

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

2001

### Procedural Uniformity and the Exaggerated Role of Rules

Thomas O. Main

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Civil Procedure Commons](#), and the [Legal History Commons](#)

---

#### Recommended Citation

Main, Thomas O., "Procedural Uniformity and the Exaggerated Role of Rules" (2001). *Scholarly Works*. 733.  
<https://scholars.law.unlv.edu/facpub/733>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

---

---

# VILLANOVA LAW REVIEW

VOLUME 46

2001

NUMBER 2

---

---

## Article

### PROCEDURAL UNIFORMITY AND THE EXAGGERATED ROLE OF RULES: A SURVEY OF INTRA-STATE UNIFORMITY IN THREE STATES THAT HAVE NOT ADOPTED THE FEDERAL RULES OF CIVIL PROCEDURE

THOMAS O. MAIN\*

UNIFORMITY is a recurring theme of procedural reform. So deeply is the idea of uniformity embedded in American legal thought that many proceduralists find it difficult or unnecessary to explain why uniformity is thought to be good. Whether because of the lure of simplicity,<sup>1</sup> the appearance of neutrality,<sup>2</sup> the likeness to sci-

---

\* Assistant Professor of Law, University of the Pacific, McGeorge School of Law. Thanks to Professors Mark Brodin, John Leubsdorf, Martha Minow, Gregory Pingree and Stephen Subrin for their comments on drafts.

1. See Janice Toran, *'Tis a Gift to Be Simple': Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 353-54 (1990) (discussing aesthetic appeal of simplicity in sociology, politics and economics). Professor Janice Toran has suggested that procedural reformers are drawn to simple, elegant solutions, not only because such solutions may prove especially workable, but also because they are more aesthetically pleasing than more complicated alternatives. See HENRY SUMNER MAINE, *ANCIENT LAW* 13 (1873) (discussing origination of systems of code law); Alexander Holtzoff, *Origins and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955) (stating that Federal Rules of Civil Procedure were hailed as "the simplest . . . procedure yet devised in Anglo-American jurisprudence").

2. See Thomas Wall Shelton, *An Efficient Judicial System*, 22 CASE & COMMENT 227, 230 (1915) ("There is a fixed notion that politics have no respectable place in the judicial department of government."). The professed ideal is one of procedural neutrality in which the system of adjective law provides the disputants a level playing field on which to resolve their disputes. See Paul Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074 (1989) (discussing "political neutrality" as goal of federal rulemaking). It follows that the legal system ought to strive for uniform rules that treat similar cases in a similar manner. See Stephen Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1932 (1989) ("[Uniformity] must be a goal, however difficult to attain, of a system that aspires to equal justice . . ."); see also George Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 667-68 (1993) (describing classical position regarding forum shopping). Accepting a clear separation of substance and procedure, a uniform procedural rule ensures the essential neutrality of adjective law.

ence,<sup>3</sup> the feel of efficiency,<sup>4</sup> the imprimatur of professionalism<sup>5</sup> or some combination of these, the norm of procedural uniformity enjoys virtually universal approval.<sup>6</sup> Thus, it should come as no surprise that the *rhetoric* of uniformity is both pervasive and predominant in the discourse of procedural reform.

Uniformity long has been a fundamental theme of procedural reform.<sup>7</sup> Indeed, both of the major reform movements in American procedural history were bred primarily of efforts to establish procedural uniformity. First, in this country, uniformity was introduced as a standard for procedural reform in the early nineteenth century as a rejection of the disparity between the procedural systems of law and equity inherited from

---

See Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 901 n.12 (1961) (“[T]he primary objective of all procedure should be to secure to parties the full measure of their substantive rights (or impose upon them their duties under substantive law).”); see also Robert Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 79 (1989) (discussing early twentieth-century uniform reform); Eric Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 344 (1990) (discussing retooling of procedural rules and resulting efficiency in system).

3. See Kenneth Graham, *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 945 (1983) (stating that “lack of uniformity is a threat to the claim that procedure is a value-free science”). Early in the twentieth century, Shelton wrote that procedural uniformity was the “key that [would] unlock the door to a new era of scientific juridical relations.” Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 392 (1916) (discussing promulgation of rules under Supreme Court modeled after English procedure).

4. See Robert Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989) (describing objectives of federal uniform rules of procedure). Many scholars argue that uniformity promotes efficiency in the federal courts because surprises are reduced and attorneys and litigants know how to proceed when they act under a set of rules that are uniform and thus, predictable. See Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 224 (1942) (concluding that discovery rules provide simple and cohesive ways by which to proceed through trial); William Mitchell, *Uniform State and Federal Practice: A New Demand for More Efficient Judicial Procedure*, 24 A.B.A. J. 981, 983 (1938) (discussing progress made in reform of judicial procedure); Stephen N. Subrin, *Federal Rules, Local Rules, and States Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002-05 (1989) [hereinafter Subrin, *Federal Rules*] (analyzing pro-uniformity argument).

5. See Subrin, *Federal Rules*, *supra* note 4, at 2004-05 (discussing rationales for uniform system of procedural rules). In 1926, Edson Sunderland wrote that the legal profession is the most highly unified of all professional groups. See Edson Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 725 (1926) (discussing influence of legal profession and attorneys).

6. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of the Federal Rules*, 46 MERCER L. REV. 757, 781 (1995) (“[T]oday few question the value of [procedural] uniformity.”).

7. See Chemerinsky, *supra* note 6, at 759 (discussing movement toward localism in procedural rules); Subrin, *Federal Rules*, *supra* note 4, at 2002 (describing need for uniformity in federal rules).

the English.<sup>8</sup> Reformers argued that the separation of law and equity was inefficient and that a uniform set of procedural rules would establish order and predictability.<sup>9</sup> This movement resulted in New York state's 1848 adoption of the Field Code, the prototype for the practice codes in all the states that would adopt code pleading.<sup>10</sup>

Procedural uniformity also was a central theme of the early twentieth-century movement to reform federal procedure.<sup>11</sup> Beginning in 1911, the American Bar Association (ABA), following the urging of Virginia lawyer Thomas Wall Shelton, lobbied Congress for a bill that would enable the Supreme Court to promulgate uniform procedural rules for all federal district courts.<sup>12</sup> What Shelton's call for procedural uniformity lacked in modesty and nuance, it supplied in passion:

[Uniformity is] so splendid, so beautiful and so beneficial in every respect, as to command unstintedly the loving labor, time and treasure of the best men of this marvelous age in which we live. There must be . . . uniformity of judicial procedure . . . . There are agencies at work too earnest and powerful to be thwarted by ignorance, pessimism or evil . . . . I have the most implicit faith in the Divine origin of the great basic principles,

---

8. See Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 316 (1988) [hereinafter Subrin, *Field Code*] (describing work done by Field in codification and reform of rules of procedure); see also Mildred Coe & Lewis Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 238 (1942) (discussing generally evolution of New York Code of Procedure); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) [hereinafter Subrin, *Equity*] (reviewing history of English and American legal civil procedure).

9. See David Dudley Field, *What Shall Be Done with the Practice of Lawyers? Questions Addressed to Lawyers*, reprinted in SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226 (A. Sprague ed., 1884) (discussing impact of New York state constitution on legal procedures in court system); see also *id.* at 363 (discussing reforms in first report of New York Practice Commission).

10. See generally N.Y. Laws 1848 ch. 379. In code pleading reform, a uniform system of law and equity administered through the form of one civil action was substituted for what had been two separate law and equity systems, and the forms of actions at law and the separate suit in equity were abolished. Professor Pomeroy considered this the most fundamental part of code pleading. See JOHN POMEROY, CODE REMEDIES §§ 5-6 (5th ed. 1929) (discussing general principles of joining of legal and equitable actions); see also CHARLES HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 8 (1897) (stating that uniformity that code pleading offered, and which many reformers embraced, was apparent simplicity and certainty in its application).

11. See Subrin, *Equity*, *supra* note 8, at 992-95 (discussing early twentieth century approaches to civil procedure reform).

12. See *id.* at 949 (discussing Shelton and ABA Enabling Act movement in nineteenth century); see also Edson Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 5 (1938) (noting impact of promulgation of Federal Rules of Civil Procedure on Virginia). See generally Thomas Wall Shelton, *An American Common Law in the Making—The Habit of Thinking Uniformity*, 30 LAW NOTES 50 (1926).

and fundamentals of the law that governed the Hebrews, were used by the Athenians, borrowed by the Romans, reluctantly absorbed by the English and are being adopted in America. And I believe they have existed since God said "Let there be light," coincident with the laws of nature and of the universe . . . . [Uniformity] symbolize[s] an unselfish love of country and a surrender of personal inclinations that will . . . solidify sentiment and incarnate the old time respect and veneration for the courts.<sup>13</sup>

This second American reform movement culminated in the 1938 adoption of uniform Federal Rules of Civil Procedure.

The rhetoric of procedural uniformity also has informed more modest reform movements. Contemporary examples include, among many others, the effort to remove the "opt-out" provision from the mandatory discovery disclosures required by Federal Rule of Civil Procedure 26(a)(1),<sup>14</sup> the drafting of legislation authorizing the aggregation of mass tort claims,<sup>15</sup> efforts to normalize the imposition of sanctions by judges,<sup>16</sup>

---

13. Thomas Wall Shelton, *Uniformity of Judicial Procedure and Decision*, 22 LAW STUDENT'S HELPER 5, 9 (1914) [hereinafter Shelton, *Uniformity*]; see also B.H. Carey, *In Favor of Uniformity*, 3 F.R.D. 507, 507 (1943) (stating that Federal Rules are "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law"); Thomas Wall Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free*, 73 CENT. L.J. 319, 321-22 (1911) (broadly discussing history of system and its problems).

14. The initial disclosure requirements added by the 1993 amendments permitted districts to "opt out" of the rule. The amendment to Federal Rule of Civil Procedure 26 establishing uniformity was effective December 1, 2000. See FED. R. CIV. P. 26 advisory comm. note (noting that changes in rule were based upon past experience of district courts); see also FED. R. CIV. P. 26(d) amends. (removing "opt-out" provisions for mandated timing and sequence of discovery); FED. R. CIV. P. 26(f) amends. (removing "opt-out" provision for discovery conference); Elizabeth Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 262-63 (1999) (describing proposed amendments to Federal Rules of Civil Procedure).

15. See generally Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943 (2000) (discussing legislative and other proposals for uniform adjudication of mass tort claims); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000) (noting need for Uniform Complex Litigation Act); Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328 (1999) (discussing legislative and other proposals for uniform adjudication of mass tort claims).

16. See, e.g., Maureen Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 689 (1996) (discussing need to limit judicial discretion in federal courts' sanctions); Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity*, 104 DICK. L. REV. 471, 474 (2000) (reviewing American Law Institute's statutory recommendations to encourage consolidation of actions in federal and state courts).

and proposals to systematically integrate alternative dispute resolution mechanisms into federal courts.<sup>17</sup>

The tenor of the rhetoric of uniformity is often resonant of Shelton's tenor at the turn of the twentieth century.<sup>18</sup> For example, several contemporary reforms reflect a trend toward localism in procedural rulemaking. The proliferation of local rules of procedure in the late 1980s and early

---

17. See, e.g., John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245, 245-46 (1996) (reviewing passage of Civil Justice Reform Act of 1990); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 827 (1998) (discussing agency dispute resolution and nonjudicial alternatives for disputing parties).

For examples of other procedural reform discourse implicating the rhetoric of uniformity, see Tara L. Haluch, *Treatment of Americans with Disabilities Act Claims When the Plaintiff Is Deceased: A Call for Uniformity*, 48 EMORY L.J. 733, 735 (1999) (noting need for uniform survivorship rule for plaintiffs under Americans with Disabilities Act); Ted Janger, *The Public Choice of Choice of Law in Software Transactions: Jurisdictional Competition and the Dim Prospects for Uniformity*, 26 BROOK. J. INT'L L. 187, 188-89 (2000) (discussing choice-of-law in multijurisdictional transactions); Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 41 (1999) (analyzing need for uniformity in standard for exemplary damages). See generally Bridget Genteman Hoy, Comment, *The Draft Uniform Mediation Act in Context: Can It Clear Up the Clutter?*, 44 ST. LOUIS U. L.J. 1121 (2000) (discussing draft of National Conference of Commissioners of Uniform State Laws).

And, of course, the rhetoric of uniformity is deployed far outside the parameters of civil procedure. A quick review of recent legal scholarship provides a range of examples from many disciplines including: bankruptcy; evidence; tort; environmental; cyberspace; trusts; maritime and criminal law. See, e.g., Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 66-67 (1998) (discussing uniform definitions of criminal offenses); James Joseph Duane, *Appellate Review of In Limine Rulings*, 182 F.R.D. 666, 666 (1999) (discussing proposed new rules for Federal Rules of Evidence); Avishai Glikman, *The New Uniform Principal and Income Act: Friend or Foe?*, 31 MCGEORGE L. REV. 463, 468 (2000) (describing chapter 145 of Uniform Principal and Income Act); Edward J. Janger, *The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy Reform*, 74 AM. BANKR. L.J. 97, 101 (2000) (discussing uniformity in bankruptcy law); A. Brooke Overby, *Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce*, 7 TUL. J. INT'L & COMP. L. 219, 220 (1999) (discussing need for uniformity of laws for electronic commerce); Pratik A. Shah, *The Uniform Computer Information Transactions Act*, 15 BERKELEY TECH. L.J. 85, 104 (2000) (discussing UCITA's effect on uniformity of law regarding computer information transactions); William Tetley, *Uniformity of International Private Maritime Law—The Pros, Cons, and Alternatives to International Conventions—How to Adopt an International Convention*, 24 TUL. MAR. L.J. 775, 778 (2000) (noting existence of advantages and disadvantages of uniformity in international private maritime law); Note, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 IOWA J. CORP. L. 553, 574 (2000) (proposing uniformity in legislation for dramshop acts); Comment, *Confusion and Deterrence: The Problems That Arise from a Deficiency in Uniform Laws and Procedures for Environmental "Whistleblowers"*, 8 DICK. J. ENVTL. L. & POL'Y 325, 339 (1999) (proposing uniform model whistleblower statute).

18. For a discussion of intra-district uniformity, see *infra* notes 37-60 and accompanying text.

1990s,<sup>19</sup> the Civil Justice Reform Act of 1990,<sup>20</sup> and the 1993 amendments to the discovery provisions of the Federal Rules of Civil Procedure,<sup>21</sup> all have contributed to an increasing diversity of procedures in federal courts across the country.<sup>22</sup> Critics have warned that such inter-district disuniformity would “turn federal practice into a veritable Tower of Babel,”<sup>23</sup> would lead to a “balkanization” of procedure,<sup>24</sup> would constitute part of a “counter-reformation in procedural justice . . . [that was] at war” with pro-

---

19. Federal Rule of Civil Procedure 83 authorizes each of the United States district and circuit courts to promulgate local rules. See Chemerinsky, *supra* note 6, at 757 (“The federal rules themselves permit individual district courts to enact their own local rules.”). Traditionally, these local rules dealt with relatively minor matters, such as the size and type of paper to be used. But, beginning in the 1980s, local rules began to address more important aspects of court procedure and there was significant variance among the districts. See Subrin, *Federal Rules*, *supra* note 4, at 2020-21 (discussing Judicial Conference’s Local Rules Project’s 1988 Report); see also Comment, *The Local Rules of Civil Procedure in the District Courts—A Survey*, 1966 DUKE L.J. 1011, 1013 (discussing variations in procedural rules among district courts).

20. Civil Justice Reform Act of 1990, Pub. L. No. 101-65 §§ 101-105, 104 Stat. 5089-98 (1990) (codified at 28 U.S.C. §§ 471-482). The Civil Justice Reform Act sought “to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management and ensure just, speedy and inexpensive resolutions of civil disputes.” 28 U.S.C. § 471. The primary mechanism of the Civil Justice Reform Act was to require each of the ninety-four United States district courts (and their adjunct advisory committees established under the Act) to implement a “civil justice delay and expense reduction plan.” *Id.* § 472. See generally Chemerinsky, *supra* note 6, at 757 (noting history surrounding adoption of Federal Rules of Civil Procedure); A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN’S L. REV. 877, 878 (1993) (discussing generally Civil Justice Reform Act of 1990).

21. In 1993, the Federal Rules of Civil Procedure were amended in significant ways, particularly with regard to discovery procedure. The discovery amendments impose new mandatory initial disclosure obligations, but allowed districts to opt-out by local rule and allowed parties to opt-out by stipulation. See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (discussing discovery amendments). The provision allowing local districts to opt-out by local rule was removed by the 2000 amendments to the Federal Rules of Civil Procedure. For further discussion, see *supra* note 14 and accompanying text.

22. See Chemerinsky, *supra* note 6, at 757 (discussing adoption of Federal Rules of Civil Procedure). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (discussing shift in role and power of district judges).

23. See Linda Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 381 n.22 (1992) (crediting Professor Rosenberg as first to use Tower of Babel metaphor for local rules).

24. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1427 (1992) [hereinafter Tobias, *Civil Justice Reform*] (noting balkanization of federal civil procedure resulting from rules). But see Carl Tobias, *Fin-De-Siecle Federal Civil Procedure*, 51 FLA. L. REV. 641, 659 (1995) [hereinafter Tobias, *Fin-De-Siecle*] (cautioning against exaggeration of empirical data of balkanization).

cedural uniformity,<sup>25</sup> and would pose a serious threat to the “integrity of [uniform] federal civil procedure.”<sup>26</sup>

Why the popularity of uniformity rhetoric? In large part because of the universality of uniformity. First, reformers are inclined to “speak of uniformity as if it were some excellence in itself, something transcendental and absolute; or at least as an undoubted blessing, as health, happiness or virtue.”<sup>27</sup> To be sure, there are critics of uniformity, but these commentators very seldom take issue with the normative value of procedural uniformity. Rather, they dispute the notion that a proposed reform is necessarily just, fair or efficient simply *because* it promotes uniformity.<sup>28</sup>

Second, the concept of uniformity seems universal because it is protean and multi-dimensional so that procedural uniformity has evolved in many forms. Thus, uniformity is universal in that it can mean all things to all people. For example, in the ongoing discourse of reform concerning substance-specific (or non-trans-substantive) procedures for the federal courts, the rhetoric of uniformity is deployed by both “sides” of the debate. Some scholars have defended the status quo and the drafters’ vision of a set of uniform rules of procedures for all types of cases.<sup>29</sup> In contrast, other reformers have argued that the drafters’ true vision of procedural uniformity—equal treatment for equal cases—demands substance-specific

---

25. See Mullenix, *supra* note 23, at 382 (noting damage done by CJRA).

26. Tobias, *Civil Justice Reform*, *supra* note 24, at 1427; see also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 929-30 (1996) [hereinafter Carrington, *A New Confederacy?*] (noting problems which occur when local rules and national rules of procedure conflict); Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Affecting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 728 (1993) (discussing how federal rules of civil procedure have been undermined by different courts adopting different procedural rules); Keeton, *supra* note 4, at 857 (noting that local procedural rules can interfere with uniform judicial decision-making); Subrin, *Federal Rules*, *supra* note 4, at 2001 (“The local rule and state divergence from procedural uniformity suggests that, without fanfare, we have already taken our first tentative steps into a new era in American civil procedure.”).

27. Subrin, *Federal Rules*, *supra* note 4, at 2000 n.5 (quoting Connor Hall, *Uniform Law Procedure in Federal Courts*, 33 W. VA. L.Q. 131, 132 (1927)).

28. See, e.g., Subrin, *Federal Rules*, *supra* note 4, at 2000 n.5 (noting Hall’s analysis of whether procedural uniformity is necessary).

Uniformity is not one of those norms that *defines* an individual’s jurisprudential philosophy of procedure. Indeed, there is no cadre of reformers for whom uniformity (or disuniformity) is, in and of itself, the organizing principle. Instead, “uniformity” is simply effective rhetoric that is used in the discourse of reform.

29. See Chemerinsky, *supra* note 6, at 781 (discussing benefits of uniform system of procedural rules).



procedures in certain instances.<sup>30</sup> Such is the universal fluidity of the rhetoric of uniformity.<sup>31</sup>

30. Robert Cover highlights this debate in his classic essay that exposed the limitations of trans-substantive rules. See Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 721 (1975) (examining influence of procedure on substance). Much has been written to shed light on the issue of whether the Federal Rules of Civil Procedure can or should be trans-substantive, as this is an issue that arises in many different "contexts." See Phyllis 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, 218, 299-303 (1992) (noting practical implications for attorneys trying to integrate substance and procedure); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999) (discussing issue of procedural reform in federal area); Stephen Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (noting influence of procedural rules on substantive laws); Stephen Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 773, 831 (1986) (discussing preclusion of state law and full faith and credit); Stephen Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 695 (1988) (discussing implications of federal courts borrowing state limitation laws); Stephen Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1964-67 (1989) (suggesting ways in which to study procedural issues in court system); John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 555 (1999) (discussing Civil Justice Reform Act); Carrington, *supra* note 2, at 2068 (stating that "judicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced" should be rejected); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 24 (1995) (discussing whether Delaware system of law can be uniformly used across other states); Geoffrey Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989) (describing the trans-substantive scope of federal rules of civil procedure); Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993) (noting problems of trans-substantivity related to federal rules); Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798 (1991) (discussing rules of civil procedure that impact informal discovery); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (arguing that procedural rules need to be reworked); Maurice Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 248-50 (1984) (noting difficulties of enforcing rules); Gene Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85, 86 (1991) (analyzing impact of Rule 15 on litigation); Jeffrey Stempel, *Halting Devolution or Bleak to the Future*, 46 FLA. L. REV. 57, 78 (1994) (stating that use of selective substance-specific procedure is necessary); Subrin, *Federal Rules*, *supra* note 4, at 2000 (discussing need for uniformity in district courts); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 693 (1998) (noting history of promulgation of Federal Rules of Civil Procedure); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 28, 55 (1994) (suggesting that different procedural rules should apply to different factual cases); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 804 (1995) (discussing modern civil procedural rules); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1505 (1992) (discussing judicial interpretation of federal rules).

31. Such universality is not always without cost. Jack Pole's analysis of "equality" may prove insightful. Upon finding that many pursuits of equality were oppo-

To better understand the role of uniformity rhetoric in the discourse of procedural reform, this Article examines one type of procedural uniformity and uses those findings to consider broader implications for procedural uniformity generally. The survey presented in this Article examines procedural uniformity and disuniformity in the federal and state courts of three states that have not formally adopted all of the Federal Rules of Civil Procedure. This type of uniformity is usually referred to as “intra-state uniformity,”<sup>32</sup> and the history of this norm is set forth in Part I.<sup>33</sup> Generally speaking, the goal of intra-state textual uniformity has not been met. Only half of the states have formally adopted the Federal Rules of Civil Procedure, and even among these, most states have not attempted to conform to changes in the federal model.

Part II presents the results of a survey of intra-state uniformity in practice in the federal and state courts of three states that have not formally adopted the Federal Rules of Civil Procedure.<sup>34</sup> Based upon a review of hundreds of judicial opinions, the survey presents evidence of uniform procedural standards within the federal and state courts of each state in *practice*, notwithstanding fundamental differences in the *texts* of those federal and state procedural rules.

Part III explores the cause of the dissonance between *form* and *practice*.<sup>35</sup> The cause of the dissonance appears to be the convergence of two factors: indeterminate pleading rules and the unifying influence of a local legal culture. Neither the standard of “notice pleading” under the Federal Rules nor the requirement of “fact pleading” under the state procedural codes establishes a clear and decisive mandate for the quantum of specificity required in a civil complaint. In addition, although the regimes of notice and code pleading are fundamentally antithetical, the legal community within the federal and state courts of each of the states appears to assimilate those pleading standards in practice.

Part IV considers the broader implications of the survey.<sup>36</sup> The survey demonstrates that the familiar rhetoric of uniformity can be misplaced or even misleading absent empirical review of one fundamental assumption: that any existing formal (or textual) disuniformity necessarily means that there is disuniformity in *practice*. Indeed, the rhetoric of uniformity may be deployed to advance a particular reform when, in practice—even if not in form—uniformity already exists. Of course, even when uniformity does

---

sitional, he suggested that “the pursuit of equality was the pursuit of an illusion.” JACK R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 292 (1978) (analyzing reasoning of court in Japanese-American cases during World War II and other similar cases).

32. See Subrin, *Federal Rules*, *supra* note 4, at 2027 (discussing state uniformity and divergence regarding procedural rules).

33. See *infra* notes 37-60 and accompanying text.

34. See *infra* notes 61-269 and accompanying text.

35. See *infra* notes 270-303 and accompanying text.

36. See *infra* notes 304-22 and accompanying text.

exist in practice, the reform still may be worthwhile, but the rhetoric of uniformity presumably would be far less compelling. Moreover, the evidence that a local legal culture can trump, or at least significantly influence the interpretation of, pleading rules suggests, more generally, that there may be limitations upon the ability of formal rules to effectuate legal reform.

