions 189
2. Eliminating Heightened Pleading Requirements in Civil Rights Cases Will Not Open the Floodgates to Meritless §§ 1981 and 1982 Claims 191
3. Giving the Discovery Process Back to Victims of Discrimination in the Marketplace 192
CONCLUSION 193

The main purpose of the complaint in a civil action is to put the defendant on notice that she is being sued because of her involvement in a specific transaction or a series of transactions.[1] As such, the liberal system of pleading created by the Federal Rules of Civil Procedure (the "Rules") requires that a complaint only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" and does not require that a complaint provide specific facts.[2]

Regardless of the clear language found in Rule 8(a)(2), many judges, in contravention of the Federal Rules of Civil Procedure, require civil rights plaintiffs to plead facts supporting their allegations of intentional discrimination.[3] These requirements of factual support are often called heightened pleading requirements.

Due to the fact that proof of intentional discrimination often rests in the hands of the alleged discriminator, requirements of facts can sound the death knell for even the most meritorious of claims. This possibility becomes all the more likely when contact between the discriminator and the victim is limited to one brief transaction; as opposed to the ongoing relationship that is paradigmatic of certain types of discrimination, like workplace discrimination.

Some scholars have noted substantive law, procedural law, and legal culture combine to vindicate or defeat rights.[4] I would modify this assertion by positing that the substantive law, procedural law, legal culture, and *real-world context* combine to define the extent of our substantive rights. In this Note, I explore the interaction of: heightened pleading requirements; substantive civil rights laws; and, a type of discrimination that usually involves a single, often brief, transaction between a discriminator and a victim—discrimination in the marketplace.

The problem of discrimination in the marketplace is a very real problem for people of color. Through heightened pleading requirements,

---

1. *See infra* notes 52–53 and accompanying text.

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

3. *See infra* notes 12, 76–95, 111, 124, 138, 141 and accompanying text.

4. Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 219 (1992).

courts have made it nearly impossible to seek remedy under the very federal civil rights laws that are supposed to guard against discrimination in the marketplace. This point was made abundantly clear to me when my clinic[5] represented an individual who we believed to have been detained and falsely accused of shoplifting because she was Black. We filed a complaint on her behalf alleging, among other things, that the defendants had violated her right to enter into contractual relations under § 42 U.S.C. 1981 and to purchase personal property under § 42 U.S.C. 1982.

Unfortunately for our client, we appeared before a judge who believed that heightened pleading requirements should be imposed in civil rights cases. The judge acknowledged that fact requirements in complaints create vague standards. The lack of a bright-line rule means that what one judge might find sufficient, another might not. This inconsistency is particularly problematic when discrimination is subtle and when the line between discriminatory behavior and legal behavior is vague.

We had alleged facts from which we believed one could infer a discriminatory intent.[6] But for our judge, our client's complaint was insufficient because it did not allege that the store's employees said something like "you must leave the premises because you're African American."[7] I argued that this standard of factual pleading was particularly impractical in the context of marketplace discrimination and that this "procedural" requirement eviscerated the substance of §§ 1981 and 1982:

> MR. GRAVES: Just think about what that standard means. Under the standard of having had specific facts of "you're out of here because you're African American," a store or its employees could decide that they want to target members of racial minority groups, that they could harass these people, they could tell them to leave their store, and that their business is no longer valued there. As long as they don't explicitly tell the defendant what they're doing, as long as they don't use any racial epithets, that person not only doesn't have a cause of action in a Federal or State Civil Rights

5. I was a member of the Community Legal Services clinic at Yale Law School for two years. The clinic held itself out to all people in the New Haven community who could not afford legal representation. As such, the matters which our clinic handled ranged from assisting clients with obtaining benefits to filing civil rights suits in federal and state court. Our clients could contact us either through our weekly outreach program or through our intake program.

6. Brief for Plaintiff at 2–3, Dabre v. Filene's Dep't Store, CV 99-0066429 S, 2000 Conn. Super. LEXIS 1964 (Conn. Super. Ct. Jul. 29, 2000) (on file with the Michigan Journal of Race & Law).

7. Transcript of Oct. 10, 2000 at 3–4, Dabre v. Filene's Dep't Store, CV 99-006429 S, 2000 Conn. Super LEXIS 1964 (Conn. Super. Ct. Jul. 29, 2000) (on file with the Michigan Journal of Race & Law).

> Law, but that person isn't even entitled to proceed to discovery on the matter.[8]

The judge acknowledged that this critique was "well put,"[9] but under precedent from the Second Circuit he dismissed the civil rights claims the next day.[10]

Given the sweeping language of §§ 1981 and 1982, it cannot be that sellers of goods can engage in intentional discrimination, so long as they make relatively minor attempts to cover it up. By exploring the interaction between substantive law, procedural law, legal culture, and real-world context, I seek to demonstrate that judges cannot offer any legal or practical justification for heightened pleading requirements in §§ 1981 and 1982 actions. Through my argument, I reach the conclusion that §§ 1981 and 1982 plaintiffs must be given the same opportunity to litigate their claims that virtually all other plaintiffs are given. While this conclusion might seem basic, it is currently being ignored in many courtrooms across this country.[11] The overwhelming majority of literature in the field makes the case against heightened pleading requirements by arguing that these requirements violate the Federal Rules of Civil Procedure.[12] The impropriety of heightened pleading requirements under the Federal Rules, however, is not the final deduction in an argument against heightened pleading requirements; it is a starting point. Once we understand that

---

8. *Id.* at 4.

9. *Id.*

10. Order of Aug. 22, 2000 at 1, Dabre v. Filene's Dep't Store, CV 99-0066429 S, 2000 Conn. Super. LEXIS 1964 (Conn. Super. Ct. Jul. 29, 2000) (on file with the Michigan Journal of Race & Law).

11. *E.g.*, Brown v. Oneonta, 221 F.3d 329, 340–41 (2d Cir. 1999), *cert. denied*, 2001 U.S. LEXIS 5530 (Oct. 1, 2001) (dismissing §§ 1981 and 1983 complaint for failing to state a claim upon which relief can be granted because the complaint did not allege facts to support discrimination); Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (" 'Conclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.' " (alteration in original) (quoting Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977)); White v. Florida Highway Patrol, 928 F. Supp. 1153, 1156 (M.D. Fla. 1996) ("In a civil rights action, more than mere conclusory allegations are required; a complaint will be dismissed where allegations are vague and conclusory.")

12. *E.g.*, Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40 (1986) (describing the pleading requirements of the Federal Rules of Civil Procedure as exhibiting an intentionally liberal pleading ethos); Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 CAMPBELL L. REV. 119, 205 (1993) (suggesting that application of heightened pleading standards by the Federal Judiciary is contrary to the Federal Rules); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1037 (1989) (arguing that heightened pleading requirements would violate special pleading requirements of Federal Rule of Civil Procedure 9 and general pleading requirements of rule 8).

heightened pleading requirements violate the Rules, we can ask why judges continue to impose them. We can, thus, attack the principles underlying judges' decisions to impose heightened pleading requirements.

In Part One, I take the first step in this argument by exploring the substantive rights guaranteed by §§ 1981 and 1982, demonstrating how the courts have emasculated these rights. In Part Two, I explore how heightened pleading requirements violate the Rules, and how these "procedural" requirements can undermine the substantive rights of meritorious claimants. In Part Three, I present the traditional arguments advanced for heightened pleading requirements, and show that these arguments are not supported by current political realities. Finally, in Part Four, I argue that the Supreme Court should strike down the practice of imposing heightened pleading requirements not only because they violate the Rules, but also because they do not reflect the needs of victims of discrimination.

I. SUBSTANCE: THE GOALS OF §§ 1981 AND 1982 AND THEIR BURDENS OF PROOF

In order to understand how courts have eviscerated the rights guaranteed under §§ 1981 and 1982 actions by imposing heightened pleading requirements, it is necessary to explore the purpose of the statutes and how courts have interpreted the rights that they guarantee.

A. *The Historical Purpose of §§ 1981 and 1982*

Section 1981 guarantees that all persons in the United States shall have the same right to make and enforce contracts as White citizens.[13] Section 1982 guarantees that all citizens will have the same right to purchase personal property as White citizens.[14]

---

13. 42 U.S.C. § 1981(a)(1991) reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by [W]hite citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

14. 42 U.S.C. § 1982(1978) reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by [W]hite citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

These statutes were initially passed as part of the Civil Rights Act (the "Act") in 1866 to abolish the Black Codes, which had been used to frustrate the purposes of the Thirteenth Amendment.[15] The Act was subsequently reenacted in 1870.[16] Many legislators viewed the rights embodied in the Act as being so fundamental that they wanted to incorporate them into the organic law; these legislators supported the Fourteenth Amendment primarily because they viewed it as adopting the guaranties of the Civil Rights Act.[17] These statutes were supposed to carry into effect the goals of the Act by ensuring that a person whose civil rights have been violated may recover damages or injunctive relief.[18]

Looking at these statutes more closely, one can see that on their face, they ensure broad rights. Section 1981 protects individuals at all stages of the contractual life: from the initial offer, to acceptance, and through post-formation.[19] This type of protection means that once a private service advertises and offers a good or service to the general public, that good or service must be offered on an equal basis to both Whites and non-Whites.[20] As was previously discussed, § 1982 guarantees that non-Whites will have the same right to purchase any type of personal property as Whites.[21] Congress designed § 1982 to complement § 1981.[22] These rights have been construed very broadly by courts.[23] A narrow construction would be inconsistent with the broad rights articulated.[24]

The most important idea to take away from any discussion of the purpose of the Civil Rights Act of 1866 is that the legislators who passed it realized that if the Thirteenth Amendment was to have practical meaning in our society, non-Whites had to have the same ability as Whites to purchase personal property and to enter into contractual relations.[25] In short, Congressmen in 1866 realized that an actual, as opposed to a theo-

---

15. Gen. Bldg. Contractors, Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 386–87 (1982); *See also,* Loren Page Ambinder, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 349 (1996).

