ASHCROFT V. IQBAL: CONTEMPT FOR RULES, STATUTES, THE CONSTITUTION, AND ELEMENTAL FAIRNESS

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Ashcroft v. Iqbal[1] is an embarrassment to the American Judicial System in which a majority of the Supreme Court chose to reject the rule of law. Deciding appellate cases and writing judicial opinions, especially at the Supreme Court level, are not easy tasks. Judges can, of course, disagree on their interpretation of law and on what constitutes a just outcome in hotly contested cases. But there are widely recognized canons about what lawyers, law professors, law students, and even other judges legitimately expect from the Supreme Court. I learned them in my first year of law school.

Justices of the Supreme Court should decide the issues presented to them in the petition for certiorari, unless they request briefing on different or additional issues.[2] One of the first articles I wrote was on Notice and the Right to be Heard.[3] At least since the Magna Carta, it has been considered unfair not to tell parties what issues are before a court. Second, cases are to be decided according to the law, whether in the Constitution, statutes, rules, or common law. A justice in the highest court of a sovereign state or nation can appropriately reinterpret law, but not eliminate legitimate binding law. Third, justices are to respect other branches of government when another branch, like the elected Congress, acts within its designated authority. Fourth, judicial opinions should be clearly reasoned. Fifth, judicial opinions should honestly address the concerns of those who disagree, especially dissenters. Sixth, judicial opinions of the Supreme Court should give guidance to the lower courts so that judges, lawyers, and clients know how to act in the future. Seventh, judicial decisions and the opinions supporting them should not ignore the blatantly unfair impact of their rulings unless the law forces such a result, which should happen rarely.

* Stephen N. Subrin, Professor, Northeastern University School of Law. Like so much of my writing, this Essay relies heavily on conversations I have had through the years with my friend, Steve Burbank. Some of the ideas can be found in our recent article, Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011). Any mistakes, as well as the tone of the distress, appearing in this *Nevada Law Journal* Essay are my own.

Thanks to my students Kevin Canty and Meryl Grenadier for their superb editorial and research assistance.

[1] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[2] SUP. CT. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

[3] Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449 (1974).

The decision handed down by the majority in *Ashcroft v. Iqbal* flunks every test by which a judicial decision and supporting opinion can be reasonably measured. In so doing, this case relies heavily on another opinion of the Supreme Court, *Bell Atlantic Corp. v. Twombly*[4], decided two years previously. That case also flunks most of the criteria for a sound opinion, but many of us thought—or at least hoped—that in *Iqbal* the Court would limit or repair some of the damage it caused by mistakes and ambiguities in *Twombly.*[5] We were wrong.

To show you how lawlessly the Court acted in *Iqbal*, I have to share brief summaries of the underlying facts of *Twombly* and *Iqbal.* Justice Souter authored the majority opinion in *Twombly,* with Justices Stevens and Ginsburg dissenting.[6] *Twombly* reinstated the dismissal under Fed. R. Civ. P. 12(b)(6) of an antitrust conspiracy complaint brought under the Sherman Antitrust Act against the regional telecommunication services providers created after the breakup of AT&T.[7] In reversing a panel of the Second Circuit, the Court "retired" the language in *Conley v. Gibson,*[8] which had been cited thousands of times with approval by the Supreme Court, Federal Circuit and District Courts, and state courts since it was decided, "that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief."[9] The court reinterpreted "notice pleading"—the requirement that plaintiffs give defendants enough information in their complaints to allow them to prepare their cases, including engaging in relevant discovery—to now require that plaintiffs provide "[f]actual allegations [that] must be enough to raise a right to relief above the speculative level."[10] The court also proclaimed that complaints must be "plausible."[11] The court labeled the plaintiffs' allegations of conspiracy "conclusory," and held that their claims were not plausible because they relied on "parallel conduct and not on any independent allegation of actual agreement among [them]."[12]

Some courts and commentators thought that *Twombly* should and would be applied only to antitrust cases or other cases in which massive discovery could be anticipated;[13] there were hints in *Twombly* that the huge expense of potential discovery in this broad-ranging antitrust class action was the major reason for its decision.[14] *Iqbal,* a 5–4 decision in which Justice Kennedy authored the majority opinion (joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito), dispelled the hope for limiting *Twombly*'s breadth.

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[4] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[5] *See generally* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) (discussing how the *Iqbal* majority could have clarified the meaning and scope of *Twombly*).