### I. THE NORM OF INTRA-STATE UNIFORMITY

One dimension of procedural uniformity is the quest for identical formal (or textual) rules for federal and state courts, or intra-state uniformity. Intra-state uniformity was realized, to some extent, under the nineteenth-century Conformity Acts,<sup>37</sup> but the resulting mandate for federal courts to follow state procedure "as near as may be" was unpopular and largely unobtainable.<sup>38</sup> Moreover, the Advisory Committee that drafted the Federal Rules of Civil Procedure was, of course, without authority to enact procedural rules for the state courts.<sup>39</sup> Nevertheless, the Advisory Committee anticipated, indeed promised, that the Federal Rules would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model:

[T]he conceded failure of state conformity called for a substitute. The Federal government could not follow the states, so it was reasonable to give the states an opportunity to follow the Federal government. That state which tries to live unto itself will suffer, if it does not perish. In spite of ourselves, we are all for one and one for all . . . . Secondly, a simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states.<sup>40</sup>

---

37. See, e.g., Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

38. See *id.* Shelton and other ABA proponents of the Rules Enabling Act insisted that the Conformity Act was a failure and that most knowledgeable people agreed. See Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040-42 (1982) (discussing problems of federal practice under Conformity Act); Shelton, *Uniformity*, *supra* note 13, at 5 (discussing failure of legislature to provide leadership in procedure law). See generally Subrin, *Equity*, *supra* note 8, at 957-58 n.284 (noting critics' comments regarding Conformity Act); Subrin, *Federal Rules*, *supra* note 4, at 2002-11 (describing "the many faces of uniformity" in federal system).

39. See Rules Enabling Act, Act of June 19, 1934, ch. 651, §§ 1 & 2, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072) ("To give the Supreme Court of the United States authority to make and publish rules in actions at law."). See generally Burbank, *supra* note 38, at 1035-36 (reviewing enactment of Conformity Act of 1872).

40. Shelton, *supra* note 3, at 393; see also Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) [hereinafter Clark, *Handmaid*] ("The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of

In arguing for vigorous implementation of the 1934 Rules Enabling Act, Charles Clark and James William Moore expressed the cognate hope that federal rules might “properly be a model to all the states.”<sup>41</sup> As the principal drafter of the Federal Rules of Civil Procedure, Clark thereafter tracked the progress of state adoption with paternal pride. For example, in 1947, he published a state-by-state survey in the second edition of his treatise on code pleading.<sup>42</sup> A flurry of state reforms immediately following enactment of the Federal Rules prompted Clark to conclude that national uniformity in systems of civil procedure was becoming a reality. Clark wrote in 1958 that “the trend of state adoption [was] proceeding apace.”<sup>43</sup> In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.<sup>44</sup> Naturally, the rhetoric of uniformity played a substantial role in the debate over these state reforms.<sup>45</sup>

---

procedural reform throughout the country generally.”). See generally CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 31 (1928) [hereinafter CLARK, HANDBOOK 1] (describing procedural reform in systems of pleading); Clark, *Handmaid, supra*, at 319-20 (discussing “general philosophy of modern pleading”); *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 516 (1920) (recommending adoption of S.1214).

41. See Charles Clark & James William Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387-90 (1935) (discussing incorporation of uniform rules by different courts).

42. See CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 31 (2d ed. 1947) [hereinafter CLARK, HANDBOOK 2] (discussing procedural reform in systems of pleading); see also Charles Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 67-70 (1949) (discussing federal rules in states and influence of federal rules of civil procedure).

43. Charles Clark, *The Federal Rules of Civil Procedure, 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 (1958).

44. See WILLIAM M. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9.1-9.53 (Wright ed., 1960) (describing civil procedure reform in variety of states).

45. See Guthrie Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption*, 49 MISS. L.J. 285, 291 (1978) (examining benefits arising from adoption of proposed rules of civil procedure); Charles F. Bongardt, *The Final Draft Report, Nebraska Rules of Civil Procedure, “Pro,”* 21 NEB. L. REV. 76, 77 (1942) (discussing need for new rules of civil procedure in Nebraska); Ira Flory & Henry McMahon, *The New Federal Rules and Louisiana Practice*, 1 LA. L. REV. 45, 45 (1938) (surmising that Louisiana lawyers will easily adjust to new federal rules of civil procedure); Ben Fowler & George Catlett, *Report of the Civil Code Committee*, 16 KY. ST. B.J. 23, 25 (1951) (reviewing major features of proposed new rules of civil procedure); Spencer Gard, *Highlights of the Kansas Code of Civil Procedure*, 2 WASHBURN L.J. 199, 201 (1963) (reviewing highlights of new civil procedure law for Kansas); Jimmie Hamilton, *Pleading: Fact Pleading in Oklahoma—Time for a Change?*, 30 OKLA. L. REV. 699, 700 (1977) (arguing for change in Oklahoma provisions of pleading); Henry McMahon, *The Case Against Fact Pleading in Louisiana*, 13 LA. L. REV. 369, 373 (1953) (discussing defects of fact pleading generally); Hudson Moore, *Shall Colorado Procedure Conform with the Proposed Federal Rules of Civil Proce-*

The momentum behind the Federal Rules as a model for state court reform began to subside at least twenty years ago—well before universal textual adoption. In 1986, Professor John Oakley and a former student, Arthur Coon, were interested in the “prospects for uniformity in American civil procedure” and undertook a nationwide survey “to assess the degree to which state court civil procedure is . . . wrought in the image of the Federal Rules.”<sup>46</sup> As a preliminary observation, Oakley and Coon acknowledged “the pervasive influence of the Federal Rules on at least some part of every state’s civil procedure.”<sup>47</sup> In the same article, however, the authors effectively eulogized the goal of intra-state uniformity.<sup>48</sup> Based upon a comprehensive, nine-variable examination of all fifty states, they “were surprised to find that only a minority of states [had] embraced the system and philosophy of the Federal Rules wholeheartedly enough to permit classification as true federal replicas.”<sup>49</sup> Moreover, the authors found that lesser-populated states represented a disproportionately large share of states that had adopted the rules: of the ten most populous states, only

---

*Id.*, 15 *DICTA* 5, 7 (1938) (discussing how procedural rules change under uniform practice); Harry W. Shackelford, *Why Adopt New Rules of Pleading and Practice?*, 21 *NEB. L. REV.* 94, 101-11 (1942) (stating objections to proposed new rules of civil procedure in Nebraska); Robert Simmons, *Why New Rules of Procedure Now?*, 26 *J. AM. JUDICATURE SOC’Y* 170, 175 (1943) (discussing differences in rules among states); see also *The Bar Favors Uniform State and Federal Rules of Civil Procedure*, 18 *TEMPLE L.Q.* 145, 145-46 (1943) (reviewing national opinion survey).

46. John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 *WASH. L. REV.* 1367, 1368 (1986).

47. *Id.* at 1369; see also CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 430 (5th ed. 1994) (“The excellence of the rules is such that in more than half the states the rules have been adapted for state use virtually unchanged, and there is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.”).

48. See Oakley & Coon, *supra* note 46, at 1369 (noting that there is little state court adoption of uniform federal model of civil procedure rules).

49. *Id.* The nine criteria for “replica” status include:

(1) state civil procedure is specified in judicially promulgated rules rather than a statutory code; (2) these rules are organized and enumerated in general conformity with the scheme of the [Federal Rules of Civil Procedure]; (3) there has been a merger of law and equity into one form of civil action; (4) the substance of the state rules of civil procedure conform generally to the federal joinder rules as amended in 1966; (5) the substance of the state rules of civil procedure conform generally to the federal discovery rules as amended in 1970; (6) the state rules provide for summary judgment according to the model of the Federal Rules; (7) the rules as written and interpreted provide without qualification for the liberal conception of “notice pleading” practiced in federal courts under the aegis of *Conley v. Gibson*, 355 U.S. 41 (1957); (8) to the extent the terms of the state rules or their interpretations are otherwise idiosyncratic or unconventional by federal standards, such variation in practice is not at bottom inconsistent with the Federal Rules’ philosophy of “procedure as the handmaiden of justice”; and (9) the state courts regard precedent and commentary construing counterpart provisions of the Federal Rules as persuasive authority in the construction of the state rules.

*Id.* at 1374-75.

Ohio had modeled the Federal Rules, but eleven of the fifteen least populous states were replicas.<sup>50</sup> Even when a “looser test than replication was applied to classify states as generally following the model of the Federal Rules, the resulting tally embraced a majority of states but a minority of our national population.”<sup>51</sup> Finally, Oakley and Coon noted that the pace of state court conversions to replicas, or to close analogues of the federal model, had stalled more than a decade earlier in 1975.<sup>52</sup>

At least one commentator has suggested that the Oakley and Coon survey actually underestimates the extent of intra-state procedural disuniformity because, not only has state “replication” of the Federal Rules long since ceased, but even the “replica” states have failed to keep pace with the flurry of amendments to the Federal Rules that followed Oakley and Coon’s survey:

Since 1980, Federal Rule 26 has been amended in three major ways . . . . Only eight of the twenty-two states in the United States that were considered replica states by the Oakley and Coon survey have adopted all three Rule 26 amendments. Eleven have adopted none of them. Fourteen out of twenty-two have adopted the new Rule 11. At this point, there may be only eight or so current replica states: Minnesota, Montana, North Dakota, Tennessee, Utah, Vermont, Washington and West Virginia. Ohio, the most populous replica state, has adopted none of the new rules.<sup>53</sup>

Since Professor Subrin made this argument more than ten years ago, the trend has become even more evident: not only did many of the laggard “replica” states never adopt these subsequent amendments,<sup>54</sup> but Rule 11 and many of the discovery rules (including Rule 26) were amended yet again in 1993.<sup>55</sup> Remarkably, of the eight replica states identified by Subrin in 1989, only *two* have adopted the 1993 amendments to Federal Rules 11 and 26.<sup>56</sup>

---

50. *See id.* at 1413 (describing Ohio’s status as “replica”).

51. *Id.* at 1369.

52. *See id.* at 1427 (concluding that trend of state court procedural reform has ended); *see also* Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1159 (1993) [hereinafter Subrin, *Teaching*] (describing “recent blow[s] to uniformity” in procedural requirements among states).

53. Subrin, *Federal Rules*, *supra* note 4, at 2037.

54. *See generally* MASS. GEN. LAWS ANN. chs. 43a & 43b (West 1992); S.D. RULES CODIFIED LAWS 15 (Michie 1984).

55. *See* FED. R. CIV. P., 1993 amends. (referring to Rule 11 and other discovery rules, including Rule 26).

56. Only Utah and Vermont (the 36th and 48th most populous states, respectively) have replicated the 1993 amendments to Federal Rules of Civil Procedure 11 and 26 in their state court rules. Of the other six states with replica status in 1989, half (North Dakota, Tennessee and West Virginia) adopted only the 1993 amendment to Federal Rule of Civil Procedure 11; the other half (Minnesota,

Given the pervasiveness of the rhetoric of uniformity in the broader discourse of procedural reform, this intra-state disuniformity has received very little attention in the past decade.<sup>57</sup> This lack of attention is a curious phenomenon because much of the uniformity rhetoric devoted to the issue of inter-district disuniformity is similarly applicable to intra-state disuniformity. Consider, for example, the following excerpt from Tobias' seminal indictment of inter-district disuniformity:

Greater . . . disuniformity is seen in increasingly disparate local rules governing the pretrial process and in growing inconsistencies between many local rules that encompass numerous procedural matters and the Federal Rules. This . . . disuniformity . . . complicates the efforts of lawyers with national practices . . . to participate in lawsuits in districts that follow procedures with which they are not completely familiar. These problems will afflict everyone who litigates in multiple districts, but will be acute for public interest litigants . . . . [R]esource deficiencies make it difficult for the public interest groups and attorneys to learn about, command, and conform to the procedures . . . . Increasingly balkanized procedure is not neutral. Procedural choices that enhance complexity and disuniformity can foster particular values and serve specific interests. Accumulating evidence suggests that many practitioners and their clients, especially those with significant resources and information, have increasingly capitalized on numerous tactical advantages that growing balkanization affords.<sup>58</sup>

---

Montana and Washington) adopted neither. Whether states will replicate the discovery (and other) amendments that became effective December 1, 2000 remains to be seen.

57. Professors Tobias and Subrin have flagged the issue on occasion. See, e.g., Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 82-83 (1997) (noting that intra-state uniformity, anticipated by federal rules, has not developed to extent believed); Carl Tobias, *Opt-Outs at the Outlaw Inn: A Report from Montana*, 14 REV. LITIG. 207, 214 & n.28 (1994) (discussing intra-state uniformity based on need to simplify law practice). But Subrin's 1989 piece was the last serious assessment of this issue. See Subrin, *Federal Rules*, *supra* note 4, at 2037 (discussing different procedural rules in federal and state systems).

Even the term "intra-state (dis)uniformity" may be disappearing in this context. In one of Professor Tobias' recent articles, he uses the term "intra-state uniformity" to refer not to uniformity between the federal and state courts within a jurisdiction, but rather to uniformity between federal district courts within a particular state. See Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 591 (1998) (discussing intra-state uniformity, referring to civil litigants in federal lawsuits).

58. Tobias, *Civil Justice Reform*, *supra* note 24, at 1423-24. Paul Carrington agrees:

Localism creates legal clutter . . . . Such legal clutter gives undue advantage to cognoscenti. Normally, these will be local lawyers who are given an advantage over counsel from other districts. But clutter also favors the expert litigator over the lawyer making episodic appearances in court

Presumably, many of these same problems, deficiencies and tactical disadvantages would result from disparate federal and state rules, as from disparate federal rules. Indeed, it seems likely that there would be at least as many attorneys—public interest or otherwise—that would practice in federal and in state courts (e.g., within the same city) than those that would have “national practices” in federal courts in different districts. Yet the contemporary literature virtually ignores this apparent intra-state disuniformity.<sup>59</sup>

Intra-state uniformity is a dimension of procedural uniformity that is especially ripe for examination. Its relative obscurity in the discourse of reform permits the findings of this study to transcend any perceived partiality or bias concerning any pending reform; this survey is not the product of a hidden agenda (nor, to my knowledge, is there any reform movement) to amend (or not to amend) either the federal or state rules of procedure to achieve (or to forestall) intra-state uniformity. More importantly, this obscurity itself lends credibility to the findings of the survey; indeed, one possible explanation for the silence could be tacit, or perhaps even unknowing acceptance of the proposition that there already is substantial procedural uniformity in practice, notwithstanding fundamental differences between the regimes of notice and code pleading.<sup>60</sup>

---

. . . . As clutter increases, the cost of legal services is also increased by a diminution of competition and retention of redundant counsel.

Carrington, *A New Confederacy?*, *supra* note 26, at 947-48.

Further, numerous scholars have used the “Tower of Babel” metaphor to depict the dangers of inter-district uniformity. See, e.g., Chemerinsky, *supra* note 6, at 759 (“[T]he proliferation of local rules and the trend to local models of adjudication threaten to turn federal practice into a veritable Tower of Babel in which no court follows the process of any sister court.”); Sherman L. Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 265-66 (1979) (discussing lack of uniformity in discovery procedures in individual courts); Mullenix, *supra* note 23, at 381 (citing Professor Maurice Rosenberg).

Again, these dangers of (inter-district) disuniformity are thought to be significant: “Different procedural rules will have an impact upon substantive justice. Varying procedures will lead to forum shopping, unnecessary cost, and widespread confusion.” Chemerinsky, *supra* note 6, at 759.

59. For further discussion on how contemporary literature ignores intra-state disuniformity, with few exceptions noted see *supra* note 57 and accompanying text.

60. There are a couple of other possible explanations for the silence, but the explanations are not compelling. One might argue that there is no intra-state disuniformity problem because, notwithstanding textual differences between federal and state rules, the procedural schemata of the two are fundamentally similar. This argument rings hollow, however, in light of the considerable attention given inter-district uniformity. Even with the proliferation of local rules, the Civil Justice Reform Act of 1990, and the 1993 amendments to the Federal Rules of Civil Procedure, one could not seriously suggest that the procedures between two federal district courts are less similar than are the procedures between the federal and state courts in states where common law or code traditions persist. Even in states that have abandoned those traditions, true replication of the Federal Rules of Civil Procedure (much less the Civil Justice Reform Act and local rules) is virtually nonexistent.



## II. THE EVIDENCE OF INTRA-STATE UNIFORMITY IN FACT

Presented here are the findings of a survey that examined intra-state procedural uniformity in practice in three states that have not replicated the Federal Rules of Civil Procedure for their state court procedures—Illinois, Pennsylvania and Nebraska. These particular states were selected because they are recognized as being among the states with procedural systems that are *least* influenced by the federal model.<sup>61</sup> Indeed, unlike

One might instead argue that there is no intra-state disuniformity problem because, although there is intra-state disuniformity, it is not a serious problem. It is unnecessary to tackle the normative component of this statement in this Article. It should suffice to argue only that however problematic this disuniformity might be in the abstract, it must be *more* problematic than inter-district disuniformity for the reason set forth in the previous paragraph.

There is an additional argument that intra-state disuniformity is not a problem because state courts are insignificant. This argument is unpersuasive. The increasing significance of states (and state courts) within the constitutional system has been dramatically underscored by a series of recent Supreme Court decisions. *See, e.g., Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress does not have power to subject nonconsenting states to private suits for damages in state courts); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (stating "[t]he dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts . . ."); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding that Religious Freedom Restoration Act of 1993 exceeds Congress' power); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot compel states to enact or enforce federal programs and thus, Congress is prohibited from compelling state officers directly); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacks power to abrogate state sovereign immunity from suits commenced or prosecuted in federal courts); Baumann et al., *supra* note 30, at 243 (discussing impact of cases mandating greater specificity in Title VII complaints); Susan Elizabeth Powley, Special Project, *Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641, 671-72, 683-86 (1991) (noting potential disadvantages and advantages in pleading employment discrimination cases in both federal and state courts).

61. Pennsylvania has been classified as a "Fact Pleading/Idiosyncratic Rules-Based Procedural System," and both Illinois and Nebraska have been classified as "Fact Pleading/Code-Based Procedural Systems." *See* Oakley & Coon, *supra* note 46, at 1407, 1415 & 1428 (classifying civil procedures of states). These classifications were categories 7 and 8, respectively, on a scale from 1 to 8, with 1 being the most strict replication of the Federal Rules of Civil Procedure. *See id.* The eight classifications were: (1) Federal Rules Replica; (2) Notice Pleading/Federal-Rules-Model Procedural System; (3) Notice Pleading/Idiosyncratic Rules-Based Procedural System; (4) Notice Pleading/Idiosyncratic Procedural System; (5) Notice Pleading/Federal Code Procedural System; (6) Fact Pleading/Federal-Rules-Model Procedural System; (7) Fact Pleading/Idiosyncratic Rules-Based Procedural System; and (8) Fact Pleading/Code-Based Procedural System. *See id.* at 1377-78.

Among the states with procedural systems least influenced by the federal model, this particular sample of three provided the most optimal mix of geography, population and ideology. Although the geographical dispersion of the sample is not ideal, the geographic reach of the study is not limited to these states. In comparisons of the federal and state procedural standards in practice, the federal procedural standard is observed at the level of the United States Courts of Appeals. Accordingly, in some respects, the geographic reach of this survey extends to the various circuit courts that collectively (although not inclusively) extend to New

the Federal Rules of Civil Procedure, which require notice pleading, the state courts of all three of the survey states are code pleading jurisdictions.

The distinction between code pleading and notice pleading is significant. Historically, pleadings served an ambitious purpose: they were devices by which the parties framed the facts and narrowed the issues.<sup>62</sup> Code pleading required plaintiffs to state factual support for all elements of each cause of action.<sup>63</sup> Compliance with these requirements was intended not only to flesh out the extent of the pleader's knowledge of the facts underlying the claim, but also to determine the legitimacy of the claim itself.<sup>64</sup>

The drafters of the Federal Rules expressly rejected the code pleading requirement that complaints set forth facts sufficient to state a cause of action.<sup>65</sup> Indeed, Rule 8(a)(2) was drafted deliberately to avoid usage of the terms "fact" and "cause of action," and the confusion they caused. In

---

Jersey in the east, the Virgin Islands in the Caribbean, Minnesota to the north, Arkansas in the south and the Dakotas in the Plains. (Pennsylvania is in the Third Circuit, which includes Delaware, New Jersey and the Virgin Islands. Illinois is in the Seventh Circuit, which includes Wisconsin and Indiana. Nebraska is in the Eighth Circuit, which includes Arkansas, Iowa, Minnesota, Missouri, and North and South Dakota.) Such breadth of reach assumes, however, that the "local legal culture," discussed *infra* at notes 271-84, extends beyond the boundaries of the survey states and to the curious states within the three courts of appeals. With regard to population, Illinois, Pennsylvania and Nebraska rank as the fifth, sixth and thirty-eighth most populous states, respectively.

Presidential politics were used as a crude proxy for political ideology. According to *The Almanac of American Politics*, Nebraska has voted for more Republicans in presidential elections than any other state, Pennsylvania is "one of the more Democratic states," and Illinois falls somewhere in the middle as a "presidential bellwether." MICHAEL BARONE, *THE ALMANAC OF AMERICAN POLITICS* 417, 806, 1129 (1996) (analyzing 1996 election year in light of each state's people, ratings, votes, election results and campaign finance).

62. The Field Code, adopted by the State of New York in 1848, was the prototype for all practice codes for states that adopted code pleading. Pleading under the Field Code required "a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of This State, ch. 379, § 120(2), 1848 N.Y. LAWS 521; accord CLARK, *HANDBOOK 1*, *supra* note 40, at 22-23 (discussing characteristics of code). See generally Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435, 463-64 (1986) (noting seeming survival of some aspects of fact pleading from original codes).

63. See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 190 (1952) (discussing history of pleading); Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 641 (1993) (presenting historical backdrop to pleading under Federal Rules).

64. See Robins, *supra* note 63, at 641 (noting greater detail in historical pleadings); Subrin, *Equity*, *supra* note 8, at 916 (noting evolution of common law as "technical pleading system designed to resolve a single issue").

65. See Subrin, *Equity*, *supra* note 8, at 922 (discussing how drafters of Federal Rules made enormous change from codes when flexible aspects of equity were adopted).

*Conley v. Gibson*,<sup>66</sup> a 1957 case that became the standard-bearer of notice pleading, the United States Supreme Court held:

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>67</sup>

Notice pleading epitomized the reforms accomplished by the Federal Rules of Civil Procedure and, particularly, the conscious departure from common law<sup>68</sup> and code pleading.<sup>69</sup>

Unlike the liberal notice pleading standard allowed by the text of Federal Rule 8(a), the procedural codes and rules in the three survey states still require the pleading of facts and causes of action. The Illinois Code of Civil Procedure requires a "plain and concise statement of the pleader's cause of action,"<sup>70</sup> the Pennsylvania Rules of Civil Procedure require the pleading of "material facts on which a cause of action . . . is based,"<sup>71</sup> and the Nebraska Code of Civil Procedure requires that the complaint disclose "facts constituting the cause of action."<sup>72</sup> This survey sought to determine whether, in each of these states, the textual difference between these code pleading requirements and the federal standard of notice pleading produces a different outcome in practice. The data are presented in Section A of Part II.

Notwithstanding the fundamental difference in pleading standards between the federal and state courts of these three states, all three have adopted, as part of their state procedural schemata, the federal summary

---

66. 355 U.S. 41 (1957).

67. *Conley*, 355 U.S. at 47.

68. One commentator provides a thorough description of common law pleading, including that:

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse. Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.

Subrin, *Equity*, *supra* note 8, at 916.

69. See, e.g., Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 491, 494-97 (1910) (discussing function of pleadings); Subrin, *Equity*, *supra* note 8, at 963-64 (discussing features of code pleading); Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 501-02 (1918) (distinguishing features of notice pleading).

70. 735 ILL. COMP. STAT. ANN. 5/2-603(a) (West 1992).

71. 42 PA. CONS. STAT. § 1019(a) (West 1987).

72. NEB. REV. STAT. ANN. § 25-804(2) (Michie 1995).

judgment rule.<sup>73</sup> Federal Rule 56(c) provides that summary judgment shall be rendered “[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>74</sup> The text of the corresponding sections of the Illinois and Nebraska Codes differ from the Federal Rule in only minor respects<sup>75</sup> and, until 1996, the Pennsylvania Rules of Civil Procedure copied the Federal Rule *verbatim*.<sup>76</sup> The control data, presented in Section B of Part II, identify the practical consequences of textual uniformity in these same federal and state jurisdictions.

### A. *The Practical Consequences of Dissimilar Procedural Rules*

This Section presents the methodology and the findings of a survey that explores the practical significance of dissimilar procedural rules. In particular, the survey evaluates the difference in *practice* between the pleading standard applied by state courts under the requirements of code pleading and the pleading standard applied by the federal courts in each of those states under the regime of notice pleading. In the narrow circumstances surveyed, the findings demonstrate patterns of substantial intra-state uniformity in practice, notwithstanding fundamental textual disuniformity.

#### 1. *Survey Design and Methodology*

The goal of this survey was to ascertain the pleading standards actually applied by certain federal and state courts, and to compare those standards between and among jurisdictions. Qualitative assessment and comparison of pleading standards is, to be sure, a precarious undertaking. These subjective dangers were mitigated through the design and methodology of the survey.

In assessing the pleading standard applied by courts, this survey was confined to published opinions. Admittedly, a substantial number of judicial applications of pleading standards appear in unpublished opinions.<sup>77</sup> This survey assumed, however, that all significant, novel or otherwise note-

---

73. See 735 ILL. COMP. STAT. ANN. 5/2-1005 (West 1992) (“Summary Judgments”); NEB. REV. STAT. ANN. § 25-1332 (Michie 1995) (citing summary judgment rule); 42 PA. CONS. STAT. § 1035.1-5 (West 1987 & Supp. 2000) (citing amended summary judgment rule).

74. 28 U.S.C.S. § 56(c) (2000).

75. The text of the pertinent summary judgment rules in the Illinois and Nebraska Codes do not include “answers to interrogatories” among the material for judges to consider upon motions for summary judgment. See 735 ILL. COMP. STAT. ANN. 5/2-1005(c); NEB. REV. STAT. ANN. § 25-1332.

