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SUMMARY JUDGMENT, PLEADING, AND THE FUTURE OF TRANSSUBSTANTIVE PROCEDURE

Stephen B. Burbank[*]

Summary judgment and pleading under the Federal Rules offer numerous opportunities for comparison. Having spent much of the last six years studying, writing about, and seeking to influence public policy concerning these two legs of what the Advisory Committee recently referred to as a three-legged stool[1]—discovery being the third—lately (that is, after the Court's decisions in *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*[3]) I have been struck by the extent to which they have been assimilated doctrinally and concerned about the extent to which they may exhibit the same patterns of disuniform geographical and substantive activity and impact. I have also been gratified that, as applied to summary judgment and pleading, realism about the power of procedure, facilitated by more frequent and sophisticated empirical study of procedural phenomena, may at last cause a widespread reexamination of the premises, as well as the costs and benefits, of transsubstantive procedure.

My research on the drafting history of Fed. R. Civ. P. 56 ("Rule 56") revealed that, because of the models available to them, the original Advisory Committee thought that the rule would prove useful chiefly for plaintiffs seeking to collect debts.[4] In the succeeding seventy years,

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∗ © Stephen B. Burbank 2010. David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. This article is based on remarks made at the 2010 meeting of the AALS Section on Litigation.

1. Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 21 (May 9, 2008) [hereinafter Kravitz Memorandum] (explaining that the "three-legged stool" consists of notice pleading, discovery, and summary judgment), *available at* http://www.uscourts.gov/rules/Reports/CV_Report.pdf.

2. 550 U.S. 544 (2007).

3. 129 S. Ct. 1937 (2009).

4. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004).

summary judgment has become something very different from what those who introduced it into federal practice envisioned.[5] It is invoked far more by defendants than by plaintiffs;[6] it is by no means invoked only in simple cases,[7] and it accounts for a much higher percentage of terminations in federal civil cases than do trials.[8] There is nothing necessarily wrong with these developments, particularly if one acknowledges the propriety of judges dusting off old tools and reshaping them to deal with problems not foreseen by their creators.

Yet, my inquiries and those of other scholars suggest a number of problems that have occurred in the enthusiastic embrace of a long-neglected litigation equilibration device that started in the 1970s. One is the fact that Rule 56, although superficially uniform, is differently interpreted in different circuits and in different types of cases, a phenomenon that may help to account for differences in the rates at which it is invoked, and at which cases are terminated by summary judgment, in different parts of the country and in different categories of cases.[9] Another problem is suggested by evidence that some courts are granting summary judgment by resort to techniques of factual and legal

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(explaining that the rule was inspired by English procedure instituted for the benefit of plaintiffs seeking to collect debts with dispatch).

5. Proponents of Rule 56 looked at it as a tool to identify and dispose of claims where there was no valid defense without the time and expense of a trial. *See* Burbank, *supra* note 4, at 598-99 (quoting Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 872-73 (1933)). Charles Clark, one of summary judgment's chief advocates, wondered whether summary judgment motions should be attempted outside of "the simple case where there really isn't much of a defense" and worried that its use in other cases would be "an instrument of delay." AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES 225 (1938) (remarks of Dean Clark).

6. *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886 (2007) (explaining that the data showed some 2526 motions were made by defendants while only 967 were made by plaintiffs).

7. *See* Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 6-8 (Nov. 2, 2007) (showing that summary judgment motions are filed in complex actions, such as those involving insurance contracts, products liability, antitrust, civil RICO, and ERISA), *available at* www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf.

8. *See* Burbank, *supra* note 4, at 616 (presenting Eastern District of Pennsylvania data showing that during fiscal year 2000, 4.1 percent of civil cases were terminated by summary judgment while only 1.9 percent were terminated at or after trial).

9. *See* Burbank, *supra* note 4, at 618; Cecil et al., *supra* note 6, at 896 (noting that the "six district courts in this study vary greatly in their levels of summary judgment activity"); Cecil et al., *supra* note 6, at 906 ("Criticism of summary judgment rarely takes into account the widely varying incidence of motions across various types of cases and the marked differences in summary judgment practices across individual federal district courts.").

carving that threaten the right to jury trial and the integrity of the substantive law.[10]