[6] *Twombly*, 550 U.S. at 547, 570.

[7] *Id.* at 548–49.

[8] *Id.* at 562–63.

[9] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

[10] *Twombly*, 550 U.S. at 555.

[11] *Id.* at 547.

[12] *Id.* at 557, 564.

[13] *See, e.g.*, *In re* Pressure Sensitive Labelstock Antitrust Litig., 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) ("*Twombly* must be read in light of the industry at issue.").

[14] *See Twombly*, 550 U.S. at 558–60.

In *Iqbal*, Justices Souter and Breyer now recognized how far their conservative colleagues were willing to go in upsetting seventy years of Federal Rule jurisprudence; they dissented, along with Justices Stevens and Ginsburg.[15]

Iqbal involved claims brought by a Pakistan citizen whom federal officials arrested after the September 11th attacks. Iqbal was detained in a Brooklyn federal detention center on charges of fraud in connection with identification documents.[16] He pleaded guilty, leading to his removal to Pakistan.[17] In his complaint he alleged that his seven-month confinement in highly restrictive conditions was accompanied by illegal and unconstitutional use of excessive force, unreasonable and unnecessary strip and body-cavity searches, and refusal "to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'"[18] Iqbal alleged that Robert Mueller, the Director of the F.B.I., and John Ashcroft, the Attorney General of the United States, adopted and/or approved the policies and directives pursuant to which he was confined and abused: policies and directives that purposely discriminated on the basis of religion and race.[19]

The district court denied the motion of Mueller and Ashcroft to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to adequately state a claim for relief, and a panel of the Second Circuit affirmed.[20] The five justice majority in *Iqbal* reversed the circuit court, eliminating some of the allegations in the complaint as conclusory (while leaving others intact that seem equally conclusory—more on that later). The Court, relying on "judicial experience and common sense," found the complaint implausible.[21] The Court disregarded the allegations of knowledge of the defendants and of their intentional discrimination, refusing to follow Fed. R. Civ. P. 9(b)'s unambiguous rule that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[22] The Federal Rules are trans-substantive: the same rules apply to all types and sizes of cases. The Court therefore made clear that its new test for what is required in a complaint, first enunciated in *Twombly*, cannot be confined to antitrust cases or cases involving national security or the qualified immunity of government officials.[23] The new test will apply to all cases.[24]

Federal complaints must now be dismissed in the federal district courts if the trial judge finds some allegations conclusory and then decides on the basis of what is left that the claim is "implausible." And upon what is the district court judge to base the conclusion of implausibility? His or her own "judicial experience and common sense."[25]

So why do I think the majority in *Iqbal* should be ashamed of their lawlessness in what I consider to be among the worst opinions I have ever read? I

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[15] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).
[16] *Id.* at 1943.
[17] *Id.*
[18] *Id.* at 1944 (citation omitted).
[19] *Id.* (citation omitted).
[20] *Id.* at 1942.
[21] *Id.* at 1950–52.
[22] FED. R. CIV. P. 9.
[23] *Iqbal*, 129 S. Ct. at 1941.
[24] *Id.*
[25] *Id.* at 1950.

will demonstrate why it is a terrible decision because of the procedure it embraces, but first I will examine its unsupportable overruling of long standing substantive law. It is known law, which both sides in *Iqbal* acknowledge, that public officials cannot be held responsible for the acts of their subordinates based on a theory of *respondeat superior*.[26] In order for the supervisor to be held liable for constitutional violations, he or she had to have personally acted illegally. The dissenters in *Iqbal* cited to "quite a spectrum of possible tests for supervisory liability," including cites to nine different lower court opinions.[27] "In fact, [Ashcroft and Mueller] conceded in their petition for certiorari that they would be liable if they had 'actual knowledge' of discrimination by their subordinates and exhibited 'deliberate indifference' to that discrimination."[28] Nonetheless, although the issue was not presented in the cert petition, nor briefed or argued by the parties,[29] the majority of the Court seems to have eliminated supervisory liability entirely. As the dissent points out, "By overriding that concession [made by Ashcroft and Mueller as explained above], the Court denies Iqbal a fair chance to be heard on the question."[30]

I am not an expert on constitutional law and do not have an informed opinion on what the rule on supervisory liability for constitutional violations should be. If I had to venture an opinion, though, it seems to me that if a supervisor knows a subordinate is engaging in unconstitutional behavior, and permits that behavior to continue, then there ought to be supervisory liability; this, I would hope, would discourage some unconstitutional behavior. But I do know that at the foundation of our notion of a just legal system is the idea that parties should know why they are brought before a court and be given an opportunity to be heard on the relevant issues. This basic concept was clearly ignored by the majority in *Iqbal*. Moreover, they do not even bother to respond to the dissenters' objection to this unfair behavior. I have to assume that they had no legitimate answer.