76. See 42 PA. CONS. STAT. § 1035 (citing rescinded section). A new summary judgment rule was adopted February 14, 1996 and was made effective July 1, 1996. See 42 PA. CONS. STAT. § 1035.1-5 (citing amended statute).

77. Not all dispositive motions (even if granted) prompt a written opinion from the court, and not all written opinions are published.

worthy applications of pleading standards would be published.<sup>78</sup> Further, this survey accepted (and could not control) that the published opinions upon which the survey relies may not tell "the whole story."<sup>79</sup>

In order to permit more meaningful comparisons among the data, the survey focused on a single substantive category of cases: discrimination and civil rights actions implicating race, national origin, gender, sexual orientation, age, religion or disability, including federal and state constitutional litigation matters. This category of cases is referred to throughout this Article as "topical" or "civil rights" cases. By focusing the survey on this single category, the population of the study was reduced to a size that permitted substantive review of *all* relevant published opinions. For purposes of this survey, published opinions were characterized as "relevant" if they implicated the sufficiency of the factual allegations in the plaintiff's complaint.

Civil rights cases were selected because heightened pleading standards have uniquely significant substantive consequences on plaintiffs' civil rights claims. When courts impose heightened pleading standards, they impose a burden of making specific factual allegations. Facts to support allegations of civil rights violations are, however, more often than not, in the hands of the defendants.<sup>80</sup> Accordingly, the imposition of a burden to plead specific factual allegations can be dispositive of many civil rights claims and have a chilling effect on still others.<sup>81</sup> Put another way, the pleading standard really matters in these cases.

---

78. The assumption was made out of necessity, not out of confidence. See Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 236 (1998) (noting controversy over increase of unpublished appellate opinions); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 802 (1995) (noting court of appeals need not publish frivolous cases or cases where law is truly well-settled). See generally Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (discussing problems associated with unpublished opinions).

79. This is not meant to ascribe any disingenuousness to the courts. Rather, it suggests that all relevant facts in a given matter may not be apparent upon a stale reading of an opinion. Indeed, scholars have noted that even judges may be unaware of the full reasoning behind their decisions, which are influenced by inarticulable intuitions and subconscious forces. See Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 84-85 nn.31 & 34 (1998) (exploring why and how judges might not fully disclose reasoning and motivations in deciding cases).

80. See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 107-108 nn.176-78 (1994) (stating that heightened pleading standard is arguably race-specific); Eric K. Yamamoto, *supra* note 2, at 372 n.147 (discussing heightened fact pleading for civil rights cases).

81. See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 949 (1990) ("As a general rule notice pleading is sufficient, but an exception has been created

Furthermore, this category of cases was selected because the pleading standard for civil rights plaintiffs in federal court has experienced a well-documented (and highly controversial) evolution in the past two decades. Notwithstanding the mandate of notice pleading under Federal Rule 8(a), fact pleading enjoyed a highly controversial revival in federal civil rights cases in the 1970s and 1980s.<sup>82</sup> Indeed, during this period, all federal

for cases brought under the Civil Rights Acts.”); Brooks, *supra* note 80, at 108 n.80 (discussing imposition of plaintiff with heightened pleading standard); 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, 1027 (1989) (noting problems with pretrial scheme that unfairly requires certain plaintiffs to plead specifically with facts); Marcus, *supra* note 62, at 436 (noting inappropriate use of fact pleading requirements as step towards discretionary dismissals); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 418 (1980) (noting evolution of fact-conclusion pleading distinction); Evan Sanford Schwartz, *A Plea for Help: Pleading Problems in Section 1983 Municipal Liability Claims*, 6 TOURO L. REV. 377, 378 (1990) (noting that popular technique to limit civil rights claims is heightened pleading standard); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 683 (1984) (discussing history of specificity requirements in civil rights complaints); Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839, 839 (1994) (noting that notice pleading in Civil Rights cases is under attack by federal courts).

82. See, e.g., MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES 20 (2d ed. 1991) (detailing requirements of heightened pleading); Blaze, *supra* note 81, at 949 (noting that reasoning given by courts for heightened pleadings in Civil Rights Act cases was dubious at best); Brooks, *supra* note 80, at 108 n.180 (discussing disparate impact of heightened pleading in Civil Rights cases on people of color); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 657 (1989) (noting that fact pleading requirement is one way to deal with lawsuits frequently found to be frivolous); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1580-81 n.49 (1991) (citing examples of civil rights cases where heightened pleading requirements existed); Louis, *supra* note 81, at 1027 (noting serious problems with Federal Rules of Civil Procedure before 1983 amendments); Marcus, *supra* note 62, at 446-47 (discussing courts insistence on vigorous fact pleading in certain cases); Paul J. McCardle, *A Short and Plain Statement: The Significance of Leatherman v. Tarrant*, 72 U. DET. MERCY L. REV. 19, 20 (1994) (discussing impact of *Leatherman* on federal pleading in civil rights cases); Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 808-09 (1988) (stating no genuine justification exists for heightened pleading in civil rights cases); Roberts, *supra* note 81, at 418 (discussing heightened pleading requirements in certain cases); Schwartz, *supra* note 81, at 382-88 (discussing revival of heightened pleading in civil rights cases); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 299 (1989) (discussing various civil rights cases in which heightened pleading was required); Wingate, *supra* note 81, at 683 (discussing first case to announce special pleading rule for civil rights cases); Bladich, *supra* note 81, at 841 (stating that heightened pleading standards are unwarranted acts of judicial activism); Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 N.C. L. REV. 1085, 1109 (1994) (considering *Leatherman*'s effect on federal pleading in civil rights cases); Clay J. Pierce, Note, *The Misapplication of Qualified Immu-*

courts of appeals applied a standard demanding factual specificity of civil rights plaintiffs filing cases in federal court.<sup>83</sup> Courts typically used one or some combination of the following arguments to justify the heightened pleading standard: (1) the higher standard discouraged frivolous litigation and abuse; (2) the higher standard encouraged civil rights cases to be filed in state courts; and (3) the increasingly large volume of cases brought under the Civil Rights Act demanded an alternative.<sup>84</sup> Yet, in 1993, a unanimous United States Supreme Court held in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>85</sup> that Federal Rule 8(a) "meant what it said":

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>86</sup>

---

nity: *Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent*, 62 FORDHAM L. REV. 1769, 1791 (1994) (considering implication of recent case law on procedural burdens under Federal Rules).

83. See, e.g., *Morton v. Becker*, 793 F.2d 185, 188 (8th Cir. 1986) (stating plaintiffs must plead specific allegations); *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) (affirming lower court's dismissal and stating "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984) (requiring some particularity in pleading); *Hurney v. Carver*, 602 F.2d 993, 995 (1st Cir. 1979) (stating courts need not "conjure up" unpled facts to support conclusory allegations); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (stating civil rights complaint must state more than simple conclusions); *Smith v. Int'l Longshoremen's Ass'n*, 592 F.2d 225, 226 (4th Cir. 1979) (stating Federal Rules of Civil Procedure require definiteness in complaint); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (holding complaint must contain specific factual allegations to support claim of conspiracy); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976) ("[P]laintiffs in civil rights cases are required to plead facts with specificity."); *Coopersmith v. Supreme Court*, 465 F.2d 993, 994 (10th Cir. 1972) (stating complaint must state factual basis for claim asserted); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) (stating pleading is insufficient to state cause of action "if its allegations are but conclusions"); *Jewell v. City of Covington*, 425 F.2d 459, 460 (5th Cir. 1970) (stating general conclusory allegations unsupported by facts do not constitute cause of action).

84. See Brooks, *supra* note 80, at 108 n.180 (citing caselaw that suggested many civil rights cases are frivolous); see also *Rotolo*, 532 F.2d at 922 (stating concern with frivolous claims as reason to require civil rights cases be pled specifically); Baumann et al., *supra* note 30, at 245 (discussing problems created by heightened specificity requirements in Title VII pleadings, despite reasons given by courts for more stringent standards); Blaze, *supra* note 81, at 950 (noting increasingly large volume of cases brought under Civil Rights Acts as reason for exception to liberal pleading); Marcus, *supra* note 62, at 436 (suggesting pleadings should enable courts to decide cases on their merits); Wingate, *supra* note 81, at 684 (pointing out reasons given by courts for heightened pleading in civil rights cases).

85. 507 U.S. 163 (1993).

86. *Leatherman*, 507 U.S. at 168 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

Thus, civil rights plaintiffs in federal court were to enjoy the same lenient standard of notice pleading as other plaintiffs.<sup>87</sup>

The evolution of the pleading standard in civil rights cases is particularly appropriate for study for two reasons. First, the controversial nature of this subset of cases suggests that the courts thoughtfully and deliberately applied the pleading standard in the opinions that are the subject of this review. Second, given that we know that the federal standard experienced an evolution from notice pleading to fact pleading and back to notice pleading, we can compare not only the standards applied by the federal and state courts within a given state at any particular time, but also the pattern of evolution of those standards within each jurisdiction.

The survey of the federal pleading standard imposed upon civil rights plaintiffs is directed primarily at the opinions of the applicable federal circuit court of appeals.<sup>88</sup> Although the pleading standard is applied, in the first instance, by federal district courts, the survey assumed that the appeals courts were the more appropriate focus for a study of the jurisprudence of the federal courts within a given state. The opinions of the courts of appeals educate the trial courts and provide the precedential text from which a pleading standard is derived. Similarly, priority was given to the opinions of the highest appeals court within each of the state court systems. However, in order to have a sufficient population of cases from which to draw conclusions about the pleading standard within each state, the survey also considered the opinions of intermediate state appellate courts (and, on rare occasions, trial courts).

To gather the data, topical and relevant opinions were reviewed and categorized as indicative of either a “notice” or a “fact” pleading standard. Recognizing the strongly subjective judgment reflected in each case review, characterization was limited to these general categories, and no ordinal judgments were made within each of these two categories.

To aid in the characterization, a concept of “badges” was adopted to determine whether a given opinion was indicative of one standard or the other.<sup>89</sup> For purposes of classification, the badges of notice pleading

---

87. Significantly, however, the Court refused to consider whether a heightened pleading standard could still be required in situations in which an individual government official asserted a qualified immunity defense. *See id.* at 166-67. A standard of heightened pleading thus continued under those limited circumstances in certain jurisdictions. *See generally* Leon Friedman, *Qualified Immunity When Facts are in Dispute*, 16 *TOURO L. REV.* 857 (2000). The Supreme Court then affirmatively foreclosed the heightened pleading standard in qualified immunity cases in *Crawford-El v. Britton*, 523 U.S. 574 (1998). *See generally* Brian P. Sharkey, Note, *Crawford-El v. Britton: The Supreme Court Re-examines the Qualified Immunity Defense Within the Confines of the Federal Rules of Civil Procedure*, 29 *SETON HALL L. REV.* 1122 (1999).

88. In two of the three subject states, the applicable federal circuit court of appeals sits within the state. The Eighth Circuit does not, however, regularly sit in Nebraska.

89. The decision to use a concept of badges came while the author was reading Professor Bruce Markell’s article discussing the “badges of fraud” in the con-



were: (i) using the word “notice” when describing the applicable standard; (ii) using the word “claim” (as opposed to “cause of action”); (iii) referring to “liberal construction” of the plaintiff’s complaint; and (iv) acknowledging the distinct roles of motions to dismiss and motions for summary judgment.

Conversely, the badges of fact pleading included: (i) using the words and phrase “facts,” “elements” and “causes of action;” (ii) demanding “specificity” or “particularity” on each element of a claim or cause of action; (iii) expressing dissatisfaction with “conclusory” allegations; (iv) deploring the evil of “frivolous” litigation; (v) expecting plaintiffs to anticipate and negate affirmative defenses; and (vi) discussing the merits of the underlying claim when assessing sufficiency of allegations (often indicating the plaintiff’s burden to “establish” or “prove” something at the pleading stage, or “weighing” and “balancing” the merits of the underlying substantive claim). The assurance of stability in the data collected is that the author was the sole reviewer, and the same categories were used throughout the review.

In each of the following sections there is a state-specific description of the significant moments in the evolution of the pleading standards—first in the federal court, and thereafter, in the state court.<sup>90</sup> When a “clearly prevailing” standard is mentioned, this means that all or nearly all of the cases within that period demonstrated the badges of that standard. Of course, there are many periods where the corpus of opinions from a given jurisdiction exhibit the badges of both fact and notice pleading; during these periods of transition (or other uncertainty), the pleading standard is referred to as “mixed.” At the conclusion of each of the following sections, the data is presented in a time-series graph that demonstrates, for each federal and state jurisdiction, the evolutionary pattern between the standards of fact and notice pleading.

---

text of state adoption of the Uniform Fraudulent Transfer Act. *See* Bruce A. Markell, *The Indiana Uniform Fraudulent Transfer Act Introduction*, 28 IND. L. REV. 1195, 1200 (1995) (discussing decisions dealing with or enunciating various badges of fraud). Accordingly, the author thanks the University of Nevada-Las Vegas School of Law for extending an interview during the law faculty recruitment process. It is most unlikely that the author would otherwise have been reading this fascinating article about the Indiana Uniform Fraudulent Transfer Act.

90. “Moments” are used as a shorthand for cases that (1) establish a new standard of application; and/or (2) are widely cited for establishing a new standard of application. This term is borrowed from Bruce Ackerman’s “moments” in the field of constitutional law. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456-61 (1989) (outlining constitutional “moments”). Not all cases specifically described in the text are “moments,” however. Some are merely exemplary of a prevailing standard.

## 2. *Survey Data*

### a. Illinois

The State of Illinois retains a system of code pleading that has origins in the Field Code.<sup>91</sup> According to Section 2-603(a) of the Illinois Code of Civil Procedure, an Illinois state court complaint must contain a “plain and concise statement of the pleader’s cause of action.”<sup>92</sup> Notwithstanding the fundamental difference between code pleading and notice pleading (under Federal Rule 8(a)), the federal and state court pleading standards in Illinois civil rights cases have evolved in remarkable parallel and are applied uniformly.

The pleading standard for civil rights plaintiffs in Illinois federal courts is easily traced. During the 1960s, a notice pleading standard clearly prevailed.<sup>93</sup> Throughout that decade, courts routinely cited *Conley*, embraced the liberal pleading requirements of Rule 8(a), and held that complaints need only give the defendant fair notice of the claim.<sup>94</sup>

Beginning in the 1970s, however, the requirement that civil rights plaintiffs plead facts crept into the jurisprudence of the Seventh Circuit. Federal Rule 8(a) notwithstanding, the badges of fact pleading first ap-

---

91. Pleading under the Field Code required “a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of This State, ch. 379 § 120(2), 1848 N.Y. LAWS 521. The Civil Practice Act adopted in Illinois copied the Field Code, except that it omitted the term “statement of facts.” The Committee decided to omit the word “facts” in order to minimize the controversy that had arisen in so many code states where pleadings had been constantly attacked as setting out conclusions rather than facts. See Walter Wheeler Cook, “Facts” and “Statements of Fact,” 4 U. CHI. L. REV. 233, 233 (1936) [hereinafter Cook, *Facts*] (discussing intentional departure from traditional code language). In 1981, the Illinois Code of Civil Procedure “reorganized” the Practice Act, but made purely stylistic changes. See Act of August 19, 1981, Public Act No. 82-280, 1982 Ill. LAWS 1381; see also 735 ILL. COMP. STAT. ANN. 5/2-101-1601 (West 1992) (providing provisions of Illinois Code of Civil Procedure).

92. 110 ILL. COMP. STAT. ANN. § 2-603(a) (West 1983).

93. This description begins with the 1960s only because this is when topical opinions first appear. No earlier published opinions discussing the pleading standard for civil rights plaintiffs in federal court could be found.

94. See, e.g., *Sigafus v. Brown*, 416 F.2d 105, 107 (7th Cir. 1969) (construing pro se complaint liberally where not “wholly insubstantial or frivolous”); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 360-62 (7th Cir. 1968) (finding complaint filed under Civil Rights Act of 1964 alleging gender discrimination sufficient, notwithstanding failure to plead certain basic facts); *Hardwick v. Hurley*, 289 F.2d 529, 531 (7th Cir. 1961) (construing Section 1983 complaint liberally, finding conclusory allegations of due process violation sufficient); *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 214 (N.D. Ill. 1969) (noting civil rights “complaint must be liberally construed”); *Joe Louis Milk Co. v. Hershey*, 243 F. Supp. 351, 356 (N.D. Ill. 1965) (finding complaint sufficiently satisfies liberal pleading requirements of rule 8(a)(2) to survive defendant’s motion to dismiss).

peared in civil rights complaints alleging conspiracies.<sup>95</sup> Complaints were dismissed as insufficient to state a cause of action unless they contained specific factual allegations about the nature of the conspiracy, the involvement of each of the named defendants, and the specific conspiratorial acts.<sup>96</sup> Fact pleading then spread beyond conspiracy cases; extra protections for pro se plaintiffs eroded, and courts required the pleading of *facts* in lieu of so-called boiler-plate pleading.<sup>97</sup>

By 1985, a fact pleading standard for civil rights plaintiffs clearly had prevailed in Illinois federal courts.<sup>98</sup> In *Strauss v. City of Chica-*

---

95. See, e.g., *Ehrlich v. Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970) (finding complaint fails to reveal any basis under Civil Rights Act); *French v. Corrigan*, 432 F.2d 1211, 1212-13 (7th Cir. 1970) (affirming dismissal of civil rights complaint because allegation is conclusory).

In fact, these roots can be traced back into the 1960s. See *Kamsler v. Zaslawsky*, 355 F.2d 526, 527 (7th Cir. 1966) (finding allegations listing improprieties and errors in state criminal trial and pretrial proceedings were insufficient to substantiate conclusory allegations of conspiracy); *Huey v. Barloga*, 277 F. Supp. 864, 873 (N.D. Ill. 1967) (recognizing duty to examine complaint for any possible grounds for relief, but finding complaint insufficient where it had "not alleged facts").

96. See, e.g., *French*, 432 F.2d at 1213 ("Obviously, this allegation is conclusory and of no aid to plaintiff absent allegations as to the acts committed by defendants in pursuance of the alleged conspiracy.").

97. See, e.g., *Cohen v. Ill. Inst. of Tech.*, 581 F.2d 658, 663 (7th Cir. 1978) (requiring some particularized facts demonstrating constitutional deprivation to sustain cause of action under Civil Rights Act); *Colaizzi v. Walker*, 542 F.2d 969, 972 (7th Cir. 1976) (finding "boiler-plate pleading" insufficient to state claim under civil rights statutes); *Roberts v. Acres*, 495 F.2d 57, 59 (7th Cir. 1974) ("[T]he only elements [needed] to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution . . ."); *Carlisle v. Bensinger*, 355 F. Supp. 1359, 1362 (N.D. Ill. 1973) (dismissing allegations that prison officials discriminated by allowing some inmates to take personal property into segregation, that some prisoners had been subjected to assaults by prison personnel, and that prison officials discriminated against inmates because of past prison records because plaintiffs "fail[ed] to present any *factual* support for these allegations" (emphasis added)).

With regard to pro se plaintiffs in particular, an especially liberal pleading standard was first eliminated by the Seventh Circuit. See *Haines v. Kerner*, 427 F.2d 71, 73 (7th Cir. 1970) (finding purely conclusory statements insufficient in complaint based on Civil Rights statutes). The Supreme Court later reversed this decision, but any special protections for pro se plaintiffs were limited. See *Haines v. Kerner*, 404 U.S. 519, 521 (1972) ("[A]lthough we intimate no view whatever on the merits[,] . . . we conclude that he is entitled to an opportunity to offer proof."); see also *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980) (stating pro se plaintiff's allegations may be liberally construed but still must be supported by facts).

98. See, e.g., *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985) (stating that plaintiff "must set out sufficient factual matter to outline the elements of his cause of action or claim"); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 198 (7th Cir. 1985) (utilizing *Ellsworth* standard) (noting that complaint must include "operative facts"); *Lowe v. Letsinger*, 772 F.2d 308, 311 (7th Cir. 1985); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) (stating that plaintiff "must set out sufficient factual matter to outline the elements of his cause of action or

go,<sup>99</sup> the plaintiff had filed a civil rights suit after he was allegedly struck by a police officer while being placed under arrest without probable cause or reasonable belief that a crime had been committed.<sup>100</sup> The district court dismissed the complaint and the Seventh Circuit affirmed because the plaintiff “alleged no *facts* to suggest that the policies of which he complains actually exist.”<sup>101</sup> Subtly acknowledging the end of the era of notice pleading, the court genuflected with the traditional maxims of a liberal notice pleading standard,<sup>102</sup> but then reviewed the complaint under a heightened pleading standard.<sup>103</sup>

The absence of any facts at all to support plaintiff’s claim renders the allegations mere legal conclusion of Section 1983 liability devoid of any *well-pleaded facts* . . . . Strauss did attempt to establish the minimal facts required by including statistical summaries . . . . We do not mean to imply that a plaintiff must plead in greater detail, but merely that the plaintiff must plead some fact or facts tending to support his allegation . . . .<sup>104</sup>

Notwithstanding a certain amount of equivocation in *Strauss* about a fact pleading standard for civil rights plaintiffs, the opinion is widely cited by scholars and courts (including the Seventh Circuit itself) for establishing a heightened pleading requirement for civil rights plaintiffs in the Seventh

---

claim”); *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) (dismissing plaintiff’s claim that city policies proximately caused unlawful police conduct because plaintiff failed to allege any facts to support claim).

99. 760 F.2d 765 (7th Cir. 1985).

100. *See Strauss*, 760 F.2d at 766 (stating facts of case).

101. *Id.* at 767 (emphasis added).

102. *See id.* at 767 (“To further this end a court must construe pleadings liberally, and mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss.”). The court also stated:

The standard a defendant must meet to have a claim dismissed for this reason is admittedly a high one. Dismissal is improper “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”. . . . Our conclusion today does not conflict with the settled rule stated in *Conley*, 355 U.S. at 47, 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.

*Id.* at 767 (citations omitted).

103. The terms “heightened pleading” and “fact pleading” are used interchangeably.

104. *Strauss*, 760 F.2d at 767-69 (emphasis added); *see also Benson*, 761 F.2d at 338 (reviewing complaint under heightened pleading standard). *Benson* was argued four months before *Strauss*, but it was decided (by a panel that did not overlap with the panel in *Strauss*) one day after *Strauss*. The *Benson* court, too, took great pains to acknowledge rule 8(a), “notice pleading” and *Conley v. Gibson*, before applying what unmistakably is a fact pleading analysis to find that the allegations of the complaint did not state a constitutional violation. *See id.* at 338-39 (analyzing pleading standard). The court found that a plaintiff “must ‘set out sufficient *factual matter* to outline the elements of his *cause of action* or claim . . . .’” *Id.* at 338 (emphasis added). The *Benson* court did not cite the *Strauss* opinion.

Circuit.<sup>105</sup> After *Strauss*, and for approximately eight years, a fact pleading standard for civil rights plaintiffs clearly prevailed in the federal courts of Illinois.<sup>106</sup>

In 1993, after the Supreme Court decided *Leatherman*,<sup>107</sup> Illinois federal courts promptly returned to a notice pleading standard. In *Triad Associates, Inc. v. Robinson*,<sup>108</sup> the Seventh Circuit affirmed the district court's refusal to grant a motion to dismiss based on the qualified immunity of the defendants.<sup>109</sup> In so holding, the Seventh Circuit remarked, "[I]n this circuit on a motion to dismiss we require no more from plaintiffs' allegations of intent than what would satisfy Rule 8's notice pleading minimum and Rule 9(b)'s requirement that motive and intent be pleaded gener-

---

105. See, e.g., Barbara Kritchevsky, "Or Causes to be Subjected": *The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1211 n.85 (1988) (noting adoption by *Strauss* court of heightened pleading standard); Marcus, *supra* note 62, at 465 n.195 (citing *Strauss* and suggesting that "detailed pleading" requirements "may tempt courts to question the factual conclusions on which the plaintiff has rested his claims"); Steven H. Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEV. ST. L. REV. 407, 445 n.218 (1993) (noting *Strauss* extended "heightened pleading" to "non-immunity issues such as the facts necessary to establish municipal liability"); Schwartz, *supra* note 81, at 382 n.26 (noting *Strauss*, among other cases, has imposed a heightened pleading standard); see also *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (citing *Strauss* and noting that some civil rights cases require heightened pleading); *Santiago v. Fenton*, 891 F.2d 373, 380 (1st Cir. 1989) (citing *Strauss* and noting that in circumstances where plaintiff does not allege "any specific facts beyond the immediate incident" plaintiff's claim "will not withstand a motion to dismiss"); *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989) (citing *Strauss* and noting that Section 1983 complaints "that cite bare legal conclusions that are 'wholly devoid of facts' . . . may warrant dismissal").

106. See, e.g., *Caldwell v. City of Elwood, Ind.*, 959 F.2d 670, 672 (7th Cir. 1992) ("A civil rights complaint must outline a violation . . . 'and connect the violation to the named defendants.'"); *Sivard v. Pulaski County*, 959 F.2d 662, 667 (7th Cir. 1992) (requiring "greater specificity" of Section 1983 plaintiff); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) (requiring "specific nonconclusory factual allegations [establishing violation]" to avoid dismissal in constitutional tort litigation); *Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1988) (finding civil rights complaint implicating involvement of head of department must be pled with greater specificity); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985) ("A plaintiff must allege sufficient facts to outline the cause of action, proof of which is essential to recovery."); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 198 (7th Cir. 1985) (affirming dismissal of complaint after scrutiny of specific factual allegations alleging several constitutional violations).

107. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

108. 10 F.3d 492 (7th Cir. 1993).

109. See *Triad Assocs.*, 10 F.3d at 494 (affirming lower court's refusal to grant motion to dismiss). The opinion was especially important because the notice pleading standard was re-introduced in a case involving a qualified immunity defense. See *supra* note 86 and accompanying text.

ally.”<sup>110</sup> Since *Leatherman* and *Triad Associates*, a liberal standard of notice pleading has clearly prevailed in Illinois federal courts.<sup>111</sup>

Turning to the experience in Illinois state courts, the analysis begins again with the earliest published opinions discussing the pleading standard for plaintiffs in civil rights cases in state court. Much like the federal court, but contrary to the fact pleading required under the Illinois Code, the first published state court opinions suggest that civil rights plaintiffs then enjoyed a notice pleading standard.<sup>112</sup> In the 1966 case of *Clark v. McCurdie*,<sup>113</sup> for example, the Illinois Court of Appeals was required to determine the “sufficiency of an amended petition to abate a nuisance.”<sup>114</sup> The petition alleged a violation of a state civil rights statute because five persons were denied service at a café “on account of race or color.”<sup>115</sup> The Illinois court held:

The Petitioner is not required to make out a case which will entitle the petitioner to all of the sought ultimate relief but *need only raise a fair question* as to the existence of the claimed right . . . . Turning now to an examination of the allegations of the complaint . . . we find an allegation of refusal to serve by reason of color or race, allegedly in violation of the statute. To impose

---

110. *Triad Assocs.*, 10 F.3d at 497.

111. See, e.g., *Jacobs v. City of Chi.*, 215 F.3d 758, 765 n.3 (7th Cir. 2000) (“[T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.”); *Patton v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 184 F.3d 623, 627 (7th Cir. 1999) (noting that complaint is sufficient where court and defendant can “understand the gravamen of the plaintiff’s complaint”); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (reversing district court’s dismissal of racial discrimination in employment claim and explaining that complaint which simply avers that “‘I was turned down for a job because of my race’” states claim); *Kyle v. Morton High Sch.*, 144 F.3d 448, 454-55 (7th Cir. 1998) (acknowledging that before *Leatherman*, Seventh Circuit “on occasion . . . would apply a more stringent standard for notice pleading in civil rights cases” but now applies “same standards [it] would apply in a non civil rights case”); *Sledd v. Lindsay*, 102 F.3d 282, 289 (7th Cir. 1996) (finding complaint sufficient because there was “set of facts” that plaintiff might prove that could be “consistent with the allegations in the complaint”); *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995) (“But apart from [Fed. R. Civ. P. 9] and a tiny handful of arguably appropriate judicial supplements to it, a plaintiff in a suit in federal court need not plead facts; he can plead conclusions.”); *Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201-U*, 46 F.3d 682, 688 (7th Cir. 1995) (“It is enough to specify the wrong done and leave [the] details to later steps . . . .”). But see *Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 859 (7th Cir. 1999) (applying “the liberal pleading standards of the Federal Rules of Civil Procedure, standards that we now know federal judges are not authorized to tighten up for civil rights cases,” but nevertheless finding allegations insufficient).

112. The author could find no opinions published prior to 1966 discussing the pleading standard for civil rights complainants in state court. Accordingly, it is unclear whether the state court had earlier (or ever) required civil rights plaintiffs to plead facts as required by the Illinois Code.

113. 220 N.E.2d 318 (Ill. App. Ct. 1966).

114. *Clark*, 220 N.E.2d at 319.

115. *Id.* at 320 (citing Ill. Rev. Stat. ch. 38, § 13-3(c) (1961)).

upon the petitioner the duty to negate all possible defenses that may subsequently be invoked by the defendant would involve the pleading of evidence . . . . This petition contains sufficient allegations *and gave enough information to indicate* a possible violation of the Civil Rights Statute.<sup>116</sup>

Importantly, the Illinois pleading standard is described here without reference to facts; instead, the appeals court declared that the purpose of the complaint was merely to provide the defendant with notice and was sufficient so long as it “raise[d] a fair question as to the existence of the claimed right.”<sup>117</sup> These are, of course, badges of notice pleading.

A second illustration of the then-prevailing standard of notice pleading is the Illinois Appeals Court’s holding in *McGill v. 830 South Michigan Hotel*.<sup>118</sup> In that case, also decided in 1966, the plaintiff had sued a hotel operator, alleging in a rather conclusory fashion that unexplained rent increases and certain threats to notify the police constituted a violation of state civil rights statutes.<sup>119</sup> In determining that, although it lacked specific facts, the plaintiff’s fourth amended complaint was sufficient to withstand a motion to dismiss, the court stated:

Under the Civil Practice Act, pleadings are to be *liberally construed* with a view toward doing substantial justice between the parties, and no pleading is to be deemed bad in substance which shall contain such information as shall *reasonably inform the opposite party of the nature of the claim*. The pleader should allege the ultimate facts to be proved and not allege the evidentiary facts which tend to prove the ultimate facts. There is no clear distinction between statements of “evidentiary facts,” “ultimate facts” and “conclusions of law.” There is no provision in the Civil Practice Act defining a conclusion, and a precise definition as to what constitutes conclusions of law is impossible.<sup>120</sup>

Like *McCurdie*, this description of the pleading standard in a code jurisdiction is remarkable because the touchstone of the articulated standard is whether the defendant has *notice* of the claim against it and because the court eschews reliance on the pleading of *facts*, acknowledging that the difference between facts and conclusions of law can be illusory.<sup>121</sup> Al-

---

116. *Id.* (emphasis added) (citations omitted).

117. *Id.*

118. See *McGill v. 830 S. Mich. Hotel*, 216 N.E.2d 273, 276 (1966) (illustrating Illinois notice pleading standard).

119. See *id.* at 274-75 (noting plaintiff’s allegations).

120. *Id.* at 276 (emphasis added) (internal case citations omitted).

121. To be sure, the court’s holding is not without any foundation in code pleading. In fact, the Illinois Code of Civil Procedure contains specific provisions that are intended to soften the harshness of fact pleading. Section 1-106 provides that the Civil Practice Act is to be “liberally construed.” See 735 ILL. COMP. STAT. ANN. 5/1-106 (West 2000). Section 2-612 expressly provides: “No pleading is bad in substance which contains such information as reasonably informs the opposite

though there are few topical and relevant reported state court opinions for approximately ten years after these 1966 decisions, the notice pleading standard likely continued to prevail.<sup>122</sup>

In 1977, while the pleading standard for civil rights plaintiffs in federal court was in the midst of its transition to fact pleading, Illinois state courts likewise introduced elements of fact pleading into their jurisprudence. In *Morse v. Nelson*,<sup>123</sup> the plaintiff had filed an action against the sheriff claiming false imprisonment and violations of federal and state civil rights laws.<sup>124</sup> With untempered language, the Illinois Appeals Court upheld the dismissal of the complaint:

[S]ubstantial averments of *facts* [are] necessary to state a *cause of action* . . . . A complaint is subject to a motion to dismiss where the *well-pleaded facts* do not *entitle* one to a recovery . . . .

Virtually no facts are alleged showing the unlawfulness of the arrest or subsequent detention. The allegation to the effect that plaintiff's commitment to jail was without competent authority is a bare conclusion. The allegation that a "warrant process" . . . was issued after the arrest does not, on its face, vitiate the lawfulness of the original arrest or detention . . . .<sup>125</sup>

After *Morse*, the transition from notice to fact pleading for civil rights plaintiffs was slow, with certain remnants of notice pleading lingering until the mid-1980s.<sup>126</sup> Beginning in 1986, however, a fact pleading standard

---

party of the nature of the claim or defense which he or she is called upon to meet." *Id.* at 5/2-612. These provisions, however, are certainly not intended to eliminate the fundamental requirement of code pleading that imposes a duty upon plaintiffs to allege sufficient facts to state a cause of action. *See* *Reed v. Hoffman*, 363 N.E.2d 140, 143 (Ill. App. Ct. 1977) (noting that state Civil Practice Act, which "abolished the common law vigors of pleading . . . does not relieve the plaintiff of his duty to allege sufficient facts to state a cause of action"); *Bauscher v. City of Freeport*, 243 N.E.2d 650, 652 (Ill. App. Ct. 1968) ("While pleadings are to be liberally construed . . . still the complaint must allege facts necessary to state a cause of action.").

122. *See, e.g.*, *Lamonte v. City of Belleville*, 355 N.E.2d 70, 78 (Ill. App. Ct. 1976) (noting that conclusory allegation that conduct was willful and wanton was sufficient to maintain claim against city under Illinois Governmental Employees Tort Immunity Act); *Steinberg v. Chi. Med. Sch.*, 354 N.E.2d 586, 591 (Ill. App. Ct. 1976) (dismissing civil rights claims because no state action, but contractual claims survived motion to dismiss because "primary purpose of pleading is [merely] to inform the opposite party and the court of the nature of the action"); *People ex rel. Willis v. Dept. of Corrs.*, 282 N.E.2d 716, 720 (Ill. 1972) (withholding judicial action on pro se plaintiff in case not involving pleading standard, but allowing petitioner to make request for transfer pursuant to new regulation); *Bauscher*, 243 N.E.2d at 652 (holding that complaint challenging constitutional validity of city ordinance should be liberally construed, but must also contain some facts).

123. 363 N.E.2d 167 (Ill. App. Ct. 1977).

124. *See Morse*, 363 N.E.2d at 168 (stating facts of case).

125. *Id.* at 169-70 (emphasis added).

126. *See, e.g.*, *Doyle v. Shlensky*, 458 N.E.2d 1120, 1127 (Ill. App. Ct. 1983) ("A complaint fails to state a cause of action when it omits facts, the existence of which is necessary for plaintiff to recover . . . . A complaint which fails to state a cause of



prevailed for the next several years as state courts expressly adopted the federal court's fact pleading requirements for Section 1983 and other civil rights plaintiffs.<sup>127</sup>

action may not be cured by liberal construction . . ."); *Mlade v. Finley*, 445 N.E.2d 1240, 1244 (Ill. App. Ct. 1983) ("To pass muster a complaint . . . must be factually sufficient; it must plead facts which bring the claim within the legally recognized cause of action alleged." (citing *People ex rel. Fahner v. Carriage Way West Inc.*, 400 N.E.2d 1005, 1009 (Ill. 1981))); *Wolinsky v. Kadison*, 449 N.E.2d 151, 158 (Ill. App. Ct. 1983) (noting that constitutional claimants "need not set forth evidence which may well be derived from discovery subsequent to the filing of the complaint"); *Int'l Soc'y for Krishna Consciousness, Inc. v. City of Evanston*, 411 N.E.2d 1030, 1038-39 (Ill. App. Ct. 1980) (noting that notice pleading allowed under Federal Rules is insufficient under Civil Practice Act and instructing trial courts "to dismiss an action . . . which fails to meet the stricter pleading requirements of the Civil Practice Act"); *Golden Rule Life Ins. Co. v. Mathias*, 408 N.E.2d 310, 317 (Ill. App. Ct. 1980) (finding allegation that white passing rate for insurance examination was sufficient to state Illinois civil rights claim despite court's "state of considerable dubiety as to whether plaintiff's allegations can be sustained at trial"); *Executive Commercial Servs., Ltd. v. Daskalakis*, 393 N.E.2d 1365, 1368-69 (Ill. App. Ct. 1979) (noting allegations of conspiracy require facts (citing *Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963))); *Walinski v. Morrison & Morrison*, 377 N.E.2d 242, 244-45 (Ill. App. Ct. 1978) (construing sex discrimination complaint filed under state law liberally and finding complaint sufficient); *Uretsky v. Baschen*, 361 N.E.2d 875, 882 (Ill. App. Ct. 1977) (dismissing Section 1983 complaint because it failed "to set forth specific illegal conduct and resultant harm"); *Parkway Bank & Trust Co. v. City of Darien*, 357 N.E.2d 211, 216 (Ill. App. Ct. 1976) (finding allegations of Section 1983 violation insufficient because plaintiff "failed to allege that the defendants acted with malice or to state circumstances from which malice could be inferred").

127. See, e.g., *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 881-82 (Ill. 1991) (holding that complaint did not state claim because, upon balancing interests, court "conclude[d] that directing plaintiff to cease all communications with the city council members . . . did not violate plaintiff's right of free speech"); *Doe v. Calumet City*, 609 N.E.2d 689, 694 (Ill. App. Ct. 1992) (recognizing fact pleading standard), *rev'd*, 641 N.E.2d 498, 501 (Ill. 1994); *Drovers Bank of Chi. v. Vill. of Hinsdale*, 566 N.E.2d 899, 905 (Ill. App. Ct. 1991) (noting that constitutional challenge to ordinance "will be dismissed where a thoughtful reading of the ordinance convinces the trial court that it is plainly within the bounds of the Constitution"); *Dudycz v. City of Chi.*, 563 N.E.2d 1122, 1126-27 (Ill. App. Ct. 1990) (finding pleaded facts for equal protection violation "wholly insufficient . . . [because] plaintiff does not establish that he and [his class] were, in fact, similarly situated so that he was entitled to be treated in the same manner"); *Towne v. Town of Libertyville*, 546 N.E.2d 810, 813 (Ill. App. Ct. 1989) ("[I]f . . . there are not sufficient allegations of fact to state a cause of action, the motion to dismiss must be granted regardless of whether it informs the defendant in a general way of the nature of the claim against him."); *Bismarck Hotel Co. v. Sutherland*, 529 N.E.2d 1091, 1100 (Ill. App. Ct. 1988) ("[T]he notice pleading allowed in Federal practice is insufficient in Illinois . . . [because] a plaintiff is required to make more than broad, generalized allegations of discrimination to state a cause of action therefor."); *Loftus v. Mingo*, 511 N.E.2d 203, 205, 209 (Ill. App. Ct. 1987) (finding that plaintiff must plead elements of cause of action); *Brown v. Michael Reese Health Plan, Inc.*, 502 N.E.2d 433, 435 (Ill. App. Ct. 1986) (noting that party challenging statutory classification has "the burden of proving its unconstitutionality and must specifically set forth in the complaint facts upon which to rebut the presumption of unconstitutionality"); *Weimann v. County of Kane*, 502 N.E.2d 373, 375-76 (Ill. App. Ct. 1986) (finding Section 1983 complaint insufficient because it pled facts

Although not bound to follow the Supreme Court's interpretation of a federal rule in *Leatherman* (or the Seventh Circuit's *Triad Associates* opinion), there is some evidence that the Illinois state courts likewise relaxed their pleading requirements coincident with the shift in the jurisprudence of the federal court. In 1992, prior to the *Leatherman* and *Triad Associates* decisions, a woman appealed to the Illinois Appeals Court the dismissal of her claims against a municipality and its police officers arising out of the officers' response to her 911 call regarding an incident in which she was locked out of her apartment and an alleged rapist was in her apartment with her children.<sup>128</sup> The intermediate appeals court held: "To overcome a motion to dismiss, plaintiffs must assert *facts* supporting the allegations of the cause of action; in other words, plaintiffs *must allege facts which establish* a duty, breach of that duty, and resulting injury."<sup>129</sup> Requiring the pleading of facts in support of each element of the cause of action is, of course, a classic badge of fact pleading. However, following the *Leatherman* and *Triad Associates* decisions, and twenty-one months after the appeals court had rendered the opinion quoted above, the Illinois Supreme Court reversed and applied a more relaxed standard of pleading in *Doe v. Calumet City*.<sup>130</sup>

The timing is not the only indication of the influence of the federal court decisions on the state court; the Illinois Supreme Court expressly stated that it was re-examining the application of the state's pleading standard for Section 1983 plaintiffs "in light of the [United States] Supreme Court's decision striking down heightened pleading standards for civil rights litigation in the Federal courts."<sup>131</sup> Significantly, however, Justice Heiple wrote a scathing dissent (joined by Chief Justice Bilandic),<sup>132</sup> and the pleading standard for civil rights plaintiffs in Illinois state courts has since been in flux. Although some recent opinions of the lower state courts have followed the mandate of *Doe* and exhibit the badges of notice pleading,<sup>133</sup> other contemporaneous state court opinions exhibit the

---

relating only to one incident and not policy or custom); *Tennenbaum v. Lincoln Nat'l Bank*, 493 N.E.2d 143, 145 (Ill. App. Ct. 1986) (dismissing civil rights complaint of *pro se* plaintiff because he failed to set forth any facts that would "place him within special duty" exception to immunity).

128. See *Calumet City*, 609 N.E.2d at 692-93 (stating facts).

129. *Id.* at 694 (emphasis added).

130. See *Doe v. Calumet City*, 641 N.E.2d at 501 (applying relaxed standard of pleading).

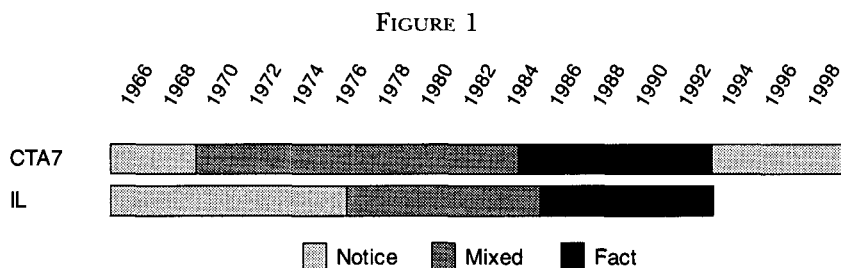
131. *Id.*

132. See *id.* at 514 (Heiple, J., dissenting) (finding cause of action for gender discrimination on pleadings "wholly ridiculous").

133. See *Mattis v. State Univs. Ret. Sys.*, 695 N.E.2d 566, 571 (Ill. App. Ct. 1998) (reversing dismissal of civil rights claims filed under state law because it was not clear that "no facts could be set forth that would entitle the plaintiff to relief"); *Murillo v. Page*, 690 N.E.2d 1033, 1037 (Ill. App. Ct. 1998) ("A complaint should not be dismissed unless it clearly appears that no set of facts can be proved which entitle plaintiff to recover."); see also *Holloway v. Meyer*, 726 N.E.2d 678, 682 (Ill.

badges of fact pleading.<sup>134</sup> The Illinois Supreme Court has not squarely revisited the pleading standard that is applicable to civil rights plaintiffs, and the methodology of the survey characterizes the current state court pleading standard as mixed.

The evolution of the pleading standard for civil rights plaintiffs in the federal and state courts of Illinois may be demonstrated graphically as follows:



As demonstrated above, the earliest reported opinions in both the federal and state courts suggest that a uniform standard of notice pleading then prevailed; this is significant, of course, because the state court standard reflects the modeling of a standard that is antithetical to the fact pleading that is required under the Illinois Code.<sup>135</sup> As indicated by the “mixed” shading, the badges of fact pleading appeared first in the federal court, and thereafter, in the state court. A uniform standard of fact pleading clearly prevailed in both the federal and state courts by the mid-1980s. Bound by *Leatherman* and the Supreme Court’s interpretation of the pleading standard under Federal Rule of Civil Procedure 8(a), the Seventh Circuit subsequently relaxed its specificity requirement. Since that change, certain badges of notice pleading likewise have appeared in opinions of the state courts. In sum, there is persuasive evidence of substantial intra-state uniformity, notwithstanding the fundamental differences between code pleading, which is required under the Illinois Code of Civil

App. Ct. 2000) (“The difference, if any, between [the standards for motions to dismiss under federal and state law] is not outcome determinative.”).

134. See, e.g., *Murillo*, 690 N.E.2d at 1037-39 (recognizing notice pleading standard but carefully scrutinizing plaintiff’s factual allegations to determine if cause of action was properly stated); *Rotzoll v. Overhead Door Corp.*, 681 N.E.2d 156, 157 (Ill. App. Ct. 1997) (finding summary judgment appropriate where plaintiff had “failed to present any factual basis that could potentially entitle her to judgment against the defendant”); *Moran v. City of Chi.*, 676 N.E.2d 1316, 1321-22 (Ill. App. Ct. 1997) (scrutinizing plaintiff’s factual allegations for sufficiency); *Scheidler v. Cook County Officers Electoral Bd.*, 657 N.E.2d 1089, 1093-95 (Ill. App. Ct. 1995) (scrutinizing plaintiff’s factual allegations to determine if they met elements of Section 1983 claim); *Donnelley v. Brauer*, 655 N.E.2d 1162, 1167-68 (Ill. App. Ct. 1995) (finding factual allegations insufficient to satisfy elements of Section 1983 action).

135. No earlier published opinions could be found that would indicate when or how the modeling first occurred.

Procedure, and notice pleading, which is required under the Federal Rules of Civil Procedure.

b. Pennsylvania

The Commonwealth of Pennsylvania also has a system of code pleading that has origins in the Field Code.<sup>136</sup> Rule 1019(a) of the Pennsylvania Rules of Civil Procedure requires plaintiffs to set forth “[t]he material facts on which a cause of action or defense is based . . . .”<sup>137</sup> Notwithstanding stark differences between code pleading under the Pennsylvania Rules of Civil Procedure and notice pleading under the Federal Rules of Civil Procedure, the federal and state court pleading standards in Pennsylvania civil rights cases have evolved in a similar fashion. The similarity is surprising in light of Charles Alan Wright’s statement in 1953 that, of the states undertaking major procedural reform since the advent of the Federal Rules, “Pennsylvania has been influenced the least by the new concepts and improved techniques first suggested in the Federal Rules.”<sup>138</sup> Notably, Rule 1019(a) has not been amended since 1946.<sup>139</sup>

The pleading standard for civil rights plaintiffs in Pennsylvania federal courts can be traced forward from 1945.<sup>140</sup> In the earliest reported opinion, *Picking v. Pennsylvania Railroad Co.*,<sup>141</sup> the Third Circuit held that the pleading of facts was unnecessary and, “for the protection of civil rights, [the court endeavored] to construe the plaintiff’s pleading without regard for technicalities.”<sup>142</sup> After *Picking*, however, the next relevant and topical opinions of the court did not appear until the 1960s. Throughout the 1960s and until the mid 1970s, the standard of pleading required of civil rights plaintiffs was mixed, as the corpus of cases demonstrate the badges of both fact and notice pleading.<sup>143</sup>

---

136. Pleading under the Field Code required “a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of This State, ch. 379, § 120(2), 1848 N.Y. LAWS 521.

137. PA. R. CIV. P. 1019(a), 42 PA. CONS. STAT. ANN. § 1019 (West 2000).

138. Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 910 (1953).

139. See PA. R. CIV. P. 1019, 42 PA. CONS. STAT. ANN. § 1019 (noting amendment history).

140. This description begins with 1945 only because that is when the first topical opinion appeared. No earlier published Third Circuit opinions discussing the pleading standard for civil rights complainants could be found.

141. 151 F.2d 240 (3d Cir. 1945).

142. *Picking*, 151 F.2d at 241.

143. See *Polite v. Diehl*, 507 F.2d 119, 143 (3d Cir. 1974) (noting that conclusory allegations in complaint alleging Civil Rights Act violations will not survive motion to dismiss); *Curtis v. Everette*, 489 F.2d 516, 519 (3d Cir. 1973) (applying notice pleading standard (citing *Conley v. Gibson*, 355 U.S. 41 (1957))); *Marnin v. Pinto*, 463 F.2d 583, 584 (3d Cir. 1972) (finding allegations that prison conditions were worse than “in ghetto areas” and food was unfit “for human consumption” “vague and conclusory,” and insufficient to state claim); *Marshall v. Brierly*, 461

This period of transition ended in 1976 when the Third Circuit formally adopted a fact pleading standard for civil rights plaintiffs.<sup>144</sup> In *Rotolo v. Borough of Charleroi*,<sup>145</sup> the plaintiff alleged that he was terminated from his employment as a building inspector for the defendant municipality because he exercised his First Amendment privileges. The court held:

In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity . . . . In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants, public officials, policemen and citizens alike-considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an

---

F.2d 929, 930 (3d Cir. 1972) (reversing district court upon very liberal construction of barely literate pro se complaint); Carr v. Sharp, 454 F.2d 271, 272 (3d Cir. 1971) (noting plaintiffs must plead facts); Kauffman v. Moss, 420 F.2d 1270, 1275-76 (3d Cir. 1970) (noting that, in *pro se* cases, courts balance specific pleading requirement "against the equally important polic[y] that pro se litigants not be denied the opportunity to state a civil rights claim because of [its] technicalities"); Lockhart v. Hoenstine, 411 F.2d 455, 458-59 (3d Cir. 1969) (requiring notice pleading); Nygrich v. Hohn, 379 F.2d 213, 215 (3d Cir. 1967) (finding complaint "insufficient because it is broad and conclusory. Its insufficiency lies in its failure to state facts in support of its conclusions."); United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215, 216 (3d Cir. 1962) (granting motion to dismiss because "no facts were alleged to support the conclusions of the complaint"); Brzozowski v. Randall, 281 F. Supp. 306, 311-12 (E.D. Pa. 1968) (applying notice pleading); Davison v. Joseph Horne & Co., 265 F. Supp. 750, 755 (W.D. Pa. 1967) (dismissing complaint where there are "insufficient factual averments"); Sinchak v. Parente, 262 F. Supp. 79, 88 (W.D. Pa. 1966) (noting that plaintiffs must allege facts, not conclusions); Washington v. Official Ct. Stenographer, 251 F. Supp. 945, 947 (E.D. Pa. 1966) ("Although technically deficient in some respects, the complaint is plain and concise enough. It suffices to apprise the defendant of the nature of the claim.").