16. Ambinder, *supra* note 15, at 350.

17. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 384–85 (quoting Hurd v. Hodge, 33 U.S. 24, 32–33 (1948)).

18. Felder v. Casey, 487 U.S. 131, 139 (1988).

19. Ambinder, *supra* note 15, at 351.

20. *Id.*

21. *See supra* notes 15–26 and accompanying text.

22. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 383–84.

23. *E.g.*, Battle v. Dayton-Hudson Corp., 399 F. Supp. 900, 905 (D. Minn. 1975).

24. *Id.*

25. Brief of Amicus Curiae Lawyer's Committee for Civil Rights Under Law at 4, Hampton v. Dillard Dep't Stores, Inc., 985 F. Supp. 1055 (D. Kan. 1997), *appeal docketed*, (10th Cir. Dec. 28, 1998) (Nos. 98-3011, 98-3261).

retical, right to purchase property and to enter into contractual relations was a prerequisite to full citizenship.

B. *Building § 1981 and § 1982 Cases*

Courts have determined the prima facie case in §§ 1981 and 1982 to be the same: A plaintiff "must allege that he has been deprived of a right which under similar circumstances, would have been accorded to a person of a different race."[26] To make this showing, a plaintiff must show "actual and intentional racial discrimination."[27]

Generally, courts have allowed plaintiffs to prove discrimination in one of two ways: disparate treatment and disparate impact. To establish a claim of disparate treatment, a plaintiff must show both that she received less favorable treatment than a White person, and that the defendant purposefully, deliberately, and intentionally treated her differently because of her race.[28] A plaintiff establishes a disparate impact claim by showing that facially neutral actions fall more harshly on one group than another.[29] The Supreme Court has held that in order to prevail on an action predicated on the Civil Rights Act of 1866, the plaintiff must establish that the defendant's actions rise to the level of intentional discrimination.[30] This interpretation precludes one from bringing a § 1981 and possibly a § 1982 disparate impact claim.[31]

The framework that the Supreme Court developed in *McDonnell Douglas Corp. v. Green*[32] and *Texas Department of Community Affairs v. Burdine*[33] for analyzing disparate treatment claims under Title VII also applies in evaluating disparate treatment claims under § 1981 and § 1982.[34] Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing the prima facie case.[35] In the context of §§ 1981 and 1982, this burden

---

26. *Battle*, 399 F. Supp. at 905.

27. Ambinder, *supra* note 15, at 352.

28. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *see also* Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163 (1995).

29. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

30. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388 (noting that the Thirty-Ninth Congress did not intend to include practices that were neutral on their face).

31. Ambinder, *supra* note 15, at 352.

32. 411 U.S. 792 (1973).

33. 450 U.S. 248 (1981).

34. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989)(agreeing with the application by the Court of Appeals of the framework of proof set forth in *McDonnell Douglas Corp. v. Green* as it applies to 1981 claims); Lewis v. J.C. Penney Co., 948 F. Supp. 367, 371 (D. Del. 1996); Ambinder, *supra* note 15, at 352.

35. *McDonnell Douglas*, 411 U.S. at 802.

can be established by showing that "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute."[36] The burden then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for his or her actions.[37] The burden then shifts back to the plaintiff to show that the defendant's proffered reason is pretextual and that the real purpose was discrimination.[38] The Supreme Court requires a showing of intentional discrimination in an action brought under the Civil Rights Act of 1866 because it found Congress did not intend for these broad goals to reach acts that were either neutral on their face or neutral in terms of intent.[39]

Intent, however, can be inferred from a variety of different circumstances. "Factors that may be considered as evidence of discriminatory intent include: a departure from normal procedures; a history of discriminatory treatment; the specific sequence of events leading up to the particular action; [and] the administrative history of the action . . . ."[40] Another relevant circumstance is the disparate impact of an action on a minority group.[41] However, in all but the rarest of cases, disparate impact is relevant to the question of intent, but is not sufficient.[42]

Now that we are acquainted with the purpose of §§ 1981 and 1982, and how one builds a prima facie case under either § 1981 or § 1982, we can explore how courts have eviscerated the rights under §§ 1981 and

---

36. Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).

37. *McDonnell Douglas*, 411 U.S. at 802.

38. *Id.* at 804–05.

39. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388. However, the Supreme Court's requirement of intent in *McDonnell Douglas*, has been criticized by dissenters and scholars alike. Some have argued that requiring plaintiffs to prove the defendant's discriminatory intent under *McDonnell Douglas* rewrites the statute under which suit has been brought. Baumann et al., *supra* note 4, at 232. Justice Marshall's dissent in *General Building Contractors Association*, argued that the intent requirement espoused by the Court was incommensurate with the broad substantive rights enumerated in the Civil Rights Act of 1866. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 408–09 (Marshal, J., dissenting). The dissent went on to argue that the majority analysis of legislative intent was particularly flawed because it failed to account for the fact that the Act was enacted to eradicate the Black Codes, which consisted of many laws that while neutral on their face, had the purpose of discriminating against African Americans. *Id.* at 410 n.2.

40. Ambinder, *supra* note 15, at 352–53.

41. *Id.* at 352.

42. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40; Ambinder, *supra* note 15, at 352. One instance in which disparate impact was found to be sufficient included a defendant who had a total of 13 Black and Spanish-surnamed persons out of 1,828 employees that filled the same position. *Int'l. Bhd. of Teamsters*, 431 U.S. at 337. These cases, deemed rare in 1977 by the Court in *Vill. of Arlington Heights*, are likely to become even more rare with potential defendants' increased understanding of civil rights law.

1982 and made it nearly impossible to build a prima facie §§ 1981 or 1982 case arising out of marketplace discrimination.

II. PROCEDURE: REVIVING FACT PLEADING TO DEFEND AGAINST "FRIVOLOUS" CIVIL RIGHTS LITIGATION

In this Part, I explore pleading requirements. I begin by discussing the history of the Federal Rules of pleading and the purpose of a 12(b)(6) motion to dismiss. I then document the move toward heightened pleading requirements, the justifications for this move, and the legal legitimacy of the court's actions. After this discussion, I will explain how heightened pleading requirements have created a great deal of uncertainty and how they have created an almost insurmountable barrier for most prospective §§ 1981 and 1982 plaintiffs. At the conclusion of this Part, I present three hypothetical cases of discrimination and explore which of these hypotheticals would survive a 12(b)(6) motion to dismiss, if a judge imposes heightened pleading requirements.

A. *A History of the Federal Rules Regarding Pleading*

The Federal Rules of Civil Procedure were initially drafted in 1938[43] by a Judicial Advisory Committee to which Congress had delegated power through the Rules Enabling Act.[44] The Committee could not alter any substantive right through the Rules.[45] The Rules are supposed to be transsubstantive.[46] In other words, the procedure defined in the Rules is supposed to be separate from the substantive law, and it is supposed to apply in all cases regardless of their substance.[47]

The Rules clearly define what is required of a defendant in pleading a cause of action. Rule 8(a)(2) requires that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...."[48] Rule 9(b) sets out a few relatively minor exceptions to Rule 8(a)(2) in which more than "a short and plain statement" are necessary: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated

43. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272 (1989).

44. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 385 (1990).

45. *Id.*

46. *See* Yamamoto, *supra* note 44, at 383–84.

47. Baumann et al., *supra* note 4, at 214–15.

48. FED. R. CIV. PRO. 8(2)(a).

with particularity. Malice, *intent*, knowledge, and other condition of mind of a person *may be averred generally*."[49] It is particularly important to note that Rule 9(b) explicitly states that intent may be averred generally.

The drafters of the Federal Rules of Civil Procedure created Rule 8(a)(2) to break away from the complex series of fact requirements that were necessary in pleadings prior to the Rules.[50] The modern view replaced complex factual allegations as the purpose of pleadings with putting the defendant on notice that someone had filed a claim against him or her.[51] The objectives of "notice" pleading are simply to identify the matter in dispute, and to begin the process so that the matter might be resolved.[52] This rule means that the plaintiff can plead conclusions, so long as they provide fair notice to the defendant.[53]

This change in the purpose of pleading represented a massive shift in the law of procedure. As Judge Clark, who was the principal architect of the Rules, explained when he ruled on a motion challenging the factual sufficiency of a complaint: "Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.' "[54] Facts are supposed to be irrelevant, so long as the allegations adequately put the defendant on notice of the type of action against which he or she must defend.

This change in the purpose of pleadings reflected a broader sentiment that cases should be resolved on the merits, not on drawn out arguments over pleading niceties.[55] These rules are supposed to provide a cheap and efficient disposition on the merits and avoid costly and time-consuming arguments over pleading requirements.[56] Matters should only be disposed of on the pleadings in a few limited areas.[57] The Supreme Court has held that it is only proper to dismiss a complaint for failure to state a claim, when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[58]

---

49. FED. R. CIV. PRO. 9(b) (emphasis added).

50. Marcus, *supra* note 12, at 433.

51. *See id.* at 451.

52. *See* Hamabe, *supra* note 12, at 125.

53. *See* Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 682 (1984).

54. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (finding plaintiff's claim reasonable and thus remanding claim to the District Court).

55. Marcus, *supra* note 12, at 440.

56. Yamamoto, *supra* note 44, at 383.

57. Marcus argues that it is only appropriate to dispose of a matter on the pleadings when more detail will reveal a fatal defect and when more detail would demonstrate that the defendant had not violated the plaintiff's rights. Marcus, *supra* note 12, at 493.

58. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

Practitioners and judges initially resisted the shift from fact pleading to notice pleading.[59] Suggestions to reintroduce prior pleading regimes were, however, rebuffed by the Advisory Committee.[60] Judges wedded to the prior pleading regime attempted to require factual pleading in certain areas, such as antitrust cases, where district courts often required special rules of pleading.[61] Appellate judges, such as Judge Clark, fended off these reactionary judges. In hearing an appeal from the dismissal of an antitrust case, Judge Clark argued that it is impermissible under the Rules for courts to create special pleading requirements: "In asserting a special rule of pleading for antitrust cases, our brothers below have in terms rejected the 'modern 'notice theory' of pleading' as here insufficient . . . ."[62]

The Supreme Court ultimately weighed in decisively on this issue and upheld the legitimacy of the notice pleading regime created by the Rules in *Conley v. Gibson*.[63] The Court noted that the sample complaints attached to the Rules were legally sufficient.[64] One of these sample complaints established a negligence count by simply stating that the "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[65] The Court's decision validated a system where one only need identify the cause of action and the incident that allegedly gave rise to the cause of action.[66]

B. *A History of the Federal Rules Regarding the 12(B)(6) Motion to Dismiss*

The motion to dismiss for failure to state a claim upon which relief can be granted created by Rule 12(b)(6) was only designed to be used in a narrow subset of claims. "Legal, not factual, sufficiency is the only issue properly challenged through a 12(b)(6) motion."[67] Thus, under modern pleading, Rule 12(b)(6) cannot be used for "issue narrowing, fact development and guidance, and [the] screening of sham or insufficient claims

---

59. David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 416 (1980).

60. Tobias, *supra* note 43, at 297.

61. Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957) (finding that lower courts often required "special pleading" in antitrust cases).

62. *Id.* at 324.

63. 355 U.S. 41, 47 (1957) ("The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.").

64. *Id.*

65. FED. R. CIV. PRO. APP. FORM 9.

66. Hamabe, *supra* note 12, at 170.

67. Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 965 (1990).

or defenses."[68] Thus,12(b)(6) should be reserved for those situations in which: (1) the facts, as alleged, demonstrate that the plaintiff is not entitled to relief; (2) the law does not recognize the cause of action identified in the complaint; (3) the complaint fails to provide adequate notice; or (4) the complaint does not allege or infer an essential element of a cause of action.[69]

Regardless of the clear-cut guidelines established by 8(a)(2), 12(b)(6), the courts, and the Advisory Committee, fact pleading and dismissal for stating insufficient facts would enjoy a revival shortly after *Conley*.

C. *The Revival of Fact Pleading in Civil Rights Claims*

Fact pleading and dismissals because of "conclusory" allegations have enjoyed a revival over the past couple of decades.[70] "Although they rarely acknowledge the shift, federal courts are insisting on detailed factual allegations more and more often, particularly in securities fraud and civil rights cases."[71] In fact, it has become commonplace for conclusory allegations to be deemed by courts to be insufficient to state a claim.[72] Civil rights cases are not the only types of cases disfavored by federal courts.[73] Nevertheless, civil rights cases were the first, and still favorite, whipping boy of the federal judiciary.[74]

In order to get rid of civil rights cases, many courts require the plaintiff "to plead facts with specificity."[75] Often, courts want specific facts about the defendant's allegedly discriminatory state of mind.[76] Some courts have imposed this requirement on all types of civil rights cases.[77] The Third Circuit has led the way in instituting heightened pleading re-

---

68. Hamabe, *supra* note 12, at 125.

69. Wingate, *supra* note 53, at 682. For example, when the complaint establishes that the plaintiff is barred by the statute of limitations, the plaintiff is denied relief. *Id.* at 680.

70. Marcus, *supra* note 12, at 435.

71. *Id.* at 436 (citations omitted).

72. *Id.* at 463.

73. Marcus also identifies securities fraud and conspiracy cases as disfavored by the federal judiciary. *Id.* at 447–50.

74. *See* Roberts, *supra* note 59, at 417–20.

75. Blaze, *supra* note 67, at 939 (quoting Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976)).

76. Marcus, *supra* note 12, at 466.

77. *E.g.*, Albany Welfare Rights Org. Day Care Center v. Schreck, 463 F.2d 620, 623 (2d Cir. 1972) ("Mere conclusory allegations do not provide an adequate basis for the assertion of a claim for violation of [§ 1983]"); Anderson v. Sixth Jud. Dist. C., 521 F.2d 420, 420 (8th Cir. 1975) ("While pleadings in civil rights cases are to be liberally construed ... they must contain more than mere conclusory statements and a prayer for relief.") (citations omitted); White v. Florida Highway Patrol, 928 F. Supp. 1153, 1156 (M.D. Fla. 1996) ("In a civil rights action, more than mere conclusory allegations are required; a complaint will be dismissed where allegations are vague and conclusory.").

quirements in all types of civil rights actions.[78] Other courts have targeted § 1981 and the rest of the Civil Rights Act of 1866 specifically.[79] Courts have advanced varying justifications for their actions.

1. Justifications for the Imposition of Heightened Pleading Requirements in Civil Rights Actions

Some courts have attempted to legitimate their heightened pleading requirements under the Rules. For instance, the Third Circuit found that vague and conclusory allegations in a civil rights complaint do not provide the defendant with fair notice.[80] Most courts, however, attempt to justify heightened pleading requirements on considerations outside of the Rules.

One of the most frequently advanced rationales for these heightened pleading requirements is the "litigation explosion." Many federal judges believe that the courts are experiencing an explosion of cases based on litigants and lawyers overuse, misuse, and abuse of the civil justice system.[81] According to adherents of this belief, the explosion began in the

---

78. Marcus, *supra* note 12, at 449; *see also* Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) ("In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity."); *but see*, Croswell v. O'Hara, 443 F. Supp. 895, 897 (E.D. Pa. 19) (holding that an allegation that White defendants, had assaulted a Black plaintiff because of her race was enough to survive a motion to dismiss).

79. *E.g.*, Brown v. City of Oneonta, 221 F.3d 329, 339 (2d Cir. 1999) ("To establish a claim under 42 U.S.C. § 1981, plaintiffs must allege facts supporting the following elements: (1) plaintiffs are members of a racial minority; (2) defendants' intent to discriminate on the basis of race; and (3) discrimination concerning one of the statute's enumerated activities.") (citation omitted); Jones v. Cmty. Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (" 'Conclusionary allegations, unsupported by facts,' will be 'rejected as insufficient to state a claim under the Civil Rights Act.' ") (quoting Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977)); Cohen v. Ill. Inst. of Tech., 581 F.2d 658, 663 (7th Cir. 1978) ("[A] pleading is insufficient to state a claim under the Civil Rights Act if the allegations are mere conclusions."); Yusuf v. Vassar College, 827 F. Supp. 952, 955 (S.D.N.Y. 1993) (" '[A] complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under 12(b)(6).' ") (quoting Martin v. N.Y. State Dept. of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978); Henderson v. Montej, No. 89 C 4440, 1989 WL 153386 at * 1 (N.D. Ill. 1989) ("A plaintiff seeking to state a cause of action under 42 U.S.C. § 1981 must plead facts that would 'support an inference that defendants were motivated by racial or some other invidious, class based discrimination.' ") (quoting Benskin v. Addison Tp., 635 F. Supp. 1014 (N.D. Ill. 1986).

80. United States v. City of Philadelphia, 644 F.2d 187, 204 (3d Cir. 1980) (Gibbons, J., dissenting and joined by Seitz, C.J., Higginbotham, J., and Sloviter, J.J.) (holding that the Attorney Generally lacked standing to maintain the suit as to the civil rights claims and that the averments of civil rights violations were conclusory).

81. Tobias, *supra* note 43, at 287–88.

late 1960's.[82] Courts perceive civil rights claims as being one of the driving forces behind this litigation explosion.[83]

The remaining standard justifications for heightened pleading requirements can be attributed to judges' distaste for these claims, which are disfavored for a variety of reasons.[84] Some judges begrudge the time these claims take to litigate, and their complexity.[85] Other judges simply disdain the goals of civil rights litigation.[86] But, the most standard reason for disfavoring civil rights litigation is that judges perceive many of these cases to be frivolous.[87]

The case of *Bray v. RHT, Inc.*,[88] best captures the disdain which judges have for these cases. In *Bray*, the plaintiff was a Black man who frequented the defendant's restaurant. During one of his visits there, the plaintiff was told that he had to leave the restaurant because he had not ordered anything to drink or eat.[89] The plaintiff alleged that he had been ordered to leave because of his race in violation of § 1981 and district tort law. The Federal District Court of D.C. cited several facts that it apparently took to be important in its three paragraph fact section. First, that the plaintiff was a graduate of Howard University Law School.[90] Second, the defendant did not use any racial epithets.[91] And, third, the plaintiff was not told that he could not return to the establishment.[92] The court concluded that the plaintiff had not alleged any facts in support of his claim and that the facts alleged tended to undermine the plausibility of his claim.[93] The judge grudgingly dismissed the pendent state law claims as he was required to do by law, but in dismissing the § 1981 claim, he noted that "it would be sorely wasteful if this frivolous action were pursued in another forum."[94] This "frivolous" case brought by a "litigious" plaintiff clearly annoyed the judge.

---

82. Yamamoto, *supra* note 44, at 350.

83. *See infra* 125–31 and accompanying text.

84. Marcus, *supra* note 12, at 471.

85. Yamamoto, *supra* note 44, at 371–72.

86. *Id.*

87. Blaze, *supra* note 67, at 991 (noting that judges disfavor civil rights actions "based on the explicit assumption that many, if not all, civil rights actions are unfounded."); United States v. City of Philadelphia, 644 F.2d 187, 204 (3d Cir. 1980) ("a substantial number of [civil rights] cases are frivolous or should be litigated in the State courts") (quoting Valley v. Maule, 297 F. Supp. 958, 960–61 (D. Conn. 1968)); Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976).

88. 748 F. Supp. 3, 6 (D.D.C. 1990).

89. *Id.* at 4.

90. *Id.*

91. *Id.* at 5.

92. *Id.*

93. *Id.*

94. *Id.* at 6.