Regardless of the substantive law change made by *Iqbal*, it is cited time and again for its pleading standard and will continue to be so cited.[31] Although I know little about the substantive law of supervisor liability for unconstitutional behavior of subordinates, I do know quite a bit about what the drafters of

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[26] Monell v. Dep't of Soc. Servs, 436 U.S. 658, 691 ("[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."); Robertson v. Sichel, 127 U.S. 507, 515 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances or negligences or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties."); Dunlop v. Munroe, 11 U.S. (7 Cranch) 242, 268 (1812) ("When the issue is taken upon the neglect of the post-master himself, it is not competent to give in evidence the neglect of his assistant.").

[27] *Iqbal*, 129 S. Ct. at 1958.

[28] *Id*. at 1956 (citation omitted).

[29] *Id.* at 1957.

[30] *Id.*

[31] Shepard's® Query Results Numbering Instances *Iqbal* Pleading Standards Have Been Cited and Followed, LexisNexis, http://www.lexisnexis.com/lawschool/research (Insert "129 S. Ct. 1937" into "Get a Document" box; then follow "*Shepardize*®" hyperlink; then follow the "FOCUS™- Restrict By" hyperlink; apply "Followed" and "HN10, HN11, HN12, HN13, HN14, HN15") (Search yielded 6,830 total cites as of June 30, 2011).

the Federal Rules of Civil Procedure had in mind when they developed the requirements for a federal complaint as captured by Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain: (2) a short and plain statement of the claim showing that the pleader is entitled to relief") and by Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). I spent ten years studying the historical background of the Federal Rules and reading the entirety of the deliberations of the drafters and the articles, books, and letters of Charles Clark, the Reporter, and major draftsman.[32] Clark and others explained numerous times why the Federal Rules rejected the fact pleading of the nineteenth century Field Codes, why it is impossible to distinguish meaningfully and rationally between facts, ultimate facts, evidence, and conclusions of law, and why it was a waste of time and unwise to concentrate on pleadings as a means of winnowing out anything but the most blatantly frivolous of complaints; such siphoning should instead be served by discovery and summary judgment.[33] The forms attached to the Federal Rules continue to permit as valid a complaint that merely states: "On *date*, at *place*, defendant *name* . . . negligently drove, or caused to be driven, a motor vehicle against the plaintiff."[34] If "negligently" isn't conclusory, I don't know what is.

The Supreme Court in at least two pleading cases, one as recent as 2002, instructed the lower courts that more rigorous pleading requirements must come, if at all, through the legal process for amending the Federal Rules.[35] In 1993, the Court was explicit: "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[36] The Supreme Court was previously acutely aware that it did not have authority to amend the Rules on its own. In a class action case, for instance, the Court explained: "[W]e are bound to follow Rule 23 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."[37]

In short, it is preposterous to argue that what the Supreme Court did in *Twombly* and *Iqbal* is anything other than a drastic departure from what the drafters of the Federal Rules intended and what has been the requirement for complaints since the Rules became law in 1938. The Supreme Court has acted lawlessly. It has amended a rule without going through the explicit and detailed process for amending the Federal Rules that has evolved through the years, including notification to the public, opportunity for public comment, adoption by the Advisory Committee on Civil Rules, adoption by the Standing Committee, adoption by the Federal Judicial Conference, adoption by the Supreme Court, and opportunity for Congress to accept (by acquiescence) or reject prior

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[32] *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[33] *See, e.g.*, *id.* at 963–65.

[34] FED. R. CIV. P. FORM 12.

[35] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514–15 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

[36] *Leatherman*, 507 U.S. at 168.

[37] Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999).

to the amendment taking effect.[38] And, of course, Congress could alter the Rules on its own for particular cases, as it has done with respect to securities litigation,[39] or for all cases.