144. See *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922-23 (3d Cir. 1976) (acknowledging prevailing fact pleading standard for civil rights plaintiffs). The Third Circuit was one of the first federal courts in the country to formally adopt a heightened pleading requirement for civil rights plaintiffs.

*Rotolo* is widely cited for establishing a heightened pleading standard in the Third Circuit. See Blaze, *supra* note 81, at 952-53 (noting *Rotolo* court's affirmance of heightened pleading standard in civil rights cases); Brooks, *supra* note 80, at 108 n.180 (noting *Rotolo* court's justification for heightened pleading standard as large increase in number of cases, including frivolous cases, filed under Civil Rights Act); Levin, *supra* note 20, at 1580-81 n.49 (noting *Rotolo* court's affirmance of heightened pleading standard in civil rights cases); McCardle, *supra* note 82, at 32-33 (noting that fact pleading standard recognized in *Rotolo* became "the firmly fixed law of the Third Circuit"); Schwartz, *supra* note 81, at 385 (stating that Third Circuit "reaffirmed its fact pleading requirement in *Rotolo*"); see also Young v. Quinlan, 960 F.2d 351, 358 n.17 (3d Cir. 1992) (noting that per *Rotolo*, complaints must be pleaded with "specificity"); Elliot v. Perez, 751 F.2d 1472, 1479 n.20 (5th Cir. 1985) (acknowledging *Rotolo* court's holding); Cummings v. Palm Beach County, 642 F. Supp. 248, 249 (S.D. Fla. 1986) (noting Third Circuit's fact standard announced in *Rotolo*).

145. 532 F.2d 920 (3d Cir. 1976).

early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

The allegations in the complaint strike us as vague and conclusory. They fail to indicate when, where, and how [plaintiff] had 'exercised his First Amendment privileges,' rendering it impossible to determine if indeed his activity was the sort afforded protection under the first amendment and whether it had any relevance to the termination of his employment. *The allegations state no facts upon which to weigh the substantiality of the claim;* they do not aver the content of the alleged first amendment exercise.<sup>146</sup>

Fact pleading remained the norm for civil rights plaintiffs in Pennsylvania federal courts for the next decade.<sup>147</sup>

146. *Rotolo*, 532 F.2d at 922-23 (emphasis added) (citations omitted).

147. See *United States v. City of Phila.*, 644 F.2d 187, 204 (3d Cir. 1980) (recognizing fact pleading as standard of pleading). In this case, a suit was brought by the Attorney General for broad declaratory and equitable relief against allegedly unconstitutional practices and policies of the Philadelphia Police Department. See *id.* at 190. Chief Judge Aldisert held that the government's allegations of racial discrimination in the administration of certain federally-funded programs were insufficient:

Elimination of frivolous and insubstantial claims at the pleading stage in cases of this nature will protect local police officials from being intimidated by the threat of burdensome discovery, and a more specific complaint will enable the district court to protect local governments' files from overbroad and irrelevant inquiries . . . .

[A] requirement of specificity under these circumstances works no hardship on the plaintiff. This is no more than the courts of the Third Circuit require of a prisoner, uncounselled and unlearned in the law with no investigators and only the most modest of legal resources, who brings a civil rights action . . . .

We conclude finally that the complaint was correctly dismissed. Its allegations of racial discrimination can only be characterized as vague, conclusory and inconsistent. It fails to identify the specific "program or activity" of the Police Department which has expended federal funds in an illegal manner. It does not in any manner allege facts showing a nexus between acts of racial discrimination and the named individual defendants or between the expenditure of federal funds and incidents of police abuse, nor does it indicate how the city *qua* city practiced discrimination.

*Id.* at 204-06 (footnotes, citations and quotations omitted); see also *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981) ("[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."); *Boyd v. Ambridge Area Sch. Dist.*, 621 F.2d 75, 80 (3d Cir. 1980) (finding it sufficient for black student, dismissed from high school drill because of her race, to allege conduct, act, improper motive, times and places of activity and persons responsible, because "[f]rom [these] facts alleged [the court] can weigh the substantiality of the claim"); *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979) (noting complaint lacked allegation of defendants' state of mind and refusing to "reasonably infer an allegation of knowledge, intent, or recklessness"); *Hall v. Pa. State Police*, 570 F.2d 86, 88-89 (3d Cir. 1978) (finding that black bank customer's complaint alleging civil rights and equal protection violations arising out of inci-

In 1985, the Third Circuit again led all federal courts in changing the pleading standard for civil rights plaintiffs, this time by revisiting notice pleading in *Frazier v. Southeastern Pennsylvania Transportation Authority*:

[T]he crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer. At the same time, however, a court cannot expect a complaint to provide proof of plaintiffs' claims, nor a proffer of all available evidence. In civil rights cases . . . much of the evidence can be developed only through discovery. While plaintiffs may be expected to know the injuries they allegedly have suffered, it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendant's practices under challenge.<sup>148</sup>

However, a notice pleading standard did not again clearly prevail. Cases following the mandate of *Frazier* were met with strong dissents and many opinions in the late 1980s exhibited the pre-*Frazier* badges of fact pleading.<sup>149</sup>

The next moment in the development of the pleading standard occurred the day after the Supreme Court decided *Leatherman*, when the

---

dent where plaintiff was photographed pursuant to police-promoted plan that discriminated based on race sufficiently stated claim because it specifically alleged time, place and conduct of persons responsible).

148. *Frazier v. S.E. Pa. Transp. Auth.*, 785 F.2d 65, 68 (3d Cir. 1985).

149. See *Freedman v. City of Allentown*, 853 F.2d 1111, 1114 (3d Cir. 1988) ("Our specificity rule in civil rights cases . . . represents a balance between the rights of local government officials not to be subjected to the burden of trial on claims that are legally insufficient . . . and the rights of [injured] plaintiffs . . ."); *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir. 1988) (stating that complaint complied with heightened pleading standard because it alleged specific conduct, time, place and identity of responsible parties); *Pace Res., Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1026 (3d Cir. 1987) ("The complaint contains no factual allegations . . . [and] conclusory allegations cannot be accepted at face value in [civil rights] area of the law."); *Dist. Council 47 v. Bradley*, 795 F.2d 310, 314 (3d Cir. 1986) (holding, over strong dissent from Chief Judge Aldisert, that complaint specifically alleged violations of clearly identified liberty and property interests through specific actions, and that suit against officials involved should not be dismissed merely because it fails to allege which particular defendants were personally responsible for implementation of allegedly unconstitutional personnel policies); *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986) (suggesting that allegation that policy-making city official conducted retaliatory and defamatory campaign against public employee in order to suppress employer's speech advocating fluoridation of city's water was sufficient to state claim under civil rights statute); *Hurd v. Romeo*, 752 F.2d 68, 70 (3d Cir. 1985) ("We cannot affirm such a dismissal unless we can 'say with assurance that under the allegations of the pro se [prisoner's] complaint . . . it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim.'"); *Darr v. Wolf*, 767 F.2d 79, 81 (3d Cir. 1985) (noting that allegations in Section 1983 complaint against judge "should be especially specific").

Third Circuit decided *Holder v. City of Allentown*.<sup>150</sup> In *Holder*, Judge Higginbotham wrote:

The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief . . . . The complaint will be deemed to allege sufficient facts if it is adequate to put the proper defendants on notice of the essential elements of plaintiffs' cause of action.<sup>151</sup>

Since *Leatherman* and *Holder*, a notice pleading standard has prevailed for civil rights plaintiffs in Pennsylvania federal courts.<sup>152</sup>

In the Pennsylvania state courts, the earliest reported opinion discussing pleading standards in civil rights cases appeared in the mid 1970s.<sup>153</sup> Notwithstanding the rigidity of Rule 1019(a) of the Pennsylvania Code, that first opinion, *Saunders v. Creamer*,<sup>154</sup> exhibits the badges of notice pleading. In *Saunders*, the lower court dismissed, for lack of factual specificity, an inmate's complaint seeking relief on grounds that prison officials' failure to place him in a community treatment program or to release him on temporary home furloughs violated his constitutional rights. The Supreme Court of Pennsylvania reversed, stating:

Appellant's complaint is written in broad and general terms and is far from a model of clarity. It is doubtful that it complies with Rule 1019 of our Rules of Civil Procedure . . . . [However, because] a fair reading of Appellant's complaint leads to the conclusion that he has imperfectly pleaded facts which, if properly

---

150. 987 F.2d 188 (3d Cir. 1993).

151. *Holder*, 987 F.2d at 194 (emphasis added) (internal citations and quotation marks omitted); see also *Carter v. City of Phila.*, 989 F.2d 117, 188 (3d Cir. 1993) ("Particularly when a civil rights violation is alleged, we should not affirm a dismissal at the pleading stage, unless it is readily discerned that the facts cannot support entitlement to relief.").

152. See *Abbot v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998) (citing *Leatherman*, court concluded "the complaint easily satisfied the standards of notice pleading"); *Graves v. Lowery*, 117 F.3d 723, 729 (3d Cir. 1997) (declining to speculate whether claim would be successful and finding sufficient facts to entitle relief); *Nami v. Fauver*, 82 F.3d 63, 68 (3d Cir. 1996) (reversing district court's dismissal because it found facts pleaded adequate to defeat summary judgment); *Loftus v. S.E. Pa. Transp. Auth.*, 843 F. Supp. 981, 984 (E.D. Pa. 1994) (noting *Leatherman* "squarely overruled" Third Circuit precedent); *Moser v. Bascelli*, 865 F. Supp. 249, 255 (E.D. Pa. 1994) (rejecting Circuit's "heightened pleading standard" to follow *Leatherman*).

153. The author could find no relevant and topical published opinions prior to 1975 (other than the lower court's opinion in *Saunders v. Creamer*, 345 A.2d 702 (Pa. 1975) discussed below). Accordingly, it is unclear whether the state court had earlier (or ever) required civil rights plaintiffs to plead facts as required by the Pennsylvania Code.

154. 345 A.2d 702 (Pa. 1975).



pleaded and proved, may entitle him to relief, the demurrer should not have been sustained.<sup>155</sup>

Although another early decision of the state court likewise exhibits the badges of notice pleading,<sup>156</sup> the pleading standard certainly became mixed by the late 1970s and into the early 1980s.<sup>157</sup> Nevertheless, it is the cases with the badges of notice pleading that are particularly significant because they diverge from the textual standard under the state procedural code. For example, in *Brown v. Taylor*<sup>158</sup> the court described the applicable pleading standard for civil rights plaintiffs as follows:

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief . . . . Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt *fail to state a claim for which relief may be granted*.<sup>159</sup>

This standard is remarkable not only because it eschews the requirement of Rule 1019(a), which requires the pleading of *facts* and *causes of action*, but also because it repeats *verbatim* the text of Federal Rule 12(b)(6), the motion by which defendants in *federal* court may challenge the sufficiency of the allegations in the plaintiff's complaint.<sup>160</sup>

---

155. *Saunders*, 345 A.2d at 704-05.

156. *See, e.g., Robinson v. Dep't of Justice*, 377 A.2d 1277, 1278 (Pa. Commw. Ct. 1977) ("If . . . there remains doubt as to the propriety of dismissing the petition, the demurrer shall not be granted.").

157. For cases demonstrating the badges of fact pleading, see: *Lynch v. Johnston*, 463 A.2d 87, 89-90 (Pa. Commw. Ct. 1983) ("Here, Plaintiff's complaint is bare of facts which would demonstrate an invasion of his privacy . . . . The same holds true with respect to Plaintiff's bald assertions of illegal detention and prejudice to his 'rights.'"); *Close v. Voorhees*, 446 A.2d 728, 731-32 (Pa. Commw. Ct. 1982) (concluding plaintiff's allegations of simple negligence fail to state cause of action under Section 1983); *Schreiber v. Jeter*, 445 A.2d 263, 264 (Pa. Commw. Ct. 1982) (dismissing Section 1983 complaint because plaintiff alleged no facts showing constitutionally protected liberty or property interest); *Law v. Fisher*, 399 A.2d 453, 457 (Pa. Commw. Ct. 1979) (noting that former state employee who brought action against state officials for improper removal from his position as result of patronage failed to allege specifically that his injury was caused by departmental policy).

For cases demonstrating the badges of notice pleading, see: *Reider v. Commonwealth*, 502 A.2d 272, 273 (Pa. Commw. Ct. 1986) (adhering to liberal construction of pro se complaint); and *Alpha Tau Omega Fraternity v. Univ. of Pa.*, 464 A.2d 1349, 1352 (Pa. Super. Ct. 1983) (emphasizing that under fact pleading requirements plaintiffs must give notice to defendants and summarize facts essential to supporting claim).

158. 494 A.2d 29, 30-31 (Pa. Commw. Ct. 1985) (stating facts).

159. *Brown*, 494 A.2d at 32-33 (emphasis added) (addressing guidelines in assessing whether demurrer should be granted).

160. *See Beckett v. Commonwealth*, 440 A.2d 649, 650 (Pa. Commw. Ct. 1982) (stating that district court refused to consider defense of mootness because "the

By the late 1980s, approximately ten years after the Third Circuit had formally adopted the fact pleading standard in *Rotolo*, fact pleading became the norm in state courts as well. In *Harding v. Galyias*,<sup>161</sup> for example, the Pennsylvania Commonwealth Court held that “mere allegations are not sufficient . . . [and that] [t]here must be *facts* alleged, which if proven, would *establish* that [defendant is liable].”<sup>162</sup> Other contemporaneous cases required the pleading of specific facts on each element of each cause of action.<sup>163</sup> In *Simmons v. Township of Moon*,<sup>164</sup> for example, the plaintiff had alleged that county detectives denied him his right to counsel after a false arrest, that they had tried to psychologically coerce a confession from him and that the arrestee subsequently committed suicide.<sup>165</sup> The appeals court ruled that the complaint was properly dismissed:

Simmons’ Complaint, however, *fails to provide specific facts* nor does it allege that the County Detectives acted with deliberate indifference or knew or should have known that decedent had suicidal tendencies. There are no factual averments that decedent exhibited any outward signs of suicidal tendencies which the County Detectives were aware or should have been aware of, nor are there allegations that decedent had tried to commit suicide in the past of which the County Detectives were aware.

Moreover, because Simmons admits that the intent of the alleged constitutional violations was to procure a statement and not to facilitate the decedent’s suicide, Simmons failed to meet the standards set forth in *Colburn* and *Freedman* for maintaining a Section 1983 action, the trial court was correct in sustaining the defendants’ [preliminary objections] to the Section 1983 action.<sup>166</sup>

The state court dismissed the federal claims of these state court plaintiffs and bolstered its holding with citations to two Third Circuit cases that had

---

Bureau’s argument . . . [was] based upon factual information not included in the Petition, *a fortiori*, it must be rejected”).

161. 544 A.2d 1060 (Pa. Commw. Ct. 1988).

162. *Harding*, 544 A.2d at 1066 (emphasis added).

163. See *Scott v. Willis*, 543 A.2d 165, 169-70 (Pa. Commw. Ct. 1988) (assessing Section 1983 claim and concluding that claim was flawed because it lacked specific facts); *King v. City of Phila.*, 527 A.2d 1102, 1104 (Pa. Commw. Ct. 1987) (noting that complaint was dismissed for failure to allege facts on essential element of claim).

164. 601 A.2d 425 (Pa. Commw. Ct. 1991).

165. See *Simmons*, 601 A.2d at 431 (concluding complaint “fail[ed] to provide specific facts”).

166. *Id.* (emphasis added); see also *Johnston v. Lehman*, 609 A.2d 880, 883 (Pa. Commw. Ct. 1992) (stating that because appellant’s claim only tangentially involved access, he must have alleged *actual* injury in order for his claim to be actionable).

been decided three years earlier in which a fact pleading standard was applied.<sup>167</sup>

Again, close behind its federal counterpart and pre-*Leatherman*, the state court pleading standard took a distinct step back toward notice pleading in the early 1990s. In *Stone & Edwards Insurance Agency, Inc. v. Department of Insurance*,<sup>168</sup> an insurance agency filed suit seeking a declaration that certain state regulations were unconstitutional.<sup>169</sup> The complaint asserted that the statutory framework of the Department of Insurance created a system whereby the Acting Insurance Commissioner was involved in both the prosecutorial and adjudicative functions of the agency in violation of due process. The court found the allegations conclusory, but sufficient nonetheless, stating: "A demurrer will not be sustained unless the face of the complaint shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer."<sup>170</sup>

A second example of a case from this period exhibiting the badges of notice pleading is *Heinly v. Commonwealth*.<sup>171</sup> In *Heinly*, the Pennsylvania Commonwealth Court determined the adequacy of the facts pleaded by ascertaining whether the allegations of the complaint provided the defendant with adequate notice:

[A] plaintiff filing a complaint in the courts of this Commonwealth is not required to specify the legal theory or theories underlying the complaint . . . . If the facts as pled place a defendant on notice that the plaintiff will attempt to prove a defendant deprived him or her of a federally guaranteed right while acting under the color of state law, the mere failure to specifically plead Section 1983 will not doom the complaint.<sup>172</sup>

The court went on to hold that the plaintiff's complaint, although "not a model pleading . . . [and] barely [meeting] the minimal pleading requirements," was nevertheless sufficient to survive a motion to dismiss.<sup>173</sup> The timing of this spirited conversion is noteworthy; although the pleading standard for civil rights plaintiffs in Pennsylvania federal courts was mixed, the full retreat to notice pleading was nearly complete.<sup>174</sup> Other cases

---

167. See *Simmons*, 601 A.2d at 430-31 (citing *Freedman v. City of Allentown*, 853 F.2d 1111 (3d Cir. 1988) and *Colburn v. Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988)).

168. 616 A.2d 1060 (Pa. Commw. Ct. 1992).

169. See *Stone & Edwards*, 616 A.2d at 1061 (stating facts of case).

170. *Id.* at 1063.

171. 621 A.2d 1212, 1215-16 n.5 (Pa. Commw. Ct. 1993) (stating "Pennsylvania is a 'fact pleading' jurisdiction," which requires claimant to plead facts constituting cause of action).

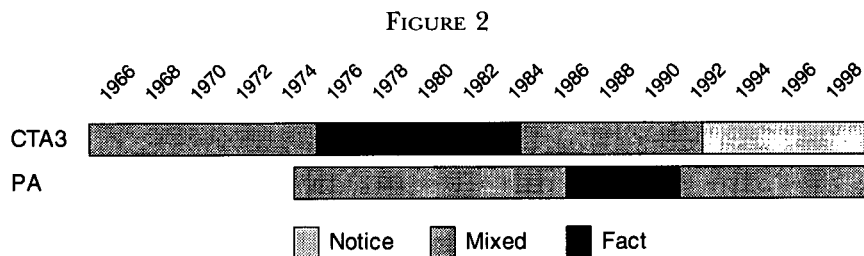
172. *Heinly*, 621 A.2d at 1215 n.5 (emphasis added).

173. See *id.* at 1217.

174. In fact, *Holder v. City of Allentown* (and *Leatherman*) were decided the following week.

exhibiting the badges of notice pleading suggest that a more relaxed standard of pleading continues to prevail in Pennsylvania state courts.<sup>175</sup> In the aggregate, however, the methodology of the survey characterizes the current state court pleading standard as mixed.

The evolution of the pleading standard for civil rights plaintiffs in the federal and state courts of Pennsylvania may be demonstrated graphically as follows:



As illustrated above, the earliest reported opinions in both the federal and state jurisdictions reveal a mixed standard of fact and notice pleading; this is significant, of course, because the state court standard, much like the experience in Illinois, reflects the influence of a standard that is antithetical to the fact pleading that is required under the state rules. The graph further demonstrates that fact pleading, which was formally adopted by the Pennsylvania federal courts in 1976, also was grafted into the state court system, albeit ten years later. Most interestingly, the standard of fact pleading was relaxed in 1992, after the retreat from fact pleading was well underway in the federal courts. In sum, there is evidence here of patterns of intra-state uniformity, notwithstanding the fundamental differences between the code pleading required under the Pennsylvania Rules of Civil Procedure and the notice pleading permitted under the Federal Rules of Civil Procedure. The evidence of intra-state uniformity is similar to that observed in the State of Illinois, although the standards of application in Pennsylvania are staggered by a lag between federal and state adoption.<sup>176</sup>

175. See *Bailey v. Storlazzi*, 729 A.2d 1206, 1212-13 (Pa. Super. Ct. 1999) (discussing *prima facie* standard to assess discrimination claim); *Hennessy v. Santiago*, 708 A.2d 1269, 1272-73 (Pa. Commw. Ct. 1998) (assessing whether sufficient facts maintain claim for relief); *Clark v. S.E. Pa. Transp. Auth.*, 691 A.2d 988, 990-91 (Pa. Commw. Ct. 1997) (finding that complaint was insufficient but applying liberal pleading standard); *Holt v. N.W. Pa. Training P'ship Consortium, Inc.*, 694 A.2d 1134, 1141 (Pa. Commw. Ct. 1997) (dismissing complaint on grounds of immunity); *Diaz v. Houck*, 632 A.2d 1081, 1086-87 (Pa. Commw. Ct. 1993) (holding that although "inartfully characterized," the facts pled were sufficient).

176. The significance of the lag is analyzed later in this Article to permit consideration of the control data presented in Part II(B). For information on the survey of Illinois law, see *supra* notes 91-135 and accompanying text. For a discussion of the lag, see *infra* notes 273-302 and accompanying text.

## c. Nebraska

The State of Nebraska adopted a system of code pleading in 1867. In 1939, one year after the adoption of the Federal Rules, the Nebraska legislature authorized and directed the Nebraska Supreme Court to promulgate rules of practice for the state courts.<sup>177</sup> The question of whether Nebraska would adopt rules of practice based on the federal model was hotly debated by members of the Supreme Court of Nebraska Advisory Committee on Rules of Practice.<sup>178</sup> Ultimately, the state legislature rejected the Nebraska Supreme Court's proposed Federal Rules-based rules.<sup>179</sup> As a result, the Nebraska Code still requires a petition to contain "a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition."<sup>180</sup> This language is identical to the mandate under the Field Code.<sup>181</sup>

The extent of intra-state uniformity in practice in Nebraska courts is difficult to ascertain because there are fewer than a dozen relevant and topical published opinions by the Nebraska state courts. Nevertheless, the cases suggest that a standard of fact pleading for civil rights plaintiffs evolved in both the federal and state courts of Nebraska, albeit at a much slower pace than in Illinois or Pennsylvania. Moreover, the opinions of the federal and state courts of Nebraska still exhibit badges of fact pleading.

In Nebraska federal courts, the relevant and topical opinions, appearing first in the 1970s, demonstrate a mixed standard of pleading for civil

---

177. See 1939 Neb. Laws 172, ch. 30, p. 164; see also *Christianson v. Educ. Serv. Unit No. 16*, 501 N.W.2d 281, 286-87 (Neb. 1993) (detailing history).

178. See Bongardt, *supra* note 45, at 77-81 (arguing that Nebraska should adopt rules of pleading modeled after federal model); Harry W. Shackelford, *Why Adopt New Rules of Pleading and Practice?*, 21 NEB. L. REV. 94, 97-101 (1942) (discussing Nebraska's consideration of federal model practice rules).

179. See 1943 Neb. Laws 145, ch. 63, p. 236; Comp. Stat. § 27-231 *et seq.* (Supp. 1941) (rejecting federal model rules).

180. NEB. REV. ST. § 25-804 (listing requirements for petition).

181. Pleading under the Field Code also required "a statement of the facts constituting the cause of action in ordinary and concise language, without repetition." 1851 N.Y. Laws 1851, ch. 479, § 1. Until 1851 the Field Code also contained the language: "[I]n such a manner as to enable a person of common understanding to know what is intended." *Id.* at 120.

rights plaintiffs.<sup>182</sup> In *Bramlet v. Wilson*,<sup>183</sup> for example, plaintiffs alleged that the corporal punishment administered by the defendants was “excessive” and caused “severe physical damage to students.”<sup>184</sup> The United States Court of Appeals for the Eighth Circuit held:

Specificity sufficient to supply fair notice of the action will withstand a motion under rule 12(b)(6). Accordingly, a complaint should not be dismissed merely because a plaintiff’s allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that gave rise to a legal basis for recovery . . . . Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.<sup>185</sup>

Dismissals were not, however, particularly “unusual”; even some cases contemporaneous with *Bramlet* exhibited the badges of fact pleading.<sup>186</sup> In-

---

182. For cases exhibiting the badges of notice pleading, see: *Cody v. Union Elec.*, 518 F.2d 978, 979 (8th Cir. 1975) (dismissing Section 1983 claim but not Section 1981 claim when plaintiff alleged that black business customers of defendant were required to pay greater security deposits than white customers solely on account of their race); *Cruz v. Cardwell*, 486 F.2d 550, 551-52 (8th Cir. 1973) (“A complaint alleging violations of civil rights should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief under any statement of the facts . . . . Pro se complaints are held to a less stringent standard than formal pleadings drafted by lawyers.” (citations omitted)); *Jones v. Lockhart*, 484 F.2d 1192, 1193-94 (8th Cir. 1973) (“[A] prisoner’s petition, no matter how inartfully drafted, should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

183. 495 F.2d 714, 715-16 (8th Cir. 1974).

184. See *Bramlet*, 495 F.2d at 715-16 (stating facts of case).

185. *Id.* at 716 (emphasis added) (citations omitted).