In the end, even if true, these justifications cannot support the use of heightened pleading requirements in civil rights actions: The Rules Enabling Act, the Rules themselves, and Supreme Court precedent do not allow for the use of heightened pleading requirements in civil rights cases.

a. Heightened Pleading Requirements in Civil Rights Cases Violate the Rules Enabling Act

Even if the courts' rationales for applying a heightened pleading requirement for civil rights claims were all true, it would be improper for courts to use a heightened pleading standard. Heightened pleading requirements are better understood as substantive law changes than procedural law reforms.[95] Demanding facts from a would-be civil rights plaintiff is the equivalent of asking for an offer of proof. Such a requirement places a burden of production on the plaintiff and shifts the substantive law "because [the] plaintiff's lack of evidence provides insufficient assurance that plaintiff in fact has no valid claim against [the] defendant."[96]

The Rules were not supposed to have any substantive impact. The Rules Enabling Act mandated that the Supreme Court and the Advisory Committee could not enlarge, abridge, or modify any substantive right.[97] Thus, judges that have created heightened pleading requirements have violated the Rules Enabling Act because they have altered substantive rights through procedural law.

b. Heightened Pleading Requirements in Civil Rights Cases Violate the Federal Rules

Judges, moreover, have violated the Rules as well as the Rules Enabling Act. Only Congress has the power to modify the Rules and create a heightened pleading requirement,[98] and nothing in the current Rules supports the imposition of heightened pleading requirements in civil rights cases.[99] Rule 9 contains all of the instances in which the drafters

---

95. Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 413 (1999).

96. Marcus, *supra* note 12, at 468.

97. Parness, *supra* note 95, at 426–27.

98. Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839, 841 (1994).

99. Marcus, *supra* note 12, at 449 (noting that there is no special provision of the Federal Rules applicable to civil rights claims); Wingate, *supra* note 53, at 693 (arguing that a strict pleading standard is directly contrary to the spirit and purpose of Rule

wanted greater specificity in the pleadings.[100] Not only does Rule 9 not provide an exception for civil rights cases, but the Rule's explicit statement that intent and other conditions of mind can be generally averred undermines any argument that a plaintiff could be required to prove a discriminatory state of mind under the Rules.[101] Interestingly, even if a court could fit civil rights counts under Rule 9, the Rule requires much less specificity than courts currently require in civil rights complaints.[102]

The courts use of heightened pleading requirements also violates Rule 12(b)(6), in that it turns the motion into a merits issue. Under this higher standard, courts must weigh evidence when considering a 12(b)(6) motion.[103] "[T]he general requirement of greater factual specificity has evolved rapidly into a requirement that the plaintiff "satisfy" or convince the court factually [at a 12(b)(6) hearing] that the claim asserted is not frivolous."[104] Using 12(b)(6) to weigh the sufficiency of the facts distorts the rule from its intended purpose of determining legal sufficiency.[105]

c. Heightened Pleading Requirements in Civil Rights Cases Violate Supreme Court Precedent

Finally, heightened pleading requirements are incongruous with Supreme Court precedent. The Court in *Conley* held that under the Federal Rules of Civil Procedure, a plaintiff does not need to set forth specific facts to support its general allegations.[106] Heightened pleading requirements, which require the plaintiff to set forth specific facts in support of her general allegations of discrimination, patently violate this Supreme Court precedent.[107]

8(a))(citing U. S. v. Gustin-Bacon Div., Certainteed Prods. Corp., 426 F.2d 539 (10th Cir. 1970)).

100. Blaze, *supra* note 67, at 968–69.

101. Marcus, *supra* note 12, at 469.

102. Blaze, *supra* note 67, at 967 (noting that according to the forms appended to the Rules, a plaintiff meets the particularity requirement for a fraudulent conveyance claim by stating that, "Defendant C.D. on or about conveyed all his property, to defendant E.F. for the purpose of defrauding the plaintiff."). The type of particularity required by 9(b) "falls far short of providing a court with enough facts to assess the validity of the claim as required under the civil rights pleading requirement." *Id.*

103. Marcus, *supra* note 12, at 470.

104. Blaze, *supra* note 67, at 961.

105. *Id.* at 963.

106. Conley v. Gibson, 355 U.S. 41, 47 (1957).

107. Hamabe, *supra* note 12, at 133; Marcus, *supra* note 12, at 463.

2. The Arbitrariness of Heightened Pleading Requirements Creates the Appearance of Unfairness, Undermines the Consistency of the Law and Makes §§ 1981 and 1982 Actions Almost Impossible to Plead

The dissent in *Rotolo*, which was one of the Third Circuit cases that required factual allegations in civil rights cases, was troubled that the majority's decision was influenced by their hostility to the substantive right at issue.[108] The standards should not vary because an action is disfavored. Even a proponent of an expanded role for 12(b)(6) motions would have to be troubled by its ad hoc application to civil rights cases.[109]

The heightened pleading requirement in claims brought under the Civil Rights Act of 1866 adds to the inconsistency of the judicial system and further delegitimates it. Not every court has accepted these heightened requirements; the shift to heightened pleading requirements has been a courtroom-by-courtroom decision.[110] This piecemeal application makes it difficult for any plaintiff to know what a particular court will require, unless the judge presiding over that district court has previously ruled on this issue. Moreover, even when one knows that a showing of factual specificity will be required, the question of how many facts will be sufficient under this nebulous standard is difficult for a plaintiff to determine.[111] The obvious answer to this dilemma is to plead as many facts as possible. But, therein lies the rub.

---

108. *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 925 (3d Cir. 1976) (Gibbons, Circuit Judge, dissenting).

109. Louis, *supra* note 12, at 1023. Louis favors the early interception of more meritless or unprovable claims or defenses. *See id.* at 1033. He notes, however, that "many recent opinions granting motions to dismiss or for summary judgment are dangerously slanted in the direction of aggressive interception, ignore or fail to mention the countervailing considerations that formerly commanded the opposite result, and in some cases are alarmingly redolent of supposedly repudiated Code rhetoric." *Id.* at 1036. Finally, Louis is troubled by the fact that courts have arbitrarily chosen actions that they disfavor and subject those actions to this treatment. *See id.* at 1037.

110. *See supra* notes 76–80.

111. *Compare* Brown v. Oneonta, 221 F.3d 329 (2d Cir. 1999) (dismissing §§ 1981 and 1983 complaint for failing to state a claim upon which relief can be granted because the complaint did not allege facts to support discrimination), Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) ("'Conclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.'") (alteration in original) (quoting Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977) *and* White v. Florida Highway Patrol, 928 F. Supp. 1153, 1156 (M.D. Fla. 1996) ("In a civil rights action, more than mere conclusory allegations are required; a complaint will be dismissed where allegations are vague and conclusory."); *with* Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1118 (D.C. Cir. 2000) (holding that heightened

The very nature of claims brought under §§ 1981 and 1982 makes it difficult for the average plaintiff to have access to many of the facts prior to discovery. "In civil rights cases, the very facts that the courts require plaintiffs to set forth in the complaint are often in the exclusive control of the defendants."[112] With this standard, courts, in effect, require §§ 1981 and 1982 litigants to gather information before discovery. Even if a plaintiff does engage in a pre-complaint investigation, evidence of discriminatory intent may be so well concealed that if it could ever be unearthed, a plaintiff would certainly need the tools of discovery to do so.[113] Dismissing cases that often involve clandestine wrongdoing before discovery is, quite simply, unjust.[114] One judge summarized this Catch-22 perfectly: "[N]o information until litigation: no litigation without information."[115]

This system discourages the filing of civil rights complaints.[116] Plaintiffs have pointed out the unfairness of the pleading requirements and that they cannot possibly meet the requirements before discovery, but these arguments often fall on deaf ears.[117] If courts are going to require showings of intent and purpose in §§ 1981 and 1982 actions, these questions should be resolved after, and not before, discovery.[118] Unfortunately, "heightened pleading requirements make discovery a luxury in most civil rights cases"[119] and often end the civil rights case "before it has begun."[120]

---

pleading requirements violate Rule 8 and can not be used to dispose of cases about which judges are skeptical), *and* Cloud v. Community Works, et al., No. 97-1796, 1998 U.S. App. LEXIS 3257 (1st Cir. 1998), *cert. denied*, 2000 U.S. LEXIS 5774 (Oct. 2, 2000).

112. Blaze, *supra* note 67, at 962.

113. Marcus, *supra* note 12, at 468.

114. Louis, *supra* note 12, at 1038.

115. Baumann et al., *supra* note 4, at 252 (quoting Johnson *ex rel* Johnson v. United States, 788 F.2d 845, 856 (2d Cir.) (Pratt, J., dissenting)).

116. Yamamoto, *supra* note 44, at 372.

117. In Muhammad v. State, No. CIV. A. 99-3742, CIV A. 99-2694, 2000 U.S. Dist. Lexis 15260, at *18 (E.D. La. Oct. 6, 2000) the plaintiff, in response to a request to provide more specific allegations, asked the court for latitude to present evidence obtained through discovery. The court still dismissed the case because, among other reasons, the allegations of race discrimination were not supported by fact. *Id.* at *22. Likewise, in Harary v. Allstate Insurance Co., 983 F. Supp. 95, 97 (E.D.N.Y. 1997), the plaintiff stated that she could not comply with a request to amend her complaint because she would be unable to support her claims with specific facts until she had been allowed discovery. The court ignored the plaintiff's argument and dismissed the complaint for failure to state sufficient facts to support her claim. *Id.* at 99–100.

118. Hamabe, *supra* note 12, at 177.

119. Bladich, *supra* note 98, at 843.

120. *Id.* at 851.

D. *Hypothetical Cases of Discrimination*

To explore the effects of heightened pleading requirements, I have created three hypothetical cases of discrimination. Each of these Hypotheticals involve a plaintiff who wishes to bring a civil rights suit against a seller of goods. All of the Hypotheticals revolve around the same core set of facts. Your client purchased goods at a number of stores. She was carrying her bags with her and shopping for additional items at a department store. While taking some goods she selected up to the cash register, she was stopped by security guards and searched. The search occurred in the middle of the store in front of a crowd of other shoppers. Your client believes that she was stopped because of her race: She was one of the few women of color in the store at that time, and the store did not stop any of the White customers who were behaving in an identical fashion to herself. In addition, the security officers treated her with absolute contempt throughout the incident. Dismayed by the events, your client dropped all the store's merchandise and immediately left the premises. Each of the three Hypotheticals have minor variations to these core set of facts. They are as follows:

Hypothetical One (Overt Discriminators): Upon concluding the search, the security guards informed your client that she was searched because it was customary at the store to search Blacks who had bags from other stores and large quantities of merchandise in their hands.