Twombly and *Iqbal* say they are not returning to the fact pleading regime of the Field Codes: "facts constituting a cause of action."[40] But, of course, they are. If the plaintiff has to allege what a judge deems non-conclusory facts for the elements of the case then the plaintiff's lawyer will have to engage in fact pleading. And it is even worse than in the nineteenth century; the plaintiff will also have to survive the trial judge's subjective view, based on common sense and experience, of whether the claim is plausible in the sense of whether it can be proved.

Not only was the Supreme Court lawlessly amending the Rules an affront to the very notion of the rule of law in *Iqbal*; even if properly amended the new rule would be terrible. The dissenters point out in *Iqbal* that they cannot discern, among the facts alleged in Iqbal's complaint, the line between conclusory allegations to be rejected and non-conclusory facts to be taken as true.[41] The majority finds the allegations of knowledge and intent of the defendants conclusory, but they accept as true the allegations that the arrests were "under the direction of Defendant MUELLER", that "they were 'cleared' by the FBI," and that the policy "was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2011."[42] Why are words like "under the direction," "cleared," and "approved" not conclusory, but "know" and "intend" are?

I suppose one could argue that "know" and "intend" are states of mind and therefore more conclusory than, say, "approve" or "clear" because knowledge and intent reside in the minds of people and are not conduct. But "approve," for instance, gives us no facts about how the approval took place. Most importantly, it is virtually impossible to get into the minds of defendants. This is precisely why Rule 9(b) states "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[43] The majority's attempt to

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[38] Legislative changes to the Federal Rules can be made in two ways, pursuant to the Rules Enabling Act of 1934: either Congress can pass a bill, or a proposed amendment can be submitted to the Advisory Committee (appointed by the Supreme Court). The Advisory Committee may accept or reject a proposal, and will then publish the proposal and invite comment. The proposal will then go to the standing committee and Judicial Conference for approval, and then to the Supreme Court for approval and then ultimately to Congress (although if Congress takes no action within seven months the Rule will take effect pursuant to 28 U.S.C. §2074). STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT 6 (3d ed. 2008).

[39] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

[40] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); *see also* 1851 N.Y. Laws 888–89.

[41] *Iqbal*, 129 S. Ct. at 1960–61.

[42] *Id*. at 1944 (citations omitted).

[43] FED. R. CIV. P. 9(b); 5A FED. PRAC. & PROC. CIV. § 1301 (3d ed.) ("The rule recognizes that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in describing a state of mind with any degree of exactitude and because of the complexity and prolixity that any attempt to support these averments by setting forth all the evidence on which they are based would introduce into the pleadings." (footnote omitted)).

explain their elimination of the clear language in Rule 9(b) is pathetic. The majority says that Rule 9 gives an elevated pleading standard for fraud and mistake, which is true, and then states that the language permitting generality for states of mind "merely excuses a party from pleading discriminatory intent under an elevated pleading standard."[44] But wait a minute, only a few things in Rule 9—such as fraud and mistake—were given a more rigorous pleading standard; everything else was left to the normal Rule 8(a).[45] Intent, knowledge, and malice would be left to 8(a) requirements if nothing else were stated. The majority's reading treats the word "generally" in Rule 9 as adding nothing. And why pick out state of mind issues to tell that they are the terms to be treated like all other terms? Why not "negligence" or "breach of contract" or "proximate cause"? The obvious reason for mandating that "state of mind issues" can be pleaded generally is precisely because they are so hard to make factual allegations about, and because discovery is particularly needed to explore circumstantial evidence that might yield inferences as to state of mind. It is telling that the majority could give no cite to any case that so disregarded the clear meaning of "generally" for state of mind allegations.[46] If a student or law associate eliminated the clear meaning of a rule with such nonsense as provided by the majority, a teacher or senior lawyer would be severely critical, and rightly so.

What guidance does *Iqbal* give lower court judges and lawyers for assessing future complaints? We have already seen the subjective nature of trying to know what an appellate court will consider "conclusory." But there is another subjective component beyond that. The trial court is then to assess whether the remaining allegations, if true, show that the plaintiff's case is "plausible." And how to assess "plausibility?" The majority, drawing on a circuit court opinion, says that it is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[47] If by "context-specific" the Court means that some types of cases will need more specificity in the complaint than others, then the Court has mandated just the type of substance-specific rules that are impermissible under the concept of trans-substantive procedure, which the Court has found necessary in interpreting the Enabling Act.[48] Moreover, applying the pleading rules differently for specific types of issues or cases necessitates the type of political judgments that the Constitution leaves to elected representatives.