186. See *Kaylor v. Fields*, 661 F.2d 1177, 1182-83 (8th Cir. 1981) (“[P]leadings in civil-rights cases, especially those brought pro se, are to be liberally construed. But a well-pleaded complaint must contain something more than mere conclusory statements that are unsupported by specific facts.” (citations omitted)); *McClain v. Kitchen*, 659 F.2d 870, 872 (8th Cir. 1981) (stating that complaint alleged “no facts to support his claim”); *Guy v. Swift & Co.*, 612 F.2d 383, 385 (8th Cir. 1980) (dismissing complaint because although plaintiff’s “pro se civil rights pleadings are entitled to liberal construction . . . they must set forth the claim in a manner which, taking the pleaded facts as true, states a claim as a matter of law”); *Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976) (“We think . . . that the property interests involved . . . as pleaded are so de minimis that the [deprivation] in the one instance pleaded does not constitute such a taking of property that due process rights are implicated.”); *Anderson v. Sixth Judicial Dist. Ct., St. Louis County*, 521 F.2d 420, 421 (8th Cir. 1975) (dismissing complaint because, even by liberal standard afforded pro se plaintiffs, the complaint “set[s] forth no facts in support of their allegations”); *Wilson v. Lincoln Redev. Corp.*, 488 F.2d 339, 341-42 (8th Cir. 1973) (dismissing complaint for failing to plead with factual specificity over strong

deed, the survey suggests that the pleading standard was mixed from the early 1970s through the early 1980s.

By 1986, however, a fact pleading standard clearly prevailed in the Eighth Circuit. In *Morton v. Becker*,<sup>187</sup> for example, a civil rights action alleged that a police department failed to file a "hold order" after mistakenly seizing the plaintiff's car as stolen.<sup>188</sup> The court reviewed the sufficiency of the pleading by inquiring into the sufficiency of each element of the claim and stated: "[W]e look now . . . to the elements required to state a section 1983 cause of action."<sup>189</sup> The complaint was dismissed because the court "believe[d] that the factual allegations . . . fail[ed] to support a sufficient causal connection . . . ."<sup>190</sup> This fact pleading standard took hold.<sup>191</sup>

Moreover, the Supreme Court's decision in *Leatherman* seems to have had only a minimal impact on this fact pleading standard for civil rights plaintiffs in Nebraska federal courts. There is some evidence that, in certain cases, civil rights plaintiffs have benefited from a more relaxed standard of pleading.<sup>192</sup> There are even more cases, however, where the Eighth Circuit, despite (or perhaps in spite of) *Leatherman*, has required civil rights plaintiffs to plead facts.<sup>193</sup> Nevertheless, the methodology of

---

dissent detailing specificity of allegations by tenant evicted from low income housing project); see also *Jenson v. Olson*, 353 F.2d 825, 828 (8th Cir. 1965) (stating that plaintiffs under civil rights statute must plead facts).

187. 793 F.2d 185 (8th Cir. 1986).

188. See *Morton*, 793 F.2d at 186 (stating facts of case).

189. *Id.* at 187.

190. *Id.* at 188.

191. See *Isakson v. First Nat'l Bank*, 985 F.2d 984, 986 (8th Cir. 1993) (dismissing complaint because plaintiff failed to allege any facts to overcome judicial immunity); *Saunders v. Dep't of Army*, 981 F.2d 990, 991 (8th Cir. 1992) (stating that complaint subject to dismissal "when the affirmative defense clearly appears on the face of the complaint" even if defense is not pleaded); *Wells v. Walker*, 852 F.2d 368, 371 (8th Cir. 1988) ("[W]e conclude the descriptions of defendants' conduct in the complaint belie their characterization as anything other than ordinary negligence . . . ."); *Harpole v. Ark. Dep't of Human Servs.*, 820 F.2d 923, 926-27 (8th Cir. 1987) (dismissing Section 1983 complaint because facts alleged failed to reveal breach of affirmative duty under state law).

192. See *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (reversing dismissal of male employee's complaint against employer for sexual harassment under Title VII because "[a]lthough the complaint is not a model of clarity, we think Schmedding has alleged sufficient facts . . . to state a claim that he was being harassed 'because of sex'"); *Harris v. St. Louis Police Dep't*, 164 F.3d 1085, 1087 (8th Cir. 1998) (stating there was no "heightened pleading" requirement and that allegations are sufficient where they call defendants' liability "into question"); *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (applying *Leatherman*, albeit somewhat dubiously); *Smith v. St. Bernards Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994) (reversing dismissal of plaintiff's Title VII claim against former employer); see also *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 928 (8th Cir. 1993) (reversing dismissal of discrimination complaint and applying liberal, notice pleading standard).

193. See *Doe v. Hartz*, 134 F.3d 1339, 1342 (8th Cir. 1998) (applying heightened standard of pleading to claim filed under Violence Against Women Act, with-

this survey characterizes the federal court pleading standard as mixed since 1998.

The pleading standard for civil rights plaintiffs in Nebraska state courts also can be traced, albeit with a much smaller population of cases than any other state or federal jurisdiction examined in this survey. First, as in Pennsylvania and Illinois, the earliest decisions of the state courts of Nebraska, dating from 1957 through 1992, exhibit badges of notice pleading.<sup>194</sup> During this period, the few reported cases suggest that "pleadings [were] liberally construed"<sup>195</sup> and that the requirements to plead "facts" and "causes of action" were relaxed. In *Maldonado v. Nebraska Department of Public Welfare*,<sup>196</sup> for example, the Nebraska Supreme Court found that even though the plaintiff's complaint did not cite Section 1983 "in any manner," the complaint was sufficient to state a claim and would survive a motion to dismiss.<sup>197</sup>

In 1993, seven years after the Eighth Circuit had adopted a fact pleading standard for civil rights plaintiffs, the Nebraska state courts did the

---

out mention of *Leatherman*); *id.* at 1344 (Fagg, J., dissenting) ("Because my colleagues use the lack of details inherent in notice pleading prematurely to dismiss Doe's complaint, I dissent."); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998) (acknowledging *Leatherman*, but choosing "not [to] apply a standard of heightened specificity . . . in cases alleging municipal liability under Section 1983"); *Walker v. M.D. Reed*, 104 F.3d 156, 157-58 (8th Cir. 1997) (dismissing pro se complaint for lack of specificity, without mention of *Leatherman*); *id.* at 158 (Arnold, Morris Sheppard, J., dissenting) (intimating that, although discussing "duty to construe pro se complaints liberally," court actually "erected a heightened pleading standard in this pro se case, a practice specifically disapproved of in *Leatherman*"); *Edgington v. Mo. Dep't of Corr.*, 52 F.3d 777, 779-80 (8th Cir. 1995) (citing dictum in *Leatherman* and subjecting complaint for damages against government officials to heightened standard of pleading); *Reeve v. Oliver*, 41 F.3d 381, 383 (8th Cir. 1994) (dismissing Section 1983 complaint for lack of specificity, without mention of *Leatherman*); *Allen v. Purkett*, 5 F.3d 1151, 1153 (8th Cir. 1993) (same).

194. See *Wichman v. Naylor*, 487 N.W.2d 291, 294 (Neb. 1992) (requiring Section 1983 claimant to plead factual allegations of "deprivation of a plaintiff's right(s) secured by the Constitution and laws of the United States . . . under color of law"); *Slusarski v. County of Platte*, 416 N.W.2d 213, 215 (Neb. 1987) (concluding petitioner stated sufficient facts, although many specifics were not pleaded); *Parriott v. Drainage Dist. No. 6*, 410 N.W.2d 97, 100 (Neb. 1987) (reversing demurrer because petitioner sufficiently pleaded facts); *Maldonado v. Neb. Dep't of Pub. Welfare*, 391 N.W.2d 105, 108 (Neb. 1986) (stating that sufficiently pleaded facts, and not theory of recovery, states cause of action); *Jones v. Vill. of Farnam*, 119 N.W.2d 157, 160 (Neb. 1963) (affirming demurrer, court accepted pleaded facts, but not legal conclusions set forth in complaint); *Patrick v. Bellevue*, 82 N.W.2d 274, 281-82 (Neb. 1957) (noting that claim does not need to refer to constitutional provisions violated if sufficient facts are pleaded).

195. See *Slusarski*, 416 N.W.2d at 214 ("[W]e are bound by the rule that pleadings are to be liberally construed . . .").

196. 391 N.W.2d 105 (Neb. 1986).

197. See *Maldonado*, 391 N.W.2d at 108 (applying liberal pleading standards); see also *Patrick*, 82 N.W.2d at 281 (stating that plaintiffs "were not required to make reference to the constitutional provision in their pleadings to have the benefit of it if the facts proven were sufficient to justify the application of it for their benefit").

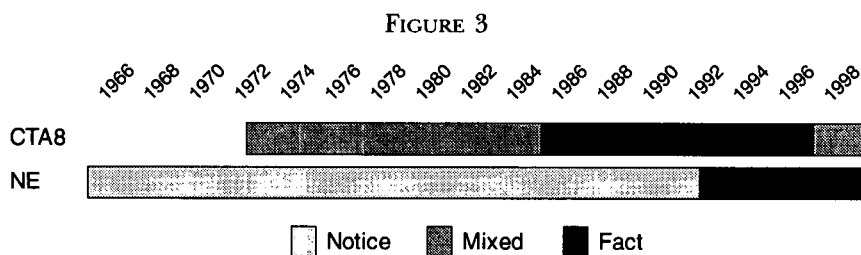


same. In *Christianson v. Education Service Unit No. 16*,<sup>198</sup> a suit was filed on behalf of mentally handicapped individuals who allegedly had suffered physical, sexual or emotional abuse while enrolled in a school.<sup>199</sup> The complaint was dismissed for failure to plead the claim with sufficient specificity, and the Nebraska Supreme Court held:

The purpose of the specific pleading requirement in civil rights actions is to enable the courts to *weigh the substantiality of the claim* and to identify and dismiss frivolous suits . . . . In the present cases, the plaintiffs pled that the times they were allegedly abused included virtually the entire time each plaintiff attended the . . . school. The plaintiffs were unable to plead the identities of their abusers beyond the allegation that one or more of several individuals performed their abusive acts. Such pleading does not meet . . . this state's code pleading requirements.<sup>200</sup>

In accord with *Christianson*, Nebraska state courts have required civil rights plaintiffs to plead facts with specificity since 1993.<sup>201</sup>

The evolution of the pleading standard for civil rights plaintiffs in the federal and state courts of Nebraska may be illustrated graphically as follows:



Even from the few reported opinions in the federal and state jurisdictions, it is clear that the state court standard, as in both Illinois and Pennsylvania, reflects the influence of a standard that is antithetical to the fact pleading that is required under code pleading. Indeed, all of the early reported opinions of the state court permitted notice pleading by civil rights plaintiffs. The graph further demonstrates that fact pleading clearly prevailed in the Nebraska federal courts by the mid-1980s, and then was grafted into

198. 501 N.W.2d 281 (Neb. 1993).

199. See *Christianson*, 501 N.W.2d at 285 (stating facts of case).

200. *Id.* at 290-91 (emphasis added) (citations omitted).

201. See *Sanitary & Imp. Dist. No. 57 v. City of Elkhorn*, 536 N.W.2d 56, 64 (Neb. 1995) (requiring petitioner to allege special or particular injury - not general injury); see also *Gould v. Orr*, 506 N.W.2d 349, 353 (Neb. 1993) ("[F]acts are sufficient to constitute a cause of action [only] when they are a narrative of events, acts, and things done . . . which show a legal liability of the defendant to the plaintiff.").

the state court, albeit several years later.<sup>202</sup> Finally, unlike Pennsylvania and Illinois federal and state courts, the badges of fact pleading still appear in both the federal and state courts of Nebraska, the mandate of *Leatherman* (upon the federal court) notwithstanding.

### B. *The Practical Consequences of Uniform Procedural Rules*

This Section presents the methodology and findings of the survey's control group, which explores the practical significance of textually uniform procedural rules in the three subject states. In particular, this data captures the difference, in *practice*, between applications by the federal and state courts of certain identical (or nearly identical) language controlling the movant's evidentiary burden upon a motion for summary judgment. The findings of this survey suggest that there is substantial intra-state uniformity, though the practical consequences of uniform formal rules may be less predictable than one might expect.

#### 1. *Control Survey Design and Methodology*

The first control group was designed to measure whether the federal and state courts within each of the three subject states uniformly applied an identical (or nearly identical) provision of their summary judgment rules. Although all three subject states are code pleading jurisdictions, the federal and state courts in all three states have summary judgment rules that are identical (or nearly identical) to the Federal Rule.<sup>203</sup> Indeed, the text of the corresponding sections of the Illinois and Nebraska Codes differ from Federal Rule 56 only in very minor respects<sup>204</sup> and, until 1996, the Pennsylvania Rules of Civil Procedure copied the Federal Rule *verbatim*.<sup>205</sup> The survey was designed to determine whether the federal and state courts within each of these states applied the rules uniformly in practice.

When assessing the standard applied by courts, the survey was again confined to published opinions of the federal and state courts. For purposes of this control survey, opinions were "relevant" when they implicated the movant's burden of production upon a motion for summary judgment. Classification of the data was straightforward because opinions were reviewed to determine only whether the movant had "some" or "no" evi-

---

202. The significance of the lag is analyzed later in this article to permit consideration of the control data presented in Part II(B). See *infra* notes 273-302 and accompanying text.

203. In light of the fact that these three states are considered among those least influenced by the Federal Rules of Civil Procedure, this textual uniformity is, in and of itself, a significant observation about textual uniformity and about the influence of the Federal Rules of Civil Procedure. See generally Oakley & Coon, *supra* note 46, at 1369 (discussing influence of Federal Rules of Civil Procedure).

204. For a discussion of the Illinois Code, see *infra* note 229 and accompanying text.

205. For a discussion of the Pennsylvania Code, see *infra* note 243 and accompanying text.

dentiary burden. Unlike the subtle and subjective identification of pleading standards, whether a court required “some” or “no” evidentiary showing on the part of the movant was readily apparent from the opinion.

This particular aspect of summary judgment jurisprudence was surveyed because this burden was carefully articulated by the Supreme Court in 1970, but then was fundamentally redefined in 1986.<sup>206</sup> The control survey was designed to capture the effect of the latter decision of the Supreme Court on not only the federal courts, which were bound by the new interpretation, but also the state courts, which were not bound by the decision but operated under a textually uniform rule. The nature of this particular inquiry required no topical limitation. Unlike the heightened pleading standard for civil rights cases, the new summary judgment standard was neither a reaction to a particular substantive category of cases, nor was its application limited thereto.<sup>207</sup> Hence, the control data is not limited to civil rights cases.

A motion for summary judgment is to be “made and supported as provided in this rule.”<sup>208</sup> Until 1986, federal case law treated this ambiguously worded requirement in the same terms as it would apply to a movant generally—as a requirement that the movant carry the burden of proof on the subject of the motion.<sup>209</sup> The leading case prior to 1986, *Adickes v.*

---

206. See Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 191 (1987) (noting impact of *Celotex* on summary judgment procedure); Gary T. Foremaster, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731, 739 (1987) (same); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 776-77 (1988) (detailing *Celotex*'s influence in determining parties' burden); Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard*, 42 CLEV. ST. L. REV. 263, 273-74 (1994) (recognizing problems created in liberal use of summary judgment); John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problem Under Rule 56*, 6 REV. LITIG. 227, 234-46 (1987) (surveying Supreme Court precedent in determining evidentiary standard for summary judgment); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206-07 (1993) (discussing increasing use of summary judgment in federal employment discrimination cases); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 64 (1988) (discussing Supreme Court action of “redefining the moving party's initial burden” in *Celotex*); Eric K. Yamamoto et al., *Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy*, 12 U. HAW. L. REV. 1, 26-29 (1990) (discussing impact of *Celotex* and federal law on Hawaii state court summary judgment procedure); Gerald N. Capps, Note, *Civil Procedure—Requirement of Affirmative Evidence by Party Moving for Summary Judgment—Celotex Corp. v. Catrett*, 35 U. KAN. L. REV. 831, 843-45 (1987) (discussing burden on moving party created in *Celotex*).

207. For a discussion of the rationale for applying a heightened pleading standard to civil rights plaintiffs, see *supra* notes 82-84 and accompanying text.

208. FED. R. CIV. P. 56(e).

209. See *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 161 (1970) (noting “the party for summary judgment has the burden to show he is entitled to judgment under established principles”).

*S.H. Kress & Co.*,<sup>210</sup> involved a conspiracy claim arising out of the refusal of luncheonette service to, and the subsequent arrest of, a white civil rights worker in Hattiesburg, Mississippi.<sup>211</sup> The conspiracy claim was premised on an allegation of concerted activity between a private actor, S.H. Kress, and state actors, the police who arrested Ms. Adickes for vagrancy.<sup>212</sup> The record contained allegations that the arresting policeman was inside the store when service was refused, although no evidence was presented by the plaintiff as to any conspiratorial activity other than the policeman's physical presence.<sup>213</sup> The defendant store sought summary judgment on the grounds that "uncontested facts," including the un rebutted affidavits of the store manager and several police officers, pointed against a conspiracy and that the plaintiff had failed to introduce sufficient evidence to support the existence of the conspiracy.<sup>214</sup> The Supreme Court rejected this argument, stating, "The moving party . . . [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."<sup>215</sup> The Supreme Court denied the motion because the affidavits of record did not foreclose a possible inference of a conspiracy by the jury from the fact that the policeman was present at the time that service was refused.<sup>216</sup>

In 1986, sixteen years after *Adickes*, the Supreme Court granted certiorari in *Celotex Corp. v. Catrett*<sup>217</sup> to readdress the defendant's evidentiary burden when moving for summary judgment.<sup>218</sup> In *Celotex*, the administratrix of the plaintiff's estate had filed suit against an asbestos manufacturer, alleging in a wrongful death action that the decedent had been exposed to asbestos manufactured by the defendant.<sup>219</sup> After discovery, the defendant moved for summary judgment, but did not file an affidavit in support of its motion.<sup>220</sup> Instead, the defendant's motion asserted simply that there was no evidence in the record, as established through discovery, that the decedent had been exposed to a product manufactured by the defendant.<sup>221</sup> A strict application of *Adickes* would, for all practical

---

210. 398 U.S. 144 (1970).

211. See *Adickes*, 398 U.S. at 149 (stating facts of case).

212. See *id.* at 149-50 (stating conspiracy claim).

213. See *id.* at 153-57 (reviewing grant of summary judgment).

214. See *id.* at 153 (detailing defendant's argument).

215. *Id.* at 157.

216. See *id.* at 157-58 (noting lack of affidavits weakened respondent's case and did not foreclose possibility that policeman conspired with luncheonette employee).

217. 477 U.S. 317 (1986).

218. See *Celotex Corp.*, 477 U.S. at 324 (stating "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials . . . except the mere pleadings themselves").

219. See McGinley, *supra* note 206, at 223-24 (detailing facts of *Celotex*).

220. See *id.* (same).

221. See *id.* (noting Supreme Court required movant to point out absence of evidence).

purposes, have defeated any prospect of summary judgment because under *Adickes*, the defendant would have had to establish non-exposure (at all points in the decedent's life) to foreclose the possibility of a plaintiff's verdict at trial. The district court, however, granted summary judgment.<sup>222</sup>

With an unconvincing nod to the continued viability of the *Adickes* standard, the Supreme Court granted certiorari and recast the movant's burden of production to comport with the ultimate burden of proof that the movant would have at trial.<sup>223</sup> As a result, *Celotex* still conformed to the requirement that a movant bear the ultimate burden for his or her motion. The Court, however, focused the critical inquiry on the question of the burden of production that a movant must satisfy to shift that intermediate burden to the nonmovant to establish his or her right to go to trial.<sup>224</sup> After *Celotex*, a movant who does not carry the ultimate burden at trial bears a far lower initial burden than under *Adickes*.<sup>225</sup> Indeed, a moving party may prevail at summary judgment having "made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion."<sup>226</sup>

The consequence of the shift from *Adickes* to *Celotex* was significant and, in certain respects, even measurable. One study concluded that prior to *Celotex*, only 1.5% of all civil cases were disposed of by summary judgment.<sup>227</sup> A more recent survey suggests that this procedural device now disposes of as many as one-third of certain types of federal civil cases.<sup>228</sup>

---

222. On appeal, the United States Court of Appeals for the District of Columbia reversed on a 2-1 decision, holding that the defendant had no affirmative duty to negate the possibility that the decedent had been exposed to the defendant's product. The Supreme Court then granted certiorari.

223. See *Celotex Corp.*, 477 U.S. at 325 (noting moving party must show "absence of evidence").

224. See *id.* at 327 ("Rule 56 must be construed with due regard . . . for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial . . . that the claims and defenses have no factual basis.").

225. See *id.* at 323 (noting Rule 56 does not require moving party to support motion by affidavits).

226. See *id.* at 321-23 (disagreeing with Court of Appeals).

227. See William P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427, 449-57 (1977) (detailing study based on cases filed in United States District Court for Northern District of Illinois, Eastern Division, for fiscal year ending June 30, 1970); see also Steven Alan Childress, *Standards of Review*, 29 LOY. L. REV. 851, 854 (1983) (telling infamous story about sign in office of district judge in Fifth Circuit that says, "No spitting. No summary judgments").

This interpretation of Rule 56 was consistent with the vision of Charles Clark. See Clark, *Handmaid*, *supra* note 40, at 319 ("[T]he remedy, while important for the disposal of cases where the opponent has no real defense on the facts, is very far from universal in its applicability. In fact in the case of a real dispute, there is no substitute anywhere for a trial.").

228. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 524 (1991) (citing estimate from Administrative Office of United States Courts that reveals thirty-five percent of civil cases are disposed of by summary judgment); see also Paul W. Mollica, *Federal Sum-*

Hence, like the selection of civil rights cases upon examination of the pleading standard, the focus here was on the application of a new interpretation of a rule that had material consequences.

Each of the sections that follow discusses a movant's evidentiary burden for summary judgment in both federal and state court. Each section first discusses the application of the Supreme Court's re-interpretation of the federal summary judgment standard on movants in federal court. The sections then address whether (or when) the state court incorporated the revised federal court standard into its own jurisprudence under an identical (or nearly identical) state court rule.

## 2. Control Survey Data

### a. Illinois

Section 1005(c) of the Illinois Code differs from the federal rule only in that it does not expressly include consideration of "answers to interrogatories" upon motions for summary judgment.<sup>229</sup> This variance is insignificant in practice, as the Illinois state courts routinely consider answers to interrogatories on these motions.<sup>230</sup> Under these nearly identical federal and state summary judgment rules, the standards are applied uniformly by the federal and state courts. Indeed, summary judgment movants in both federal and state courts have experienced a shift from an *Adickes*-like standard to a *Celotex*-like standard, albeit with a lag between federal and state adoption.<sup>231</sup>

Prior to 1986, the *Adickes* standard clearly prevailed in Illinois federal courts.<sup>232</sup> In *Cedillo v. International Ass'n of Bridge & Structural Iron Workers, Local Union No. 1*,<sup>233</sup> for example, the Seventh Circuit held that "[t]he

---

*mary judgment at High Tide*, 84 MARQ. L. REV. 141, 143-44 (2000) (noting three-fold increase from 1973 to 1997 in proportion of summary judgment cases in Federal Reporter); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1931 (1998) (remarking that dismissals are often mislabeled and more accurately should be labeled summary judgments).

229. 735 ILL. COMP. STAT. ANN. 5/2-1005(c) (West 1992).

230. See *Estate of Henderson v. W.R. Grace Co.*, 541 N.E.2d 805, 807 (Ill. App. Ct. 1989) ("Illinois case law clearly allows answers to interrogatories to be treated as affidavits for summary judgment purposes . . ."); *Komater v. Kenton Ct. Assocs.*, 502 N.E.2d 1295, 1298 (Ill. App. Ct. 1986) (stating that where movant fails to provide evidentiary support for summary judgment motion, opposing party may rely upon his complaint or answer to establish triable issues of fact); *Sirens v. Clausen*, 328 N.E.2d 559, 561 (Ill. App. Ct. 1975) (equating answers to interrogatories with discovery depositions and affidavits pursuant to Illinois rules).

231. For further discussion, see *infra* notes 233-42 and accompanying text.

232. See *Herman v. Nat'l Broad. Corp.*, 744 F.2d 604, 607 (7th Cir. 1984) (citing *Adickes*); *Yorger v. Pitt. Corning Corp.*, 733 F.2d 1215, 1218-19 (7th Cir. 1984) (discussing burden upon movant to establish absence of genuine issue of material fact); *Hadley v. County of DuPage*, 715 F.2d 1238, 1241 (7th Cir. 1983) (citing *Cedillo*); *Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 11 (7th Cir. 1979) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

233. 603 F.2d 7 (7th Cir. 1979).

party moving for summary judgment has the burden of clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in his favor."<sup>234</sup>

Four months prior to the Supreme Court's decision in *Celotex*, however, the Seventh Circuit applied a new standard that essentially eliminated the production burden for summary judgment movants. In *American Nurses' Ass'n v. State of Illinois*,<sup>235</sup> the Seventh Circuit introduced the new standard, holding:

[I]f the plaintiff fails to obtain admissible evidence with regard to an essential issue that the plaintiff has the burden of proving, the defendant can obtain summary judgment without putting in his own evidence. For it is clear in such a case that the plaintiff can't win at trial, and the purpose of summary judgment is to head off trials the outcome of which is foreordained.<sup>236</sup>

Thereafter, the standard was bolstered, of course, by the Supreme Court's *Celotex* opinion, and, since then, the *American Nurses' Ass'n/Celotex* standard has consistently been applied by the Illinois federal courts.<sup>237</sup>

Illinois state courts experienced a similar shift, although a few years after their federal counterpart. Prior to 1989, Illinois state courts had applied rules, including:

[the] fundamental rule that it is the burden of the party moving for summary judgment to establish that there are no genuine issues of material fact and that she is entitled to judgment as a matter of law . . . . Only where the movant has made some evidentiary showing which refutes the allegations made must the party opposing summary judgment present counteraffidavits.<sup>238</sup>

---

234. *Cedillo*, 603 F.2d at 11; *accord Hadley*, 715 F.2d at 1241 (quoting same).