Hypothetical Two (Clandestine Wrongdoing): Unbeknownst to yourself and your client, the store had an internal training memorandum instructing security personnel to stop all Blacks carrying bags and large amounts of store merchandise. In addition, John Doe, who was a former security guard, was so disgusted by the racist practices of other security guards that he left the store. If he were to be contacted regarding any lawsuit against the store, he would be more than happy to testify about the store's practices.

Hypothetical Three (The Unconscious Discriminators/False Positives): The store's internal training memorandum instructed that a person is not to be stopped on the basis of race. Nevertheless, an examination of security incident reports would show that Blacks were not only disproportionately stopped by security offices, but that they constituted an inordinately large number of people who had been falsely detained on suspicion of shoplifting.

Despite the fact that all of the plaintiffs had been discriminated against, only the plaintiff from Hypothetical One would be able to survive a motion to dismiss in most courtrooms. Barring an extraordinary bit of luck, none of the other prospective plaintiffs would be able to gather the facts that would enable them to allege facts in support of their allegations of discrimination. Without the ability to demand a document

production, the plaintiff from Hypothetical Two would be required to depend on the kindness of someone in possession of this smoking gun to turn it over to her. Likewise, without the ability to request a list of former employees, the plaintiff from Hypothetical Two would be unable to contact the guard who would be willing to testify on her behalf, and absent the guard catching word of this suit, he would not contact the plaintiff. Finally, without the ability to request all of the incident reports from the last several years, the plaintiff from Hypothetical Three would be unable to piece together the statistical analysis which could serve as evidence of discriminatory intent. In short, the three prospective plaintiffs have had their federal civil rights violated and are left without recourse, and this result was reached, in part, by the courts' application of supposedly neutral procedural law.

Given heightened pleading requirements blatant disregard for the letter and spirit of the Rules, it is no wonder that the requirements are viewed as undermining the law.[121] Indeed, some argue that the imposition of heightened pleading requirements is a sheer act of lawlessness by the courts.[122] Are the courts at least justified in their lawlessness? That is, are their proffered reasons for imposing heightened pleading requirements legitimate? Should we treat §§ 1981 and 1982 claims as suspicious? In the end, have courts reached the correct result, by illegitimate means? I turn to these questions in the next Part.

III. CONTEXT: NEITHER THE FEDERAL JUDICIAL CASELOAD NOR THE STATE OF RACE IN CONSUMER AMERICA COULD JUSTIFY HEIGHTENED PLEADING REQUIREMENTS

To answer the questions from the end of the last Part, we must return to courts' reasons for imposing heightened pleading requirements in civil rights cases and see if these reasons have any basis in fact. As was discussed in the previous section, courts attempt to justify heightened pleading requirements on the basis of "objective" and subjective reasons. The objective reasons are: (1) The boom in federal court filings requires that the court take action to preserve the integrity of the judicial system; and (2) Civil Rights cases are time consuming and difficult to manage. The subjective reason is that many courts view most, if not all, of civil

---

121. *See* Tobias, *supra* note 43, at 299–300.

122. *See* Carroll G. Robinson, Johnson v. Jones: *The Heightened Pleading Bias*, NBA NAT'L B.A. MAG, Oct. 9, 1995, at 11 ("[I]t could be argued cogently that in disregarding the Supreme Court's promulgated and Congressional approved Rule 8 by demanding fact pleading of certain plaintiffs, the subject matter federal courts were acting lawlessly, or surely beyond their constitutional authority; a matter of no small consequence.") (quoting Paul McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV 19, 37 (1994)).

rights claims to be frivolous. I explore the validity of each of these justifications in turn.

A. *The Litigation Boom Justification*

Courts commonly claim heightened pleading standards must be implemented to curb the so-called "litigation boom." Many argue that reports of this litigation boom are more myth than reality.[123] This myth is predicated on the increase of federal court filings in the 1960s and 1970s.[124] Marc Galanter studied this increase and found five substantive fields of law largely accounted for the increase.[125] Galanter identifies prisoner petitions and civil rights cases as two of these substantive fields, but notes that these two account for a relatively small proportion of the overall increase in comparison to other substantive fields.[126] Galanter treats prisoner petitions as being distinct from civil rights cases.[127]

Both prisoner petitions and civil rights cases share 42 U.S.C.A. § 1983 as a cause of action. Including prisoner suits brought under § 1983, one study found that civil rights cases constituted 18% of the total cases commenced in federal courts the year examined.[128] In the 1960s, civil rights cases accounted for about two percent of the docket.[129] This surge in civil rights cases, however, can be accounted for, in large part, by the increase in prisoner suits.[130]

---

123. See Marcus, *supra* note 12, at 492.

124. *Id.* at 441.

125. Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 17 (1986). Galanter argues that "five categories of cases—recovery of overpayments, social security cases, prisoner petitions, torts, and civil rights cases—account for almost three-quarters of the entire increase in filings." *Id.*

126. Galanter states that, "[h]alf of the total increase is accounted for by two giant increases—recovery cases and social security cases. Each is the result of deliberate and calculated official policy—to recover overpayments of veterans' benefits by litigation and to curtail disability benefits by summarily removing beneficiaries from the rolls." *Id.*

127. *See id.* at 18 (stating that "[d]isputing about discrimination has a very distinct profile compared to disputing other matters.").

128. Blaze, *supra* note 67, at 936.

129. *Id.*

130. Roberts reports that of the nearly 25,000 civil rights actions brought in the 12 month period ending in June of 1979, 11,783 of these cases were prisoner civil rights actions. Roberts, *supra* note 59, at 417–18 n.17; *See also* Blaze, *supra* note 67, at 936 ("Actions brought by prisoners, primarily pursuant to 42 U.S.C. § 1983, account in large part for the dramatic rise in the volume of civil rights litigation."). Interestingly, prisoner suits have not increased because prisoners have become more litigious; rather, the increase in prisoner suits can be directly attributed to the increase in the prison population: Prisoner filings increased by 61%, but the prison population grew 74%. "The number of petitions

Courts cannot use this increase in the number of civil rights cases filed to justify the imposition of heightened pleading requirements for four reasons. First, no value neutral justification, such as the legal complexity of the issues involved, exists for singling out civil rights claims for special treatment, especially where other fields of law constitute a larger part of the federal docket.[131]

Second, even if judges were concerned with the growth of civil rights claims vis-à-vis other substantive fields, it would be wholly irrational to change the pleading requirement for *all* types of civil rights cases when we know that the increase in civil rights cases has largely been driven by the increase in prisoner suits.[132] While prisoner suits and some civil rights actions might share § 1983 in common, the contested actions in civil rights cases involving race differ radically from the actions in civil rights cases involving prison treatment. Treating the two types of actions the same does not have a strong, practical basis.

Third, judges cannot punish civil rights plaintiffs for filing more cases when that is what Congress wanted private citizens to do. Congress intended that citizens use private enforcement of civil rights actions, such as the Civil Rights Act of 1866, to accomplish the goals of the civil rights movement.[133] As we began to integrate in the 1960s and 1970s (which marked the beginning of the litigation boom), there was greater interracial contact in schools, the workplace, and the market place. With greater interaction came an increased opportunity for discriminatory behavior: an employer who has only hired White workers will not be the subject of a suit alleging disparate racial treatment in the workplace.[134] As we began to confront our country's racist history, Congress empowered aggrieved citizens to act as private attorney generals and remedy many of the harms they were suffering by passing Acts, such as the Civil Rights Act of 1964.

---

per 1,000 prisoners actually dropped from 73.4 per 1,000 in 1975 to 67.1 per 1,000 in 1984." Galanter, *supra* note 125, at 18.

131. *See supra* note 127 and accompanying text. Another author who studied this issue found that during the fiscal year ending June 30, 1987, civil rights cases constituted 18% of the docket, but contract cases constituted 19% of the docket. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85,109–10 (1994).

132. Moreover, courts might be hard pressed to prove that they need special pleading requirements to get rid of these prisoner suits. One study of the cases in the Federal District Court for the District of Arizona found that "defendants never even answer more than two-thirds of the prisoner civil rights complaints. Few inmate plaintiffs, less than ten percent, request discovery and even fewer successfully obtain it." Blaze, *supra* note 67, at 975.

133. Marcus, *supra* note 12, at 471–72.

134. Galanter, *supra* note 125, at 18.

It would be odd to punish civil rights plaintiffs for enforcing their rights as Congress had intended.[135]

Finally, courts cannot use the litigation boom to justify heightened pleading requirements because the rationale is pretextual—courts started to impose heightened pleading requirements before the increase in filings in federal courts.[136] Even if the litigation boom justification were legitimate, it would at best be a post hoc justification for actions undertaken for other reasons.

B. *The Time-Savings/Management Justification*

The other objective argument advanced by courts is that these cases are difficult to manage because they are so time intensive; therefore, heightened pleading requirements should be used to prevent these cases from clogging up the court's calendar. While this justification has the feel of an objective argument that could justify singling out civil rights claims, it fails to recognize the reality of these claims. Most courts give a civil rights complainant at least one opportunity to amend her complaint.[137] In the time spent arguing over whether the complaint has the requisite specificity and amending it, a plaintiff could have been granted limited discovery to determine whether the defendant's records help to establish the existence of intentional discrimination.[138] Heightened pleading requirements do not clear the calendar more quickly than a ruling granting limited discovery, but they do result in more cases being dismissed.[139]

---

135. In fact, evidence exists that civil rights claims are still being underreported. A study in the 1980's found that civil rights grievances were, on average, much less likely to result in litigation than other types of grievances. Galanter, *supra* note 125, at 19. This under-litigation is most likely due, in part, to difficulties such as the reality that these cases are often litigated by pro bono attorneys who cannot bear the risk of Rule 11 sanctions in addition to not having their time compensated. Yamamoto, *supra* note 44, at 370.