The pleading in the Advisory Committee's three-legged stool was so-called "notice pleading."[11] What a difference a year makes. Endangered by the Court's decision in *Twombly*, notice pleading has been put on life support by *Iqbal*. The three-legged stool of yore is a very different looking piece of furniture. The process used to accomplish this, moreover, was not that of "dusting off . . . and reshaping," as with summary judgment.[12] There, the courts altered a few of the federal common law standards that implement Rule 56, and gave vitamins to some others—in order to meet the perceived challenges of modern litigation, to be sure, but all in aid of the historic function of separating wheat from chaff by identifying those cases with sufficient factual support to warrant submission to a jury. In *Twombly* and *Iqbal*, by contrast, the Court ignored the requirements of the Enabling Act and its own prior decisions on the difference between judicial interpretation and judicial amendment.[13] Moreover, disdaining or fundamentally misapprehending the historic role of Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)")—which was intended to test whether the substantive law authorizes relief to one in the plaintiff's situation under any set of facts—and the analytically distinct role of Fed. R. Civ. P. 12(e) ("Rule 12(e)"),[14] the *Twombly* Court did not just retire the "no set of facts"

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10. *See* Burbank, *supra* note 4, at 624-25; 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, 229-31 (1993).

11. Kravitz Report, *supra* note 1, at 64.

12. *See* Memorandum from Steve Burbank to Mike Baylson and Lee Rosenthal 1-2 (Jan. 20, 2007) (on file with author).

13. "[W]e are bound to follow [a Federal Rule] as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999); *see also* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered.").

14. The architecture of *Iqbal's* mischief—undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal*—is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley's* "no set of facts" language concerned the former question, not the latter, with the result that even if post-*Conley* courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court "retired" the "no set of facts" language, it did not retire, but rather perpetuated and exacerbated, this mistake. *Whether the Supreme Court has Limited Americans' Access to Court: Hearing Before the S. Comm. on the*

language in *Conley v. Gibson*.[15] Fulfilling the fondest dreams of lower courts that, rebuffed in attempts to impose fact pleading directly, had found ways to do so indirectly,[16] the *Twombly* Court substituted for the self-inflicted confusion of those lower courts the conflation of Rules 12(b)(6) and 12(e).[17]

Iqbal made what could have been merely an isolated aberration into a general repudiation of the original understanding of the Federal Rules on pleading and motions to dismiss, one that makes Rule 12(b)(6) another factual screening device, albeit a notably capricious one, and Rule 12(e) essentially irrelevant. As noted, the *Conley* Court's use of the "no set of facts" language was intended to address only those situations in which, no matter how compelling the facts alleged, the law did not provide relief. That is a far cry from the power to assess the plausibility of recovery under an accepted theory of relief.

It is too early to tell what the impact of *Iqbal* will be; we have very limited data. The most comprehensive study to date, an analysis (using econometric techniques) of some 1200 cases by Professor Patricia Hatamyar, although subject to the biases that afflict work based on published decisions, is probably the best we have for now.[18] It suggests that what I have called "the usual victims of 'procedural' reform" are being differentially and adversely affected by *Twombly* and especially

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Judiciary, 111th Cong. 11 (2009) (prepared statement of Stephen B. Burbank) [hereinafter *Burbank Testimony*], *available at* http://judiciary.senate.gov/pdf/12-02-09%20Burbank% 20Testimony.pdf.

15. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (holding that a complaint should not be dismissed for failure to state a claim unless it is established that the plaintiff can prove "no set of facts in support of his claim which would entitle him to relief").

16. Apparently persuaded that an invigorated summary judgment procedure—already embraced by many lower federal courts starting in the 1970's and blessed by the Supreme Court in the mid-1980's—was not a sufficient response to contemporary litigation ills, a number of lower federal courts performed a similar operation on the pleading rules. Notwithstanding the Supreme Court's embrace of notice pleading and the listing of only a few matters requiring greater factual specificity in Federal Rule 9(b), some courts determined that certain types of cases should be subject to heightened pleading requirements. In its *Swierkiewicz* and *Leatherman* decisions, one a civil rights case and the other an employment discrimination case, the Supreme Court twice within a decade rejected such judge-made rules as inconsistent with the Federal Rules and with the principle that Federal Rules can be changed only through the Enabling Act process or by statute. Apparently the message was lost on, or simply unacceptable to, some lower federal courts, as the technique persisted even after *Swierkiewicz*. By this time it bordered on lawlessness. *Burbank Testimony*, *supra* note 14, at 6.

17. *Burbank Testimony*, *supra* note 14; Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 551 (2009) (suggesting that the plausibility requirement has little to do with Rule 12(b)(6) and everything to do with Rule 12(e)).

18. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 555-56 (2010).