235. 783 F.2d 716 (7th Cir. 1986).

236. *Am. Nurses' Ass'n*, 783 F.2d at 729-30. The Seventh Circuit's opinion relied heavily on the reasoning in Judge Bork's dissent in *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985). See *Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1352-53 (7th Cir. 1985) (entering summary judgment on plaintiff's Section 1983 claim even though defendant did not affirmatively establish non-existence of conspiracy).

237. See *Draghi v. County of Cook*, 184 F.3d 689, 691 (7th Cir. 1999) (citing *Celotex*); *Smith v. Severn*, 129 F.3d 419, 425 (7th Cir. 1997) (citing *Cornfield* and *Celotex*); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993) (requiring non-movant to identify specific facts which establishes genuine triable issue); *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990) (citing and applying *Celotex* standard).

238. *Becovic v. Harris Trust & Sav. Bank*, 469 N.E.2d 1379, 1387-88 (Ill. App. Ct. 1984); see also *Komater v. Kenton Ct. Assocs.*, 502 N.E.2d 1295, 1298 (Ill. App. Ct. 1986) ("[E]ven where the party opposing the motion fails to file counteraffidavits, the movant is not entitled to summary judgment unless his motion and supporting affidavits establish his right to judgment as a matter of law."). But see *Kimbrough v. Jewel Co.*, 416 N.E.2d 328, 333 (Ill. App. Ct. 1981) (providing early indication of *Celotex*-like standard, where plaintiff was "required to present some factual basis that would arguably entitle her to a judgment").

This “fundamental rule,” which modeled the *Adickes* standard, was abandoned in 1989 by the Illinois state courts in *Estate of Henderson v. W.R. Grace Co.*,<sup>239</sup> a products liability action alleging that an employee of the defendant died from exposure to asbestos. Noting that the facts of this case were “substantially similar” to *Celotex*, and that Federal Rule of Civil Procedure 56 was similar to the state code provision, the Supreme Court of Illinois held that summary judgment was properly granted for the defendants because the plaintiff had insufficient evidence that the defendant’s product was involved.<sup>240</sup> Since that case, the *Celotex*-like standard has consistently been applied by the Illinois state courts:

The moving party is entitled to a summary judgment as a matter of law where the nonmoving party has failed to make a sufficient showing on an essential element of the case for which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) . . . . In this case plaintiffs may not resist a motion for summary judgment, on an issue for which they have the burden of proof, by arguing that it is up to movant to negate their case.<sup>241</sup>

Thus, after a lag of about three years, the Illinois federal and state courts again were in lockstep.<sup>242</sup>

#### b. Pennsylvania

Until 1996, Pennsylvania Rule 1035 copied *verbatim* the federal rule.<sup>243</sup> Under the identical federal and state summary judgment rules, the standards were applied uniformly by the federal and state courts. Summary judgment movants in both federal and state courts experienced a shift from an *Adickes*-like standard to a *Celotex*-like standard, albeit (like the State of Illinois) with a lag between federal and state adoption.

Prior to the Supreme Court’s *Celotex* decision, the federal courts in Pennsylvania steadfastly applied the *Adickes* standard to movants for sum-

---

239. 541 N.E.2d 805 (Ill. App. Ct. 1989).

240. See *Estate of Henderson*, 541 N.E.2d at 808 (discussing basis of holding).

241. *Swisher v. Janes*, 606 N.E.2d 798, 804 (Ill. App. Ct. 1992). See, e.g., *Rice v. AAA Aerostar, Inc.*, 690 N.E.2d 1067, 1070 (Ill. App. Ct. 1998) (noting two instances warranting summary judgment); *Rotzoll v. Overhead Door Corp.*, 681 N.E.2d 156, 161 (Ill. App. Ct. 1997) (describing standard for grant of summary judgment).

242. The lag is real and not explained merely by the fact that no reported opinions discussed the standard in the interim. Throughout this three-year period, the Illinois Appeals Courts routinely applied the old *Adickes*-like standard. See, e.g., *Guthrie v. Zielinski*, 541 N.E.2d 178, 180 (Ill. App. Ct. 1989) (applying *Adickes*-like standard to summary judgment motion); *Kaplan v. Berger*, 539 N.E.2d 1267, 1269 (Ill. App. Ct. 1989) (same); *Competitive Food Sys., Inc. v. Laser*, 524 N.E.2d 207, 209 (Ill. App. Ct. 1988) (same); *Schwaner v. Belvidere Med. Bldg. P’ship*, 508 N.E.2d 522, 526 (Ill. App. Ct. 1987) (same); 502 N.E.2d at 1298 (same).

243. For the text of the 1996 amendment to the Pennsylvania rule, see *infra* note 257 and accompanying text.



mary judgment. In *Maldonado v. Ramirez*,<sup>244</sup> for example, the Third Circuit held, in an opinion released only months before the *Celotex* decision, that:

Rule 56 only requires a response to those motions for summary judgment made and supported as required. If "evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." FED. R. CIV. P. 56(e) Advisory Committee Note (1963) . . . . [T]he Supreme Court has stated that a response is not essential to defeat a motion that does not satisfy the movant's initial burden. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970).<sup>245</sup>

But, of course, the federal courts in Pennsylvania were obliged to, and in fact did, follow *Celotex* in applications of Federal Rule 56. Indeed, on the next occasion that the Third Circuit addressed the burden of a movant for summary judgment, the court held, in *Falcone v. Columbia Pictures Industries, Inc.*,<sup>246</sup> that the moving party was entitled to judgment as a matter of law where "the non-moving party has failed to make a sufficient showing of an essential element of her case."<sup>247</sup> Subsequently, the *Celotex* standard has been widely employed in the Third Circuit.<sup>248</sup>

In the Pennsylvania state courts, however, the movant carried an *Adickes*-like evidentiary burden upon a motion for summary judgment for some time after *Celotex* and *Falcone*. In *Metal Bank of America, Inc. v. Insurance Co. of North America*,<sup>249</sup> for example, the court required "a *prima facie* showing by the party seeking summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, shifts the burden of producing evidence to the party opposing the motion."<sup>250</sup>

Approximately two years after *Celotex* and *Falcone*, the first indication of a *Celotex*-like standard surfaced in the state court. In *Eckenrod v. GAF*

---

244. 757 F.2d 48 (3d Cir. 1985).

245. *Maldonado*, 757 F.2d at 50.

246. 805 F.2d 115 (3d Cir. 1986).

247. *Falcone*, 805 F.2d at 118 (affirming summary judgment because employee failed to demonstrate consideration binding his employer to alleged promise not to terminate without warnings); *see also* Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 174 (3d Cir. 1988) ("[D]efendant's proffer [of affidavits] was superfluous . . . [because] the plaintiff has failed to make a sufficient showing of an essential element of his case with respect to which he has the burden of proof.").

248. *See, e.g.*, Estate of Zimmerman v. S.E. Pa. Transp. Auth., 168 F.3d 680, 684 (3d Cir. 1999) (citing *Celotex*); County Floors, Inc. v. P'ship Composed of Gesper & Ford, 930 F.2d 1056, 1061 (3d Cir. 1991) (same); *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1243 (3d Cir. 1989) (same).

249. 520 A.2d 493 (Pa. 1987).

250. *Metal Bank of Am.*, 520 A.2d at 494.

*Corp.*,<sup>251</sup> a case with facts remarkably similar to those in *Celotex*, the Pennsylvania Superior Court held:

Summary judgment [for defendants] is proper when the plaintiff has failed to establish that the defendants' products were the cause of plaintiff's injury . . . . Upon careful scrutiny of the record, we must uphold the trial court's granting of the motions for summary judgment in favor of [defendants]. We acknowledge that the facts establish that the decedent on occasion was exposed to asbestos; there is no evidence, however, as to the regularity or nature of the decedent's contact with asbestos . . . . The mere fact that appellees' asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered . . . . Absent testimony of record that identifies appellees' products as being present in the furnace, there is not even a reasonable inference that appellant was exposed to appellees' asbestos products.<sup>252</sup>

The Pennsylvania Supreme Court declined to hear the appeal in *Eckenrod*, but the new standard immediately took hold, as the *Eckenrod/Celotex* standard was routinely applied thereafter.<sup>253</sup>

Interestingly, when introducing this *Celotex*-like standard into its state court jurisprudence, the *Eckenrod* court acknowledged a departure from earlier state case law, but made no mention of the Supreme Court's *Celotex* decision.<sup>254</sup> Nearly eight years after the *Eckenrod* decision, the Pennsylvania Supreme Court finally addressed the issue, finding the reasoning of *Celotex* "persuasive" and formally adopting *Celotex*.<sup>255</sup> That opinion was one of only three reported opinions of all of the Pennsylvania state courts ever to cite *Celotex*.<sup>256</sup> Meanwhile, also in 1996, the Pennsylvania legislature amended the state summary judgment rule. Among other changes, the new rule states that a party may move for summary judgment where

---

251. 544 A.2d 50 (Pa. Super. 1988).

252. *Eckenrod*, 544 A.2d at 52-53.

253. See, e.g., *Myers v. Penn Traffic Co.*, 606 A.2d 926, 928 (Pa. Super. 1992) ("This 'assure[s]' that the motion for summary judgment may 'pierce the pleading' and . . . require[s] the opposing party to disclose the facts of his claim or defense."); *Godlewski v. Pars Mfg. Co.*, 597 A.2d 106, 109 (Pa. Super. 1991) ("[I]f a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action.").

254. See *Eckenrod*, 544 A.2d at 52 ("Therefore, a plaintiff must establish more than the presence of asbestos in the workplace.").

255. See *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996) (citing *Celotex*).

256. Similarly, the Supreme Court's *Adickes* decision had been cited in only six reported opinions of all Pennsylvania courts and, in all but one instance, only for its Section 1983 jurisprudence. See *Larsen v. Phila. Newspapers, Inc.*, 602 A.2d 324, 329 (Pa. Super. 1991) (discussing summary judgment standard).

"an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."<sup>257</sup> The state legislature, thus, effectively codified the *Celotex* standard.

In sum, after a two-year lag, there was a uniform summary judgment standard applied in practice by the federal and state courts of Pennsylvania. Several years thereafter, the standard applied in practice by the state courts (and by the federal courts) was codified by the state legislature.

c. Nebraska

Section 25-1332 of the Nebraska Code, like the Illinois Code provision, differs from the federal rule only in that it does not expressly include consideration of "answers to interrogatories" upon motions for summary judgment. This variance (from the federal rule) is insignificant in practice, as the Nebraska state courts routinely consider answers to interrogatories on these motions.<sup>258</sup> Surprisingly, under these nearly identical federal and state summary judgment rules, there is intra-state *dis*-uniformity in Nebraska because movants for summary judgment face different standards in federal and in state court.

Prior to *Celotex*, the Nebraska federal courts imposed a production burden upon movants for summary judgment. In *Kegel v. Runnels*,<sup>259</sup> a case decided less than two weeks prior to *Celotex*, the Eighth Circuit reversed a district court order granting a motion for summary judgment for defendants in a medical malpractice case, where there was no evidence introduced by either party as to an essential element of the plaintiff's claim. Consistent with *Adickes*, the Eighth Circuit held that it was the movant's burden to proffer affirmative evidence to disprove the element rather than vice versa.<sup>260</sup>

Even after the Supreme Court decided *Celotex*, the Nebraska federal courts seemed reluctant to adopt the new standard for Federal Rule of Civil Procedure 56. Indeed, even a year later, the Eighth Circuit applied the *Adickes* standard in *Cambree's Furniture, Inc. v. Doughboy Recreational*,

---

257. PA. R. CIV. P. 1035.2, 42 PA. CONS. STAT. ANN. § 1035 (West 2000); *see also* Order Amending Rule 1035 promulgated Feb. 5, 1996, amendments effective July 1, 1996 (noting changes).

258. *See, e.g.*, *Evangelical Lutheran Good Samaritan Soc'y v. Buffalo County Bd. of Equalization*, 500 N.W.2d 520, 524 (Neb. 1993) (affirming grant of summary judgment based in part on interrogatory); *DeCamp v. Lewis*, 435 N.W.2d 883, 885 (Neb. 1989) (same); *Brierly v. Federated Fin. Co.*, 97 N.W.2d 253, 254 (Neb. 1959) (same); *Hennek v. Lexington State Bank & Trust Co.*, No. A-92-407, 1994 WL 388018, at \*3 (Neb. Ct. App. July 26, 1994) ("We now focus our attention on the interrogatories from the Bank . . . which ultimately led to the trial court's granting of summary judgment.").

259. 793 F.2d 924 (8th Cir. 1986).

260. *Kegel*, 793 F.2d at 927-28 (noting production burden).

*Inc.*<sup>261</sup> In that case, a distributor had filed suit, alleging that its relationship with the defendant-manufacturer was a franchise and that its distributorship agreement had been wrongfully terminated.<sup>262</sup> The defendant moved for summary judgment arguing, *inter alia*, that the plaintiff had offered no affidavits in opposition to its motion for summary judgment.<sup>263</sup> Remarkably, the Eighth Circuit, citing *Adickes*, held:

This argument misapprehends the burdens of proof the parties to a summary judgment proceeding must meet. The burden of establishing the non-existence of any genuine issue of material fact is on the moving party. FED. R. CIV. P. 56(c); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 . . . (1970) . . . . Nothing in the affidavits submitted by [defendant] purports to negate the existence of [the material] facts . . . . Therefore defendant did not meet its initial burden . . . and summary judgment must be denied notwithstanding the absence of opposing affidavits or other evidence. *Adickes*, 398 U.S. at 159-60.<sup>264</sup>

Eventually, *Celotex* was adopted, as the Eight Circuit acknowledged in 1988 that it was becoming “more hospitable to summary judgments than in the past.”<sup>265</sup> The *Celotex* standard has since prevailed in the Nebraska federal courts.<sup>266</sup>

The state courts of Nebraska have likewise resisted incorporating a *Celotex*-like standard into their jurisprudence. Since 1982, Nebraska state courts have cited *Hanzlik v. Paustian*,<sup>267</sup> which is an *Adickes*-like standard, as the governing standard for application of the state summary judgment

261. 825 F.2d 167, 174 (8th Cir. 1987) (citing and applying *Adickes*) (citation omitted).

262. See *Cambree's Furniture*, 825 F.2d at 168-69 (noting facts and procedural history).

263. See *id.* (examining defendant's arguments for summary judgment).

264. *Id.* at 174 (citations omitted). For another application by the Eighth Circuit of the prior (*Adickes*) standard, see *Anderson v. Roberts*, 823 F.2d 235, 238 (8th Cir. 1987), which was decided one month after *Celotex*.

265. *City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988); see also *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987) (“While we generally use summary judgment ‘sparingly’ in anti-trust litigation, summary procedures are appropriate where the issues for resolution are primarily legal rather than factual.”); *Hegg v. United States*, 817 F.2d 1328, 1331-32 (8th Cir. 1987) (finding no genuine issue of whether defendant acted willfully or maliciously); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 520-21 (8th Cir. 1987) (finding informal agreement followed by conduct pursuant to that agreement raised genuine issue of material fact).

266. See, e.g., *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999) (citing and applying *Celotex*); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995) (same); *Thelma D. ex rel. Delores A. v. Board of Educ. of St. Louis*, 934 F.2d 929, 932 (8th Cir. 1991) (same); *Mitchell v. Mills County*, 847 F.2d 486, 489 (8th Cir. 1988) (same); *LeNeave v. N. Am. Life Assurance Co.*, 854 F.2d 317, 318 (8th Cir. 1988) (same).

267. 318 N.W.2d 712 (Neb. 1982).

rule. To this end, in 1995, many years after *Celotex* and *City of Mount Pleasant*, the Supreme Court of Nebraska stated:

[The defendant] again failed to meet the burden of a movant for summary judgment of proving that no genuine issues of material fact exist . . . . That [plaintiff] has not yet adduced evidence supporting her allegations is of no consequence. In the absence of a *prima facie* showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which [sic] she expects to produce at trial to prove the allegations contained in her petition.<sup>268</sup>

Thus, for more than a decade, Nebraska federal and state courts have employed different summary judgment standards, notwithstanding uniform textual rules.<sup>269</sup>

### III. THE CAUSE OF INTRA-STATE UNIFORMITY

Based upon the survey data examined here, the most likely explanation for the evolution of uniform pleading standards for civil rights plaintiffs in the federal and state courts of the three subject states is the influence of a local legal culture on indeterminate pleading rules. This conclusion rests primarily on the fact that, while substantial intra-state uniformity was observed in all three states, it manifested itself differently in each. Local variations in outcome can be caused by an embedded legal culture in which judges, lawyers, and other repeat actors influence the application of the law within each state. In the circumstances surveyed here, the practice of a local legal culture appears to have assimilated the standards for pleading under code pleading and notice pleading, respectively. While the two regimes are fundamentally antithetical, the Federal Rules of Civil Procedure and the procedural codes of the three subject states are not drafted with an exactitude that strictly constrains their application—and thus their interaction and integration—in practice.

The data from the survey demonstrates not only that a uniform pleading standard evolved within each state, notwithstanding the fundamentally different regimes of notice and code pleading, but also that the uniform standard within each state was distinguishable from the others. These unifying forces that are unique, localized within each state, and not the result of formal legal standards, are likely the product of a “local legal cul-

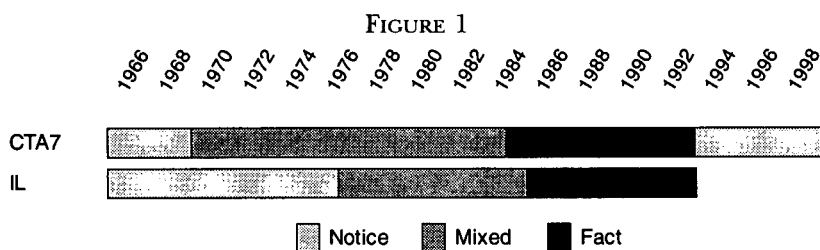
---

268. *Roubideaux v. Davenport*, 530 N.W.2d 232, 235 (Neb. 1995) (citing *Hanzlik*).

269. See *Fackler v. Genetzky*, 595 N.W.2d 884, 890 (Neb. 1999) (citing *Hanzlik*); *Boyle v. Welsh*, 589 N.W.2d 118, 125 (Neb. 1999) (same); *Wagner v. Pope*, 531 N.W.2d 234, 236-37 (Neb. 1995) (applying *Hanzlik* standard). But see *Gillespie v. Smith*, No. A-98-181, 1999 WL 502140, at \*6 (Neb. Ct. App. July 6, 1999) (applying standard that resembles *Celotex*).

ture.”<sup>270</sup> A “legal culture” refers to the composite of shared norms, experiences, expectations and values of lawyers, judges and other institutional forces (whether legal or non-legal) that, while not necessarily reflected in the textual rules, nonetheless inhere in the standards that are applied.<sup>271</sup> The pertinent “locality” here is everything within the boundary of each of the subject states.<sup>272</sup>

In Illinois, for example, the uniqueness of that state’s uniformity was demonstrated by the dynamic conformity of the pleading standards. The pleading standards applied in practice by the federal and state courts evolved similarly and simultaneously, notwithstanding the fundamental differences between the regimes of notice and code pleading in the Illinois federal and state courts, respectively.<sup>273</sup> This dynamic uniformity was illustrated in Figure 1, which was discussed earlier in this article and is reprinted here:



270. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 518 (1993) (acknowledging normative influence of legal cultures); Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535, 537-38 (1993) (same); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1502 (1996) (same); Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 136 (1999) (same); Subrin, *Federal Rules*, *supra* note 4, at 2046 (same); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 804 (1994) (same).

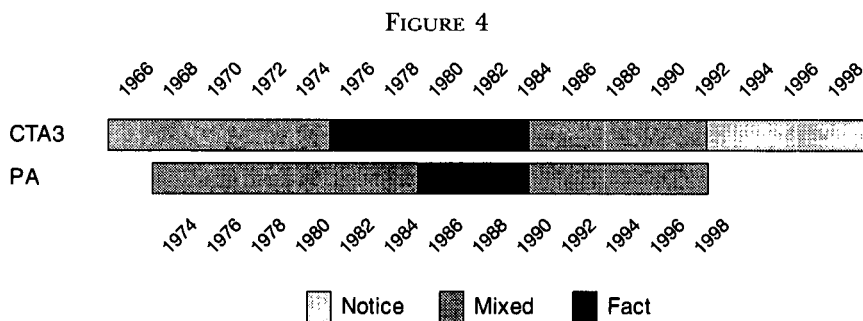
271. See EDWARD BURNETT TYLOR, *PRIMITIVE CULTURE* 1 (1871) (defining legal culture). The term “culture” has myriad anthropologic meanings and connotations. The author uses the term most generically in this context. One classic definition of culture, provided by the nineteenth century English anthropologist Edward Burnett Tylor in the first paragraph of his book *Primitive Culture* will suffice: “Culture . . . is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.” See *id.*

272. Of course, the locality could be either broader or more localized. To be sure, the locality is not national. However, the locality could be broader than a single state and might extend, for example, to some or all of the states within the same federal circuit. Alternatively, the locality could be even more localized if the data collected from each state were parsed. Indeed, the methodology of the instant survey assumed that the state was the appropriate locality; however, the substantial periods of time when the pleading standard was “mixed” could indicate that a narrower locality may have been appropriate. Expanding or shrinking the locality does not, however, alter the thesis or the conclusions of this essay.

273. For further discussion, see *supra* note 135 and accompanying text.

The dynamic quality of this uniformity is even more impressive upon consideration of the control data. There was a lag of approximately three years before the Illinois state court adopted the federal court's interpretation of a nearly identical summary judgment rule.<sup>274</sup> Thus, the Illinois state courts conformed even more quickly to the interpretation of the fundamentally different pleading rule than to the nearly identical summary judgment rule. In any event, Shelton's "all for one and one for all" vision of intra-state procedural uniformity has been obtained in practice in Illinois, even if not in form.

The uniqueness of Pennsylvania's uniformity was demonstrated by a staggered uniformity, as state adoption of the federal standards lagged several years behind. In fact, as illustrated in Figure 2, the lag between federal and state court adoption was such that the pleading standards were identical at almost no point in time. Importantly, however, these lags do not preclude a finding of intra-state uniformity. In fact, if the time-lines from Figure 2 are adjusted to account for a lag of approximately six years, as done below in Figure 4, the evidence suggests virtually identical *patterns*, and hence, intra-state uniformity.



Moreover, a staggered pattern of uniformity was also observed in the control data. It took approximately two years for Pennsylvania state courts to conform interpretations of their identical state summary judgment rule to the new interpretation of Federal Rule 56.<sup>275</sup> Although the lengthier delay prior to state adoption of the federal pleading standard may well be attributable to the textual dissimilarity between the rules, the significant finding is that, in any event, the patterns establish that substantial intra-state uniformity is ultimately obtained.

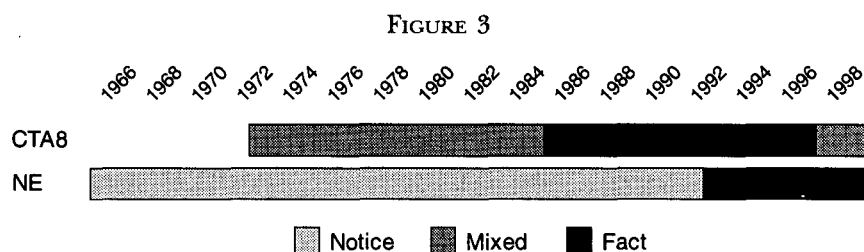
Moreover, the fact that the Pennsylvania federal *and* state courts were the forerunners, both to and from a standard of heightened pleading, is even more compelling evidence of the effect of a local legal culture in Pennsylvania. Indeed, fact pleading was introduced in the federal and state courts of Pennsylvania before either of their respective federal or

274. For further discussion, see *supra* notes 229-42 and accompanying text.

275. For further discussion, see *supra* notes 243-51 and accompanying text.

state counterparts.<sup>276</sup> Additionally, Pennsylvania federal and state courts began the retreat from fact pleading back to notice before any of their respective counterparts; in fact, the federal and state courts of Pennsylvania relaxed their pleading standards even before the Supreme Court decided *Leatherman*.<sup>277</sup> Hence, even with the staggered uniformity, the Pennsylvania federal and state courts have unique and substantially uniform pleading standards vis-à-vis the other survey states.