136. *See* Blaze, *supra* note 67, at 948 ("In the early 1960's, even prior to the litigation deluge, courts began to dismiss civil rights complaints for failure to allege specific facts in support of conclusory allegations . . . .")

137. Wingate, *supra* note 53, at 684.

138. Blaze, *supra* note 67, at 982. Blaze notes that,

> applying [heightened pleading requirements] delays, rather than expedites, resolution and disposition of claims, thereby impeding the efficiency of other procedures. Courts normally do not dismiss complaints for failure to meet the [heightened pleading requirements]without affording the plaintiff an opportunity to amend. Numerous motions, responses and continued court involvement result.

Id. at 989–90.

139. "The requirement of greater factual specificity is wholly unnecessary and ineffective in achieving its goal [of reducing the burden on the federal caseload]. The rule is

C. *The Inherently "Frivolous" Rationale*

Given that neither the litigation boom nor the timeliness/management concern can justify heightened pleading requirements, one must conclude that "the underlying rationale that courts have articulated [for heightened pleading requirements] remains the same: The vast majority of civil rights actions are frivolous."[140] Courts adhere to this belief that civil rights claims are largely, if not wholly, frivolous despite the fact no proof exists that civil rights lawsuits are more frivolous than any other type of lawsuit.[141] Because of this belief, courts have improperly used procedure, rather than the merits, to dispose of these claims.[142] In disposing of these cases in this matter, courts have run the risk of dismissing meritorious cases, such as Hypotheticals Two and Three, along with the "frivolous" cases.

Assuming that judges support the substantive rights articulated in §§ 1981 and 1982, such an attitude can only be justified if the judges believe that the number of meritorious claims that cannot meet the heightened pleading requirements pales in comparison to the number of frivolous claims. In order to hold this belief that almost all of these cases are frivolous, a judge would have to believe it is not very likely that these plaintiffs were the subject of discrimination in the marketplace. The facts of race in America do not support such a belief.

As ashamed as we might be to admit this, studies have shown that race impacts most decisionmaking most of the time.[143] Some scholars have suggested that racial stereotypes have become part of our cognitive process.[144] The stereotypes our minds create are irrational and quite often based on illusory correlations.[145] Nonetheless, our minds still use them to deal with the massive amounts of information we must ingest on a day-to-day basis.[146] People are unaware of these "short-cuts" their brains have

---

simply a reflection of a widespread judicial assumption that most, if not all, civil rights suits lack merit." *Id.* at 940.

140. *Id.* at 960.

141. Brooks, *supra* note 131, at 109–10.

142. *Id.* at 105–06.

143. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 985 (1993) (discussing social science literature and studies that indicate the effect of race on White decision-making).

144. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995) (reporting on the work of cognitive scientists who have found that people use race-based stereotypes to order the massive amount of information around them).

145. *Id.* at 1195.

146. *Id.* at 1188.

adopted,[147] so it is fair to say this type of racism is cognitive, and not motivational, in nature.[148]

Other scholars have taken a more psychoanalytic approach and argued that internal defensive mechanisms have repressed our racism. Under this theory, people's minds deal with their guilt for holding an unpopular belief by denying it or refusing to consciously recognize it.[149] Our culture is saturated with racist beliefs that we cannot help but to internalize. Despite the fact that racism is all around us, a societal ethic has developed that it is wrong to be racist.[150] People deal with this ethic by repressing their racist beliefs.[151] But, even when repressed, these racist beliefs unconsciously manifest themselves in people's decisionmaking processes.[152]

Whether one finds the cognitive approach or the psychoanalytic approach more persuasive, evidence abounds that people do not act in conformity with the values they believe that they hold.

For instance in 1972, 97% of adult White males stated that they believed Blacks should have as good a chance as White people to get any kind of job, but surveys and experiments have shown that the number of Whites refraining from discrimination is not nearly that high.[153] Audits, in which researchers paired a White applicant with a nearly identical Black applicant, showed highly skewed results—White applicants were three times as likely to be offered a job, and nearly twice as likely to be treated favorably during the interview.[154]

This phenomenon is not confined to the employment context. Studies of both children and adults have demonstrated that by changing the race of a person in a picture or a video from White to Black, the White viewer's characterization of that person could change from playful and friendly to threatening and violent.[155] Faced with studies such as the aforementioned, one scholar concluded that "while few whites admit to holding overtly racist principles, particularly in the area of equal

147. *Id.*

148. *Id.* at 1164.

149. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

150. *Id.* at 335.

151. *Id.* at 336.

152. *Id.*

153. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 904–05 (1993) (citing a 1972 study by the National Origin Research Center at the University of Chicago).

154. *Id.* at 915.

155. Krieger, *supra* note 144, at 1202–03.

employment opportunity, racism remains a potent force in [W]hite attitudes about African-Americans."[156]

In addition to unconscious racism, conscious racism still infects the marketplace.[157] Blacks are often viewed and treated as potential shoplifters.[158] For this reason, stores use their security and surveillance to target Black shoppers.[159] "In stores across this country, minority shoppers are under suspicion simply because of the color of their skin."[160]

In addition to targeting Blacks as suspected shoplifters, many White business owners have problems with Blacks being in their stores. Some assume that even if the Black shopper will purchase goods instead of steal them, the Black shopper has probably not earned the money to purchase the goods honestly.[161] This belief that Blacks have not come by their money honestly, coupled with the belief that Blacks are likely to steal, leads some to conclude that Blacks "are not worthy to buy in the marketplace."[162]

These conscious and unconscious beliefs directly and quantifiably shape one's experience as a Black shopper. Businesses that treat the Black consumer poorly run the gamut of the consumer world—retail establishments, banks, airlines, and movie theatres are just several examples.[163]

One of the best documented examples of a quantifiable impact of discrimination is a study that was done on the different prices offered to White and Black shoppers by car dealerships. A 1991 study had shown that "[B]lack male testers were asked to pay more than twice the markup of [W]hite male testers; and [B]lack female testers were asked to pay more than three times the markup of [W]hite male testers."[164] Subsequent researchers attempted to duplicate the result of this 1991 study by sending

---

156. Oppenheimer, *supra* note 153, at 915.

157. This Note focuses on the treatment of Blacks in the marketplace. I do not, however, believe that Blacks are the only group discriminated against in the marketplace. Instead, my focus reflects the reality that the overwhelming majority of scholars who have addressed the issue of discrimination in the marketplace have focused on Blacks. Not surprisingly, however, anecdotal evidence and some scholarly work suggest that discrimination affects all people of color. *See, e.g.*, Theresa A. Martinez, *Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender*, 1994 UTAH L. REV. 193 (1994).

158. Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 148 (1994).

159. *Id.* at 152.

160. James L. Fennessy, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549, 549 (1999) (quoting *ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998)).

161. *Austin*, *supra* note 158, at 151.

162. Martinez, *supra* note 157, at 195.

163. Austin, *supra* note 158, at 150.

164. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 109 (1995).

pairs of consumers who were nearly identical in every aspect, except for race, to car dealerships. This second study confirmed that Black male and female consumers were asked to pay more for new cars than their White male counterparts.[165] It showed that the initial offer made to Black males was $962 higher than the initial offer made to White males; the final offer was $1132 higher.[166] This disparity meant that "the *initial* offer [W]hite male testers received was lower than the *final* offer 43.5% of [non-White] males received. That is, without any negotiating at all 43% of White males obtained a better offer than their counterparts achieved after bargaining for an average of forty-five minutes."[167]

Perhaps the most interesting conclusion of the study was that the behavior of the car dealers was consistent with the theory that part of the reason that they offered the higher prices was that they "disproportionately [valued] profits extracted from black males."[168] That is, car dealers acted, in part, because they derived joy out of sticking Black consumers with a bad deal.

One can see that a judge cannot be viewed as justified in presuming that a §§ 1981 and 1982 suit would be frivolous. We live in a raced society, and that racism has infected the marketplace. We have seen that: Blacks are under surveillance when they shop; Blacks are harassed when they shop; and Blacks are given the proverbial "bum deal" when they shop. Despite widely reported anecdotal and empirical evidence that racism, whether unconscious or conscious, is alive and well in the marketplace, many judges have stamped §§ 1981 and 1982 actions with a presumption of frivolousness. For whatever reason, many judges seem to believe that the government has done enough for people of color.[169]

IV. THE INTERSECTION OF SUBSTANTIVE LAW, PROCEDURE, AND SOCIAL CONTEXT: THE EFFECT OF THE LAW UPON VICTIMS AND WHERE WE CAN GO FROM HERE

In this Part, I explain how the substantive law, procedure, and social context interact to make the victim of discrimination feel powerless to confront the discrimination that surrounds her. I argue that courts must, once again, be made a forum in which people of color can voice their complaints. I conclude that this will not happen on a consistent basis

---

165. *Id.* at 109–10.

166. *Id.* at 116.

167. *Id.* at 119–20.

168. *Id.* at 132.

169. *See* Judith Olans Brown et al., *Some Thoughts about Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1489–90 (1997).

until heightened pleading requirements are eliminated by the Supreme Court. I note that ample precedent exists for this type of ruling from the Supreme Court. Next, I anticipate counter-arguments that eliminating heightened pleading requirements will result in an influx of "meritless" civil rights claims and respond to these arguments. Finally, I conclude this part by summarizing the importance of returning the discovery process to civil rights plaintiffs.

A. *The Effect of the Substantive Law and the "Procedural" Law of §§ 1981 and 1982 on Victims of Discrimination*

The substantive law of §§ 1981 and 1982, coupled with the procedural law surrounding the statutes, conveys two messages to people who believe that they have been victims of discrimination. First, your grievance will not be remedied unless you can prove that the transgressors intentionally discriminated against you. And, second, you will not even be allowed to explore your claim through adjudication, unless you have evidence at the outset that the prospective defendant discriminated against you because of your race.