Iqbal.[19] Thus, she concluded that "[m]otions to dismiss [in constitutional civil rights cases] were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from Conley (50%) to Twombly (55%) to Iqbal (60%)."[20]

Ongoing work by the Federal Judicial Center that is based on actual docket entries will eventually clarify the empirical picture. I would be surprised if we did not see substantially different rates of activity across the country, as well as in different kinds of cases. That, after all, has been the experience with Rule 56, which in turn was very similar to the experience with Fed. R. Civ. P. 11 during the decade between 1983 and 1993.[21] It is the experience one would expect knowing both that in some parts of the country, as I observed, *Iqbal* answered "the fondest dreams" of some lower courts and that district judges in other parts of the country are ignoring *Iqbal*—cubing a process of lawlessness that started with lower courts subverting *Conley* and continued with the Court subverting the Enabling Act.[22] It is also what one would expect knowing that the *Iqbal* Court's reliance on "judicial experience and common sense"[23] is, in certain types of cases, an invitation to "cognitive illiberalism" more worrisome than when summary judgment is involved.[24] At least in the latter situation, judicial subjectivity is disciplined by an evidentiary record created after discovery.[25] No such constraint operates when a judge assesses the plausibility of a complaint in connection with a

19. *Burbank Testimony*, *supra* note 14, at 3.

20. Hatamyar, *supra* note 18, at 556.

21. *See* Burbank, *supra* note 4, at 618.

22. Stephen B. Burbank, *Time Out, in Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009) (arguing that the process the Supreme Court used to change the standards courts should use in evaluating motions to dismiss was "illegitimate and inadequate" in light of the Rules Enabling Act of 28 U.S.C. § 2072).

23. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (explaining that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

24. Cognitive illiberalism is demonstrated in cases where the court, by insisting that a case be decided summarily, denies those citizens who see the facts differently an opportunity, in jury deliberations, to "inform and possibly change the view of citizens endowed with a different perspective." Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841-42 (2009). It also makes the decision illegitimate in the eyes of any subcommunities whose members see the facts in a different way. *See id.* at 842. *See also* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 117-18 (2009) (applying cognitive illiberalism analysis to pleading under *Twombly* and *Iqbal*).

25. Fed. R. Civ. P. 56(c)(2) states that summary judgment should be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact."

motion to dismiss.[26] Finally, how could it be otherwise, given the example of ad hoc manipulation of the substantive law, arbitrary complaint carving, and equally arbitrary inference carving according to "judicial experience and common sense" that the *Iqbal* Court has provided to the lower courts?

If there is a silver lining here—other than the possibility that the Court's contempt for both the Enabling Act process and the original understanding of the Federal Rules that it had previously pledged to honor when operating outside of that process may prompt Congress to enact remedial legislation—it is that *Twombly* and *Iqbal* have vividly highlighted the costs of transsubstantive procedure.[27] Now that even Congress has learned how to use procedure, openly or not, to advance substantive goals, greater attention naturally focuses on choices made by those responsible for crafting and interpreting procedural rules, wherever they sit. Yet, the foundational assumption that the Enabling Act requires transsubstantive rules[28] is thought to prevent use of its process when a particular substantive context requires a different procedural rule, while the judiciary's refusal to acknowledge that statutory procedure is legitimate prevents it from taking the initiative in seeking a legislative fix.[29] As a result, courts struggle to make a substance-specific solution fit within the general rule, or they change the general rule without admitting that they are doing so. The tendency of the first tactic is to yield a non-optimal solution for the particular substantive context. The tendency of the second, the technique used in *Twombly* and *Iqbal*, is to yield a non-optimal solution for all substantive contexts. I would not be surprised if the near future brought legislation that authorized the rules committees of the Judicial Conference to propose substance-specific

26. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be made before any responsive pleading is filed, let alone before any discovery is conducted.

27. Under transsubstantive procedure the same procedural rules apply regardless of the substance of the case. *See generally* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010).

28. *See* Burbank, *supra* note 17, at 536 (explaining foundational assumption that the Federal Rules should be uniformly applicable in all federal courts and in all federal cases).

29. *See id.* at 562. Note the recent exception in amendments to Fed. R. Evid. 502, proposed as legislation by the judiciary and enacted by Congress. *See* Pub. L. No. 110-322, 122 Stat. 3537 (2008); S. Rep. No. 110-264, at 4 (2008), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr264.110.pdf ("On December 11, 2007, Chairman Leahy introduced S. 2450, incorporating the language proposed by the Judicial Conference's Advisory Committee."). Because, however, the amendments govern attorney-client privilege, the judiciary had no choice by reason of the Enabling Act's requirement that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b) (2006).

rules when necessary to solve this dilemma, effective, however, only if enacted by Congress.