Another unique type of intra-state uniformity was observed in the federal and state courts of Nebraska. As in Pennsylvania, the data from Nebraska state courts suggest that a lag of approximately six years preceded state adoption of the federal heightened pleading standard. Figure 3 is reprinted here:



The graph may, however, exaggerate the duration of the lag; there were only two topical and relevant state court opinions reported between the years 1986 and 1992, and both were published in 1987. On the other hand, the control data suggests that an even lengthier lag may be typical: for well over a decade, the Nebraska federal and state courts have applied different summary judgment standards to virtually identical rules.<sup>278</sup>

In any event, the most compelling evidence of a local legal culture in the federal and state courts of Nebraska is the unique reluctance of the courts to adopt new standards. For example, while the federal and state courts of Pennsylvania were trailblazers in adopting standards of fact pleading and, thereafter, notice pleading, the federal *and state* courts of Nebraska were the last to adopt a standard of fact pleading and were the last to commence a retreat to notice pleading.<sup>279</sup> In fact, opinions of the federal courts still routinely exhibit the badges of fact pleading, notwithstanding the mandate of *Leatherman*; nor has the state court retreated to a standard of notice pleading.<sup>280</sup> Similarly, the Nebraska federal courts

276. For further discussion, see *supra* notes 254-57 and accompanying text.

277. For further discussion, see *supra* note 251 and accompanying text.

278. For further discussion, see *supra* notes 258-69 and accompanying text.

279. For further discussion, see *supra* notes 267-69 and 257-68 and accompanying text.

280. For further discussion, see *supra* notes 258-69 and accompanying text.



were reluctant to follow the mandate of *Celotex*, and, as stated above, the state courts have yet to acquiesce.<sup>281</sup>

The composition of the local legal cultures at work in each of the survey states is likely an amalgamation of innumerable forces and pressures. For example, lawyers could be very influential in shaping a local legal culture and, more particularly, a standard of pleading. Federal and state bar associations within a locality are—if not the same attorneys—members of the same law firms, committees and organizations; they are graduates of the same law schools; they attend the same continuing legal education classes; and they navigate through the same social circles. The norms of such a culture could affect a pleading standard because the lawyers determine, in the first instance, whether even to challenge the factual sufficiency of a complaint. Absent such a challenge, the courts are unlikely ever to address the issue. When a challenge is brought before a court, the local culture of the bar may already have established a certain standard that the judge essentially adopts as practical.<sup>282</sup> After all, federal and state judges were likely drawn from the local bar and thus, may share those similarities of culture already discussed. Moreover, federal and state court judges may themselves share (and thus impose) certain norms and expectations that are a product of their common experiences and institutional pressures.<sup>283</sup>

This Article does not undertake the exercise of parsing the components of the unique local legal cultures in each of the three survey states. Instead, it relies more broadly on the empirical data, which demonstrates conclusively that the pleading standard for civil rights plaintiffs within federal and state courts of each of the three states is substantially uniform, and also that that uniform standard is unique in each locality. The term “local legal culture,” then, is a descriptive label for those unique and unifying forces within that locality.

One cannot, however, expect the unifying influence of a local legal culture to enable assimilation of textually dissimilar rules in every instance. For example, if federal and state courts within a particular state had fundamentally different rules for assigning newly filed cases to courts and

---

281. For further discussion, see *supra* notes 258-69 and accompanying text.

282. Though uttered in a slightly different context, Charles Clark quipped in 1938, “[H]abit has a tendency to become our master.” Clark, *Handmaid*, *supra* note 40, at 300 (discussing substance-procedure dichotomy).

283. There is evidence in the survey, for example, that federal and state courts shared a fear that society was becoming too litigious and that civil rights actions, in particular, were particularly onerous, given their potential to embarrass public officials and to inordinately consume public funds in defense litigation.

Naturally, federal and state court judges may also be subject to very different pressures. For example, state judges may be elected rather than appointed positions; caseloads may also be shrinking in one jurisdiction while growing in another. The argument is not that the federal and state courts are always subject to identical pressures, but rather that there appears to be a set of common pressures that results in a uniform standard of pleading in civil rights cases.

judges, surely a standard common to both jurisdictions would not evolve in practice. Nor would, say, different federal and state limits on the number of depositions a party may take in discovery evolve into a single standard in practice within a particular locality. Indeed, some other factor(s) must be present in order for the local legal culture to unify rules in practice. In the circumstances surveyed here, that factor seems to be a certain threshold level of indeterminacy in the pertinent formal rules. Because the language of neither the procedural codes nor the Federal Rules imposes an absolute mandate, the indeterminate language is trumped—or at least significantly influenced by—the assimilative effect of the local legal culture.

The indeterminacy of federal and state pleading standards is demonstrated, first, by the fact that the applied standards have experienced dramatic historical shifts between standards of fact and notice pleading. This survey tracks *patterns* of evolution in all six jurisdictions between fact and notice pleading standards. Neither the mandate of notice pleading under the Federal Rules, nor the mandate of fact pleading under the respective state pleading codes was substantively amended at any point in the past sixty years.<sup>284</sup> The indeterminacy of the rules is indicated by the fact that neither the federal nor state pleading rules historically have been applied consistently and uniformly even within those jurisdictions.

Next, the indeterminacy of the two standards is apparent from the language of the pertinent rules. Under code pleading, a plaintiff must allege “[a] plain and concise statement of the facts constituting each cause of action [including defense or counterclaim] without unnecessary repetition.”<sup>285</sup> A fundamental achievement of code pleading was to shift the purpose of pleading from the development of issues to the development of facts,<sup>286</sup> but this system led to hopelessly formalistic disputes over what constituted “facts” and whether there was a meaningful distinction be-

---

284. The last serious proposal to amend Federal Rule 8(a) was in the early 1950s, when a group of reformers sought to revive code pleading by requiring the plaintiff to allege “the facts constituting the cause of action.” *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952). The Advisory Committee on Civil Rules rejected the proposed change, and *Conley v. Gibson* put the reform movement to rest. See Marcus, *supra* note 62, at 445-46 (discussing rejection of code pleading reform). More recently, some advocates of non-trans-substantive procedure have advocated different pleading requirements for different substantive categories of cases. See Robins, *supra* note 63, at 638 (noting that position of those who argue procedural rules should vary with cause of action).

285. CLARK, HANDBOOK 2, *supra* note 42, at 210 (discussing requirements of code pleading); Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Procedural Rules*, 57 COLUM. L. REV. 518, 520-21 (1957) (same).

286. See FREDERIC MATILAND, *THE FORMS OF ACTION AT COMMON LAW* 15 (1909) (contrasting modern emphasis on facts with older procedures); THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 410 (5th ed. 1956) (describing system as driving plaintiffs to plead fact itself); ROSCOE POUND & THEODORE F. T. PLUCKNETT, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 421-22 (3d ed. 1927) (explaining requirements for plaintiff's declaration).

tween conclusions (of law) and facts.<sup>287</sup> The codes did not specifically outline the factual predicate minimally necessary to maintain a claim, and, as a result, a greater level of specificity was required for certain disfavored actions, while more commonly accepted actions could be pled generally.<sup>288</sup> The language of the codes neither prescribed nor proscribed interpretations at either extreme.

The drafters of the Federal Rules expressed their general antipathy toward the pleading of "facts," but the simpler alternative of notice pleading similarly lacks interpretative guidance.<sup>289</sup> All that is required of a plaintiff is "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>290</sup> The inherent ambiguity is that while "[a] 'short and plain statement of the claim' implies mere notice[,] . . . a 'showing that the pleader is entitled to relief' implies a threshold showing as to all essential elements of the claim."<sup>291</sup> Such language exemplifies the drafters' vision "to effectively contain and direct judicial discretion by

287. Plaintiffs were required to plead "ultimate" rather than "evidentiary" facts or conclusions of law. See JOHN N. POMEROY, *THE EQUITY SYSTEM OF PLEADING* 640 (5th ed. 1929) (discussing pleading requirements); see also CLARK, *HANDBOOK* 2, *supra* note 42, at 231-47 (noting dispute as to what constituted facts); Cook, *Facts*, *supra* note 91, at 244-46 (same); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 419-21 (1921) [hereinafter Cook, *Statements*] (same); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1336-38 (1942) (same); Robins, *supra* note 63, at 642 (discussing historical backdrop to pleading under federal rules); Carl C. Wheaton, *Manner of Stating Cause of Action*, 20 CORNELL L.Q. 185, 187 (1935) (noting dispute as to what constituted facts).

288. See CLARK, *HANDBOOK* 2, *supra* note 42, at 231 ("Our real problems is, How specific must the pleader be?"); Cook, *Facts*, *supra* note 91, at 243 (questioning whether allegations provide sufficient detail to be proper statements of fact); Cook, *Statements*, *supra* note 287, at 420-23 (stating that primary question in applying code distinctions is desirability of more specificity); James Alger Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491, 492-93 (1948) (discussing conflicting interpretations of pleading requirements); Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 629 (1988) (discussing joinder of claims and parties); Marcus, *supra* note 62, at 438 (noting evolution and corruption of simplified pleading); Robins, *supra* note 63, at 642 (discussing historical backdrop to pleading under federal rules); Subrin, *Equity*, *supra* note 8, 933 (discussing common law mentality in pre-twentieth-century America).

289. In the notice pleading regime, plaintiffs were intended only to give the other party notice of the claim, not to refine any issues nor to discover facts. Indeed, the drafters took great pains to avoid even using the word "fact" in the context of pleading.

Reformers urged that procedure should be merely "the handmaid of justice," and that a system of procedural rules should deliver, rather than hinder, substance. Subsidiary to this conception, critics argued that pleading should merely give general notice of the nature of a claim, rather than refine issues for interception.

Robins, *supra* note 63, at 643 (citations omitted).

290. FED. R. CIV. P. 8(a)(2). For further discussion, see *supra* notes 65-66 and accompanying text.

291. Robins, *supra* note 63, at 645 (citations omitted) (citing ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 192 (1952)); see also Baumann et al., *supra* note 30, at 214 n.11 (tracing confusion over

broadening the channel in which it runs.”<sup>292</sup> The net result, however, is a pleading standard that suffers from some of the same infirmities of code pleading: the text of the rule is colorable and, therefore, subject to procedural manipulation in practice.<sup>293</sup> The Supreme Court endorsed a very liberal vision of notice pleading in *Conley v. Gibson*,<sup>294</sup> holding that a “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>295</sup> But this interpretation was vulnerable from its outset: “taken literally, it might have precluded dismissal in any cases where the plaintiff invoked a valid legal theory. How can a court ever be certain that a plaintiff will prove no set of facts entitling him to relief?”<sup>296</sup>

Finally, the indeterminacy of the pleading standards is demonstrated by the standards articulated in various opinions of federal and state courts of the three subject states. As demonstrated throughout Part II of this Article, federal and state courts use rhetoric borrowed (whether credited or not)<sup>297</sup> from the jurisprudence of the other in applications of their respective standards. For example, when Illinois state courts applied the badges of notice pleading, the language used by the state courts could easily be mistaken as an application of notice pleading under the Federal Rules: “The Petition . . . need only raise a fair question as to the existence of the claimed right . . . . This petition contains sufficient allegations and gave enough information to indicate a possible violation of the Civil Rights Statute.”<sup>298</sup> Likewise, the Seventh Circuit’s applications of standards of fact pleading could be mistaken as an application of the state’s procedural code: “[A] plaintiff must allege sufficient facts to outline the *cause of action*, proof of which is essential to recovery.”<sup>299</sup> Because the text of neither the federal nor the state rules proscribed such interpretations, federal and

---

term “notice pleading” to Charles E. Clark, who recognized these two types of notice functions).

292. Carrington, *supra* note 26, at 949 (stating that “‘Tight will tear; wide will wear’ was the sartorial wisdom” of drafters).

293. See Subrin, *Field Code*, *supra* note 8, at 311-13 (describing rules as “in decline, if not in [their] death throes”).

294. 355 U.S. 41 (1957).

295. *Conley*, 355 U.S. at 45-46 (citations omitted).

296. Marcus, *supra* note 62, at 434.

297. State courts would occasionally and sporadically cite to federal court opinions as persuasive, although obviously not dispositive, when articulating the state pleading standard. Ironically, this tended to occur more frequently when state courts were requiring plaintiffs to plead with greater specificity; instead of relying on their own strict pleading codes, the courts took comfort in federal cases deviating from the federal standard.

298. *People ex rel. Clark v. McCurdie*, 220 N.E.2d 318, 320-21 (Ill. App. Ct. 1966).

299. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985) (emphasis added) (citations omitted).

state courts appear to use a combined reservoir of rhetoric to pen their respective opinions.

Moreover, on occasion, courts have attempted to reconcile the standards of code and notice pleading. Consider, for example, this excerpt from Pennsylvania Commonwealth Court Judge Pellegrini:

Even though the federal courts have a notice system of pleading in civil rights cases, federal courts have required a plaintiff to plead the underlying facts with a specificity akin to the fact pleading required by [Pennsylvania Rule of Civil Procedure] 1019(a). Under fact pleading, "the complaint must apprise the defendant of the nature and extent of the plaintiff's claim so that the defendant has *notice* of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence."<sup>300</sup>

Judge Higginbotham of the Third Circuit used similar reasoning in *Holder v. City of Allentown*,<sup>301</sup> when stating:

The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief . . . . The complaint will be deemed to allege sufficient facts if it is adequate to "put the proper defendants on *notice* of the essential elements of plaintiffs' cause of action."<sup>302</sup>

These excerpts demonstrate the indeterminacy of both federal and state pleading standards because they suggest that the standards can be reconciled. In both instances, the judges conclude that a certain quantum of "facts" are required, but the threshold is only those facts necessary to give the defendant "notice" of the claim. Harmonization of the standards under the regimes of notice pleading and code pleading was not the "significant reform" that the drafters of the Federal Rules of Civil Procedure envisioned.<sup>303</sup>

---

300. *Heinly v. Commonwealth*, 621 A.2d 1212, 1216-17 (Pa. Commw. Ct. 1993) (emphasis added) (citations omitted).

301. 987 F.2d 188 (3d Cir. 1993).

302. *Holder*, 987 F.2d at 194 (emphasis added) (internal citations omitted); see also *Carter v. City of Phila.*, 989 F.2d 117, 118 (3d Cir. 1993) ("Particularly when a civil rights violation is alleged, we should not affirm a dismissal at the pleading stage, unless it is readily discerned that the facts cannot support entitlement to relief.").

303. The following anecdote illustrates the significance of the reform: At a meeting in Cleveland, . . . Mr. Clark stated that he heard from a lawyer who criticized [the new pleading] Rules. The lawyer said, . . . "[A] sixteen-year old boy could plead under these rule!" "Well, I would say, in answer," observed Mr. Clark, "Why not, if he tells the court what his case is about? And that is what we are trying to ask the lawyers to do, and to do quite simply."

CHARLES E. CLARK, *CASES ON MODERN PLEADING* 26 n.18 (1952) (quoting *SEC v. Timetrust, Inc.*, 28 F. Supp. 34, 41 (N.D. Cal. 1939)).

The most likely cause of uniform pleading standards for civil rights plaintiffs in the federal and state courts of the three subject states appears to be the influence of a local legal culture on indeterminate pleading rules. The influence of a local legal culture is evinced by unique and uniform standards within each of the subject states. The indeterminacy of the pleading rules is demonstrated by: (i) the evidence of deviation within each jurisdiction; (ii) the text of the rules; and (iii) the efforts by judges to reconcile and blend the applicable standards. Although the regimes of notice pleading and code pleading are fundamentally antithetical, the unifying influence of a local legal culture assimilates the standards applied in practice.

#### IV. CONCLUSION: LOCATING ROLES FOR THE RHETORIC AND FOR THE RULES

This survey of pleading standards applied by the federal and state courts of the three subject states to civil rights plaintiffs presents compelling evidence of intra-state uniformity in fact, notwithstanding the fundamentally different regimes of notice and code pleading. The survey's conclusion of substantial intra-state uniformity initially may seem reassuring. As participants in contemporary reform discourse, we are familiar with the rhetoric, if not hyperbole, of disuniformity, chaos and complexity in contemporary procedure.<sup>304</sup> And, one might find some solace in a survey that concludes procedure may not be as disuniform, chaotic or complex as we thought. At a more abstract level, however, the survey reveals a troubling fissure between form and practice that both tarnishes the ubiquitous rhetoric of uniformity and challenges the effectiveness of procedural rules as a mechanism for legal reform.

First, the survey's conclusion of uniformity in practice casts a shadow of empirical doubt on essentially all reform discourse that implicates the norm of uniformity. Most proposals for legal reform rest on an untested (even unstated) assumption that a change in form (e.g., the rules) will effect the desired change. One salient finding of this survey is that a formal change may not effect the desired change because the change may already have occurred. Under such circumstances, the rhetoric of uniformity would be misplaced or even misleading. Although a reform to codify an existing uniform standard of application may be worthwhile, the rhetoric of uniformity presumably would be far less compelling.

The list of current reform efforts that might be vulnerable to empirical study is, of course, as long as the list of reform efforts that implicate the rhetoric of uniformity.<sup>305</sup> To be sure, not every formal dissimilarity is or

---

304. For further discussion, see *supra* notes 283-302 and accompanying text. See generally Subrin, TEACHING, *supra* note 52 (discussing disuniformity and complexity in contemporary civil procedure).

305. For further discussion, see *supra* note 14-26, 29-30 and accompanying text.

will be applied uniformly in practice.<sup>306</sup> The intent of this Article is not to suggest that they are, but rather to ensure that the question of *whether they are* is raised if and when some well-intentioned reform draws on the powerful rhetoric of uniformity in support of (or in opposition to) some legal reform.<sup>307</sup> Many scholars have lamented that procedural reforms are wont to bypass serious empirical research;<sup>308</sup> at a minimum, the variance between form and practice demonstrated here highlights one reason that empirical study is a necessary prerequisite to principled reform discourse.

Further, the survey's conclusion of uniformity in practice emasculates the role of rules as the progenitor of procedural reform. A uniform pleading standard evolved in each of the subject states without the benefit of, indeed in spite of, formal rules. This concern is especially poignant because the control data from Nebraska suggest that even a rule that is identical in *form* may nevertheless be applied differently by courts in *practice*. Hence, although even identical texts do not ensure uniform applications, some other (unifying) force can, under certain circumstances, trump even significant formal differences.

Ambivalence about the significance of formal rules is not particularly novel. Professor David Shapiro, for example, has argued that behavior often precedes formal legal reform.<sup>309</sup> In Shapiro's model, rules can be reflective, as opposed to prescriptive, and the significance of formal rules is thereby diminished. The legal realist movement and its progeny long

---

306. And, of course, not all of the rhetoric of uniformity concerns textual dissimilarities.

307. This survey examined the federal and state courts in only three states; and, in those few states, the survey focused only on narrow slices of the jurisprudence of pleading and summary judgment. With regard to the former, the survey focused on only one substantive category of cases. Although the survey was comprehensive with respect to those particular states and rules (because it captured the data for every case within this scope), this population does not purport to be a representative sample of all other applications of pleading and summary judgment rules. Nor is it necessarily typical or representative of the uniformity experienced under all other rules—procedural or otherwise. Because the findings of the survey are exemplary of phenomena that could be present outside this narrow context, this possibility gives rise to the broader questions raised in this essay.

308. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 334 (1991) (“[W]ith rare exceptions, rule changes seldom have been based on empirical research.”); Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker*, 23 J. LEGAL STUD. 595, 597 (1994) (opposing certain procedural reforms); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464-69 (1993) (discussing reform and its obstacles). See generally Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession*, 30 WAKE FOREST L. REV. 347 (1995) (proposing empirical scholarship reform).

309. See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1991-98 (1989) (commenting on underlying assumptions of Federal Rules of Civil Procedure); see also Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 157 (1997) (“National rulemaking . . . frequently represents codification of practice and reflection of change rather than commencement of newly-minted regimes.”).

have emphasized this variance between form and practice.<sup>310</sup> In the realists' model, rules are relevant but are not dispositive of results; individual actors (namely judges) interject variation into otherwise predictable applications of rules.<sup>311</sup> The evidence of intra-state uniformity presented here lends some empirical support to both of these theories. But, I do not endeavor to tackle either of these theories here; instead, I shine the light on but one corner of this oversized room.<sup>312</sup>

The survey suggests the cause of this particular instance of intra-state uniformity was the effect of a local legal culture on indeterminate pleading rules. The evidence of a local legal culture suggests that formal rules targeted (or expected) to yield certain consequences can be subverted by localized influences and pressures. To be sure, the local legal culture that is credited here with assimilating fundamentally different pleading standards may be largely influenced by factors that are unique to the circumstances surveyed here. For example, a local legal culture may not unify disparate standards absent the influence of a dominant regime.<sup>313</sup>

If not hegemonic, the influence of the Federal Rules of Civil Procedure is certainly pervasive.<sup>314</sup> In each of the survey states, none of the state courts introduced the badges of fact or notice pleading until the corresponding federal court had already done so.<sup>315</sup> In addition, to the extent that there was any cross-citation between the federal and state courts,

---

310. See generally Sullivan et al., *supra* note 270, at 803-04 (analyzing local legal culture's anthropological use).

311. See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65-159 (1995) (providing history of legal realism); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 498-99 (1996) (same).

312. Professor Shapiro created this wonderful metaphor. See Shapiro, *supra* note 309, at 1969 ("My own inclination, when confronted with . . . a cosmic question, is to try to particularize it by looking at an important instance of the problem—to see whether light from one corner can help to illuminate the whole room.").

313. See Sullivan et al., *supra* note 270, at 803-05 (discussing local legal culture).

314. For further discussion, see *supra* note 47 and accompanying text (discussing textual adoption generally). In addition, see *supra* notes 204-06 and accompanying text (discussing summary judgment rules).

315. For examples, see *supra* notes 124 & 131 and accompanying text (discussing Illinois state court adoption of fact pleading and notice pleading standards, respectively); see *supra* notes 171 & 175 and accompanying text (discussing Pennsylvania state court adoption of fact pleading and notice pleading standards, respectively); see *supra* note 201 and accompanying text (discussing Nebraska state court adoption of fact pleading standard).

Importantly, however, the lags between federal and state court adoption of the pleading standards (in Pennsylvania and Nebraska) could also evince independence or coincidence. See *supra* notes 275-78 and accompanying text (discussing lag times in adoption of pleading standards by Pennsylvania and Nebraska state courts). For contrast, however, see *supra* notes 131-34 and accompanying text (discussing Illinois state court adoption of federal court pleading standard). The Pennsylvania state court's failure to mention *Celotex* when introducing and applying that (*Celotex*) standard to the identical state court summary judgment rule may also be significant. See *supra* note 254 and accompanying text.



this was strictly a one-way phenomenon, with state courts citing federal precedent.<sup>316</sup> Whether a dominant regime, such as the Federal Rules of Civil Procedure, is a prerequisite to assimilation by a local legal culture would be an interesting subject of further study.

The local legal culture may also have been especially influential under the circumstances surveyed here because civil rights cases are especially likely to be “political” and, thus, subject to a unique set of institutional forces and pressures.<sup>317</sup> Regardless, a local legal culture can facilitate, if not introduce systemic variation and we should be aware of the subtle contours of that influence.<sup>318</sup> If the potential influence of a local legal culture is overlooked, reformers could overstate the anticipated impact of the reform, either because the culture may already have affected the reform in fact, even if not in form, or because the culture may trump—or at least significantly influence—the application of the reform (i.e., a formal rule) in practice.

This survey further suggests that the indeterminacy of the mandates under code and notice pleading, respectively, enabled—or perhaps even invited<sup>319</sup>—the local legal culture to assimilate them. Although notice and code pleading are fundamentally antithetical in tradition, scope and even text, the language of neither proffers a rigid standard for application in practice.<sup>320</sup> As a result, the pleading standard within all six of the federal and state jurisdictions examined here has been variously applied in manners consistent and inconsistent with the purpose and intent of the governing rules. The sensitivity of indeterminate rules to institutional forces and pressures is particularly significant because such indeterminacy inheres in procedure generally, and in the Federal Rules of Civil Procedure in particular.<sup>321</sup>

This survey reveals a dissonance between form and practice that is unsettling. As participants in the discourse of reform, our rhetoric and our proposals emphasize formal uniformity. Yet, despite our rhetoric and our proposals, we may already have (or, alternatively, may never have)

---

316. Citations by state courts to federal court precedent occurred infrequently and almost exclusively in Section 1983 cases, where state courts were entangled in the requirements of pleading these claims that can blend substance and procedure. For further discussion, see *supra* notes 131-34 and accompanying text (discussing Illinois state court adoption of federal pleading standard). For a contrast, see *supra* note 254 and accompanying text (discussing Pennsylvania court's adoption of new summary judgment standard without mention of *Celotex*).

317. See generally Baumann et al., *supra* note 30 (discussing local legal culture).

318. See Sullivan et al., *supra* note 270 at 803-04 (discussing local legal culture).

319. The survey data suggest either that local legal cultures may assimilate rules, unless the rules are drafted to proscribe such applications in practice, or, conversely, that indeterminate rules may invite assimilation by local legal cultures.

320. For further discussion, see *supra* notes 285-303 and accompanying text.

321. For further discussion, see *supra* notes 285-303 and accompanying text.

what must be the purest form of uniformity—uniformity of result.<sup>322</sup> We must be mindful of unstated and untested assumptions lurking behind the powerful rhetoric of uniformity. We must appreciate the role that a local legal culture and other influences that are difficult to quantify might have played (or will play), formal rules notwithstanding.

---

322. Uniformity of result perhaps is the only true virtue of uniformity. This theme has been invoked for centuries. Commenting upon Lord Mansfield's statement that, "we must act alike in all cases of like nature," Judge Henry J. Friendly termed this "the most basic principle of jurisprudence." Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982); see also Subrin, *Federal Rules*, *supra* note 4, at 2002-06 (elaborating on pro-uniformity movement); Yamamoto, *supra* note 2, at 387 (discussing that ironic result of uniform procedure is dis-uniform results).