The expressive message of the laws has been heard, and the victims of discrimination in the marketplace do not turn towards the litigation process to seek justice. A near majority of Blacks feel that even complaining informally about disrespectful treatment in the marketplace is a waste of time.[170] And, as was discussed above, the number of informal civil rights grievances that result in full-blown litigation are disproportionately low.[171] The low number of claims of discrimination that actually result in litigation should not be surprising from an economic standpoint: litigation of claims brought under §§ 1981 and 1982 can be costly and time-consuming.[172] Finally, the sheer frequency of incidences when people of color are discriminated against in the marketplace, results in a feeling of powerlessness and an attitude that this type of discrimination is somehow normal.[173]

Despite all of these disincentives and obstacles in §§ 1981 and 1982 litigation, claims of discriminatory treatment while shopping are not uncommon.[174] Given all of the disincentives to civil rights litigation and all

---

170. Austin, *supra* note 158, at 154 n.26. (citing data that 48% of African Americans surveyed viewed complaining about poor treatment as being a waste of time).

171. *See supra* note 121 and accompanying text.

172. Ambinder, *supra* note 15, at 347.

173. *Id.*

174. *E.g.* Allen v. Columbia Mall, Inc., 47 F. Supp. 2d 605 (D. Md. 1999) (alleging that two African American teenagers were unlawfully detained and searched in the middle of the mall based on suspicions of shoplifting because of their race); Allen v. Montgomery Ward & Co., Civ. No. 1:98CV7, 1999 U.S. Dist. Lexis 5640 (W.D.N.C. March 3, 1999) (plaintiff claiming that she was stopped in the store's parking lot and asked to return to the

of the aforementioned studies that show that civil rights claims are under-litigated, the number of discriminatory-treatment-while-shopping claims must be viewed as speaking to the pervasiveness of the problem.

B. *The Need to Reinstate Courts as Viable Forums for §§ 1981 and 1982 Litigation*

In order to achieve the stated goals of §§ 1981 and 1982, litigation in this field must be made feasible again. The battle for equality has been a battle that has been waged predominately in the courtroom. "For people of color, litigation has always been the most essential governmental resource in the protracted struggle for racial equality in America."[175] Private litigation against one culpable individual or institution can cause other rights violators to reassess the propriety and legality of their actions.[176] The Court's affirmation of the rights articulated in §§ 1981 and 1982 can give hope to people of color that equality rights are not hollow. Litigation provides a context for sharing common struggles publicly.[177] This public forum for the common struggle can serve as a rallying point to make society at large aware of a problem and to challenge the status quo.[178] Thus, civil rights litigation has the ability to empower subjugated groups.[179]

We need to once again make courts a forum in which people of color can negotiate about the meaning of public values.[180] In the context of §§ 1981 and 1982 claims, this goal means that we must expose and document the disparate treatment to which people of color, and in particular Blacks, are subjected when they enter the consumer world.[181] Victims must be able to use §§ 1981 and 1982 to get compensatory and

---

store for questioning about shoplifting because of her race); Ackerman v. Food-4-Less, Civ. No. 98-CV-1011, 1998 U.S. Dist. Lexis 8813 (E.D. Pa. June 9, 1998) (plaintiff claiming that her being physically detained because she was suspected of shoplifting a Spanish spice powder was racially motivated); Ackaa v. Tommy Hilfiger Co., No. CIV.A. 96-8262, 1998 WL 136522 (E.D. Pa. March 24, 1998) (plaintiffs alleging that they were followed in a department store and falsely detained on suspicion of shoplifting because of their race); Hampton v. Dillard Dep't Stores, Inc., 985 F. Supp. 1055 (D. Kan. 1997) (plaintiff claiming that she had been falsely detained by a department store's employee on suspicion of shoplifting because of her race); Lewis v. J.C. Penney Co., 948 F. Supp. 367 (D. Del. 1996) (plaintiff claiming that she had been falsely detained for shoplifting because of her race); Battle v. Dayton-Hudson Corp., 399 F. Supp. 900, 902 (D. Minn. 1975) (plaintiffs alleging that they had been falsely detained for shoplifting because of their race).

175. Brooks, *supra* note 131, at 108.

176. Galanter, *supra* note 125, at 33.

177. Yamamoto, *supra* note 44, at 405.

178. Galanter, *supra* note 125, at 34.

179. Yamamoto, *supra* note 44, at 404.

180. *See id.* at 408.

181. *See* Austin, *supra* note 158, at 173.

punitive damages.[182] Furthermore, §§ 1981 and 1982 plaintiffs must seek large damages so that the message can be clearly sent to sellers of goods and services in the consumer world.[183]

To date, these types of cases are few and far between. Two of the better documented cases in which large awards were granted for false accusations of shoplifting based on race are *Jackson v. Eddie Bauer, Inc.*[184] and *Hampton v. Dilliard Dep't Stores, Inc.*[185] In *Jackson*, the jury awarded one million dollars in damages when three young Black men were falsely accused of shoplifting, defamed, detained, and generally mistreated.[186] In *Hampton*, the plaintiffs received 1,156,000 dollars when a jury found that they had been falsely accused of shoplifting and detained by a security guard who had a history of discriminating against Black shoppers.[187]

Until lawsuits, such as the aforementioned, become viewed as ordinary rather than as anomalies, rights violators will continue to engage in discriminatory practices. Two high-profile incidents illustrate this point. In anticipation of litigation against taxicab companies in the District of Columbia area, the Washington Lawyers' Committee for Civil Rights Under Law conducted a study of taxicab practices. This study found that Blacks were more likely to be passed by than Whites when seeking service and that it took taxis longer to stop for Blacks.[188] Despite a high profile settlement, a study done after the suit revealed that the rate at which Blacks were passed over had actually increased slightly.[189] Sellers of goods and services need to realize that large damages will likely be the result of discriminatory behavior; as opposed to the status quo, where discriminatory behavior is very unlikely to result in large damages.

The same story can be told about the stopping of Black motorists along the Interstate 95 corridor: even after state troopers were told that they were being monitored because of the radically disproportionate number of Black drivers who were pulled over, the troopers continued to stop Blacks at the same alarming rates.[190]

---

182. *See* Ambinder, *supra* note 15, at 376–77 (discussing the use of §§ 1981 and 1982 compensatory and punitive damages to document the discriminatory practices of taxicab drivers).

183. *See id.* at 346.

184. JVR No. 209761, 1997 WL 802274, (LRP Jury October 1997).

185. 18 F. Supp. 2d 1256 (D. Kan. 1998).

186. *See* Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C.L. REV. 717, 723 (1999).

187. *Hampton*, 18 F. Supp. 2d at 1261.

188. Ambinder, *supra* note 15, at 359–60.(citing STANLEY E. RIDLEY ET AL., TAXI SERVICE IN THE DISTRICT OF COLUMBIA: IS IT INFLUENCED BY THE PATRONS' RACE AND DESTINATION? (1989)) (detailing report prepared for the Washington Lawyer's Committee for Civil Rights Under Law).

189. *Id.* at 363.

190. Russell, *supra* note 184, at 727.

C. *So Long as Heightened Pleading Requirements Exist, Courts Cannot Adequately Fulfill Their Role as Forums For People Whose Rights Have Been Violated*

Unfortunately, the required type of documentation and punishment will not occur so long as heightened pleading requirements exist for §§ 1981 and 1982 actions. Courts must give civil rights litigants the same opportunity to present the merits of their claims that they give to a negligence plaintiff, or practically any other type of plaintiff for that matter.[191] Eliminating heightened pleading requirements will not bog the federal docket down with "meritless," civil rights claims. In the end, nothing can justify withholding discovery from plaintiffs who claim to have had their civil rights violated.

1. The Supreme Court Should Eliminate Heightened Pleading Requirements for § 1981 Claims, § 1982 Claims, and All Other Civil Rights Actions

Given the reticence of several Circuits to do away with these heightened pleading requirements, the Supreme Court will likely have to intervene to remedy the problem. This type of intervention is not unprecedented. In Civil Racketeer Influenced and Corrupt Organization (RICO) cases, district courts and several circuits created various pleading requirements that did not appear on the face of the statute.[192] The Court has held that a complaint could not be deemed insufficient for failure to allege any of these supposed factual requirements.[193] In two cases addressing pleading requirements in RICO suits, the Court explained that lower courts could not create special pleading rules simply because they did not like the types of claims that were being brought under the statute.[194] Instead, only Congress can correct supposed shortcomings of the

---

191. Marcus notes that given the import of civil rights claims, it is questionable for courts to treat them less favorably: "It would surely be odd to treat the above claims as less favored than ordinary automobile torts that find their way into federal court due to diversity jurisdiction. Yet auto accident cases are clearly, under Form 9, subject to minimal scrutiny at the pleading stage." Marcus, *supra* note 12, at 473.

192. *See e.g.*, Sedima, S.P.R.L. v. Imrex Company, Inc., 473 U.S. 479, 484–86 (1985) (reviewing the actions of the Second Circuit, which had instituted rules that a RICO plaintiff must plead that the defendant had been convicted of the predicate RICO Act and that the plaintiff had suffered some "RICO-type injury.").

193. *Id.* at 500.

194. *Id.* at 499, 500; *Am. Nat'l Bank and Trust Co. of Chicago v. Haroco*, 473 U.S. 606, 608–09 (1985).

substantive law.[195] In short, the Court held that procedural tools cannot be used to erode the substantive law.[196]

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit[197] provides another example of the Supreme Court disallowing judicially created pleading requirements.[198] In *Leatherman*, the U.S. Supreme Court held that lower courts could not use heightened pleading requirements in 42 U.S.C. § 1983 actions against municipalities, because such requirements could not be squared with the pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure.[199] The Court noted that Rule 9(b) provided two specific instances in which heightened pleading requirements would be used and that § 1983 actions alleging municipal liability do not fall under either one of those specific categories.[200]

Unfortunately, although not surprisingly, lower courts have read *Leatherman* narrowly. Many courts have simply read the case as invalidating heightened pleading requirements in § 1983 actions against municipalities and have not extended its logic to other types of civil rights cases.[201] Every case requiring heightened pleading requirements in §§ 1981 and 1982 actions, and every other type of civil rights case mentioned in this Note, are still good law, even after *Leatherman*.

It is time for the Supreme Court to speak out clearly and loudly on this issue.[202] The Court needs to grant certiorari to a §§ 1981 or 1982 complaint that has been dismissed because of heightened pleading requirements. The Court should simply apply *Leatherman* and find that

---

195. *Sedima*, 473 U.S. at 499–500.

196. *See* Marcus, *supra* note 12, at 460–62.

197. 507 U.S. 163 (1993).

198. *Id.*

199. *Id.* at 168.

200. *See id.*

201. Brooks, *supra* note 131, at 106–07. *See also*, Brown v. Oneonta, 221 F.3d 329, 340–41 (2d Cir. 1999) (dismissing §§ 1981 and 1983 complaint for failing to state a claim upon which relief can be granted because the complaint did not allege facts to support discrimination); Muhammad v. State, No Civ. A. 99-3742, 2000 WL 1511181 (E.D. La. Oct. 6, 2000) (holding that complaint failed to state a claim upon which relief can be granted because the allegations of discrimination were conclusory and not supported by the facts); White v. Florida Highway Patrol, 928 F. Supp. 1153, 1156 (M.D. Fla. 1996) ("In a civil rights action, more than mere conclusory allegations are required; a complaint will be dismissed where allegations are vague and conclusory.")

202. The Supreme Court has just granted a petition for a writ of certiorari in Swierkiewicz v. Sorema, No. 00-9010, 2001 WL 246077 (2d Cir. Mar. 12, 2001). Swierkiewicz v. Sorema, 2001 U.S. App. LEXIS 3837 at *5 (Sep. 25, 2001). In *Swierkiewicz*, the Second Circuit, in an unpublished opinion, affirmed the district court's decision to dismiss a complaint because the plaintiff failed to allege "circumstances that give support to an inference of discrimination." *Id.* Although it is a Title VII case, the case will give the Supreme Court an opportunity to review pleading requirements in civil rights actions.

heightened pleading requirements in *any* civil rights action cannot be squared with the plain language of Rule 8(a)(2).

2. Eliminating Heightened Pleading Requirements in Civil Rights Cases Will Not Open the Floodgates to Meritless §§ 1981 and 1982 Claims

Some courts and commentators have argued that eliminating heightened pleading requirements will open the floodgates of civil rights litigation and that the federal docket will drown under the deluge of claims, many of which will be frivolous. These dire predictions seem more myth than reality, and the Federal Rules of Civil Procedure are equipped to handle any frivolous claims that are filed.

If courts are concerned that a factual examination will not only fail to bear out the plaintiff's claim, but will also be unduly burdensome to the defendant, the court can use its broad managerial powers under Rule 16 to have limited discovery into whether the plaintiff will be able to prove intent.[203] If, after limited discovery, the claim does appear to be truly frivolous, the matter can be disposed of by a summary judgment motion brought pursuant to Rule 56.[204] The drafters of the Federal Rules intended that Rule 56 be the primary method of eliminating meritless claims.[205] Long before courts began to create heightened pleading requirements, the system was already capable of eliminating frivolous claims.[206]

Limited discovery quickly followed by a summary judgment motion is a more effective and efficient way of handling meritless claims than heightened pleading requirements—especially when courts routinely grant a plaintiff at least one opportunity to amend the complaint before the court dismisses it for deficient pleading.[207]

Finally, prospective defendants are not only protected by the Federal Rules of Civil Procedure. Over-worked pro bono organizations represent most civil rights plaintiffs.[208] Given the expense and the time required to

---

203. Fed. R. Civ. Pro. 16. Rule 16 gives courts the power to schedule discovery (or to force the parties to create a mutually agreeable discovery schedule) and to monitor the progress of discovery through pretrial conferences. "Rule 16 affords federal courts a significant degree of authority to control and manage the litigation process. Although this rule does not provide a direct mechanism for identifying and terminating meritless cases, properly exercised the rule can meaningfully expedite resolution of cases." Blaze, *supra* note 67, at 985–86.

204. Bladich, *supra* note 98, at 844.

205. Blaze, *supra* note 67, at 980.

206. *Id.* at 990.

207. *See id.* at 982.

208. *See supra* note 136 and accompanying text.

litigate civil rights claims, coupled with the threat of Rule 11 sanctions, it is unlikely that eliminating heightened pleading requirements will result in pro bono organizations rushing to federal district courts to file frivolous claims.

3. Giving the Discovery Process Back to Victims of Discrimination in the Marketplace

We need to give the discovery process back to civil rights plaintiffs. My focus has been those civil rights plaintiffs bringing suit under § 1981 and/or § 1982. Even with the onerous intent standards construed into §§ 1981 and 1982 actions, the statutes are not just supposed to protect against those rights violators who are foolish enough to tell their victims that they are discriminating against them, as in the overt discrimination depicted by Hypothetical One.[209] Courts have interpreted §§ 1981 and 1982 as proscribing intentional discrimination. Thus, people of color must be protected against the clandestine, intentional discrimination presented in Hypothetical Two and must at least be granted discovery on the unconscious discrimination depicted in Hypothetical Three. Because our society no longer openly condones explicit racism,[210] one would think cases of clandestine discrimination, and not overt discrimination, will be the paradigmatic cases in the 21st Century. Courts cannot ignore this reality and eviscerate the protections granted by §§ 1981 and 1982 by demanding a showing of discrimination more emblematic of discrimination that occurred in the 1960s.[211] Under laws that were first enacted in 1866, people of color have the right not to be intentionally discriminated against when they enter the consumer world. Through procedure, courts have, in effect, redefined this right so that people of color only have the right not to be intentionally, *overtly* discriminated against. In the new millennium, the only debate in §§ 1981 and 1982 law should be whether we want/need to reinterpret the guarantees of the statute to protect against the unconscious discrimination depicted in Hypothetical Three.[212] This

---

209. *See supra* Part II.D. for Hypotheticals.

210. *See supra* note 151 and accompanying text.

211. In the Title VII context, Krieger notes that courts have erected requirements more commensurate with the type of discrimination prevalent in an earlier age, and that such requirements are inadequate for addressing the subtle, and often unconscious, racism of today. *See* Krieger, *supra* note 144, at 1186–1217.

212. As was previously discussed, nothing on the face of § 1981 or § 1982 requires a showing of intentional discrimination. Justice Marshall spoke quite poignantly on this matter in his dissent from *General Bldg. Contractors Ass'n v. Pennsylvania*:

> In order to hold that § 1981 requires a showing of intent, the majority must assume that the rights guaranteed under § 1981—to make and enforce contracts on the same basis as [W]hite persons—can be adequately protected by limiting the statute to cases where the aggrieved person can

procedural argument over whether one can consciously discriminate and get away with it so long as she is discrete, represents a giant step backwards in this country's discourse on race.

CONCLUSION

As we contemplated accepting a settlement offer in our clinic case, my clinical professor asked me if I was happy with the prospect of settlement. I told her that I was not. When she asked why, I said that I did not think that the dollar amount adequately accounted for the wrong that had been perpetrated. I grudgingly agreed, however, that given the weakness of our case after the judge struck the civil rights counts, we should settle. My professor gave me a sympathetic smile and said clinic students always think their first case is a million dollar case. I would be remiss if I denied being swept up in the excitement of my first case, but my problems with settlement in this particular case were not just those of the law student working on his first case.

Discriminatory treatment in the marketplace is a painful reminder of the status of Blacks and other people of color in this country. To operate in this country, one must continually put herself in the marketplace. Each of these trips is an opportunity to be followed around a store, to be humiliated by sales people, to be accused of shoplifting, and to "inexplicably" be asked to leave the premises. The drafters of the Civil Rights Act of 1866 realized that we needed to eliminate vestiges of slavery in the marketplace, if Blacks were to be full citizens of this country.[213]

Recently, support for this principle has waned. The courts use of heightened pleading requirements, which exist in contravention of the rules, to silence legal accounts of this discrimination feels like another violation of civil rights more grievous than the first. Blacks have grown accustomed to discrimination in the marketplace.[214] The presumption in

---

> prove intentional discrimination. In taking this extraordinarily naïve view, the Court shuts its eyes to reality ignoring the manner in which racial discrimination most often infects our society.

58 U.S. at 412 (Marshall, J., dissenting). The fact of racial oppression exists regardless of the discriminator's intent. *See* Flagg, *supra* note 143, at 968. The main value of the intent standard is that it limits the number of actionable cases. *See* Lawrence, *supra* note 149, at 324. Society can then point to the lack of §§ 1981 and 1982 lawsuits as proof of how race neutral our society has become. *Id.* at 325. Ironically, this judicially created dearth of successful civil rights cases is used by some segments to engender support for anti-affirmative action initiatives and other programs designed to eliminate, or at least alleviate the effects of, continuing racism. *Id.*

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

214. *See supra* notes 158–68 and accompanying text.

many federal district courts across this country that the claims of discrimination in the marketplace are frivolous, however, is a blow from an institution which is supposed to protect the rights of minorities.

Courts must do better for those people of color who are brave enough and committed enough to stand up to the discrimination that most people of color just grin and bear. I am not arguing that the courts should offer special treatment to §§ 1981 and 1982 plaintiffs. I only ask that §§ 1981 and 1982 plaintiffs be given the same opportunity to litigate their claims that virtually all other plaintiffs are given. If the playing field is simply leveled, I have every confidence that the plight of people of color, and in particular Blacks, in the marketplace will finally be documented—and hopefully remedied.