Consider the "common sense" and "judicial experience" test. My common sense tells me that it is in fact highly likely that the defendants in *Twombly* agreed not to compete in other regions and to keep others from competing in their regions, but I would certainly like discovery to shed light on whether I'm right. I'm even more certain that Ashcroft and Mueller condoned and agreed to the discrimination that Iqbal alleges. After all, as Judge Newman for a panel of the Second Circuit stated in trying to apply *Twombly* to the facts of *Iqbal,* there

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[44] *Iqbal*, 129 S. Ct. at 1954.
[45] FED. R. CIV. P. 9(b).
[46] *Iqbal*, 129 S. Ct. at 1954.
[47] *Id*. at 1950 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).
[48] *Id.* at 1954; Burbank, *supra* note 5, at 110–11; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713–14 n.140 (1988); Subrin, *supra* note 32, at 956–61.

is a "likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11."[49]

One doesn't have to agree with my assessment of what's conclusory or my assessment of the trial and circuit courts' assessment of plausibility in *Iqbal*. But I think it is incontestable that these terms—conclusory and plausible—are highly fluid and non-defining, and that different judges calling on their own common sense, experience—and yes, their political views—will surely interpret the terms differently in the cases before them.[50] These tests force judges to weigh facts, or even worse, allegations of fact. *Iqbal* not only ignores the clear language of Rule 9, and rejects the 70-year understanding of Rules 8(a), 12(b)(6), and the Forms, and rejects the requirements of the Enabling Act for amending the Rules, such as permitting Congress to examine amendments before they become law; it is also a direct assault on the Seventh Amendment that mandates that litigants in civil cases are entitled to a jury to resolve contested factual issues.[51]

There is another level of lawlessness and disrespect for the legislature implicit in *Iqbal.* Since the time of the Sherman Antitrust Act, and more prominently since the New Deal, Congress has entrusted the enforcement of many laws to private litigation.[52] It has tried to encourage vigorous enforcement through such measures as permitting multiple damages (triple damages in the case of the Sherman Antitrust Act under which *Twombly* was brought) and fee shifting to winning plaintiffs (as in the case of the alleged violation of constitutional rights in *Iqbal*). Congress, in passing such legislation since 1938 when the Rules became law, could assume the notice pleading federal rule regime, followed by broad discovery. As many civil procedure experts have pointed out, it is discovery that permits the enforcement of much federal law and without which that federal law would largely be a toothless tiger.[53] *Iqbal* eliminates discovery by permitting dismissal at the pleading stage. And it does so in just the type of case where discovery is critical, such as trying to explore the states of mind and secret activities of high ranking public officials. This one case violates pleading rules, the Enabling Act, the Seventh Amendment, and the dozens of substantive statutes passed by Congress granting rights to be enforced through private litigation that relies on discovery. It does all of this while providing tests—conclusory and plausible—that invite confusion, subjectivity, and unpredictability.

A major reason for the Court's supporting more rigorous pleading standards in *Iqbal* was a concern that the burdens of meritless litigation and discov-

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[49] Iqbal v. Hasty, 490 F.3d 143, 175–76 (2007). I understand that this is probably no longer actionable under what seems to be the majority's elimination of supervisory liability. *See* text accompanying footnotes 26–30.

[50] *See* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 402 (2011).

[51] *Id.* at 404–05.

[52] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3 (2010).

[53] *See* Burbank & Subrin, *supra* note 50, at 405–06.

ery would interfere with the fulfillment of public officials' duties.[54] Similarly, *Twombly* can be rationally interpreted and supported as an opinion attempting to protect defendants from the enormous expense and disruption, largely as a result of discovery, stemming from what might turn out to be meritless antitrust suits.[55] In each instance, the Court could have tied their enunciation of more strenuous pleading requirements to the policies behind the Sherman Antitrust Act or the common law evolved doctrine of partial immunity for public officials. Federal common law could have supported this integration of procedure in the legitimate service of substantive law.[56] The Court could have instead, and perhaps more wisely, alerted Congress to the problems in those areas. This integration of procedure and substance can surely be seen as a legitimate political issue, best handled through congressional action after hearings that permitted testimony on the political, social, and economic implications of more rigorous pleading standards for sub-sets of civil cases.

There is no evidence that discovery is an unreasonable burden in the vast majority of cases. In fact, the evidence is to the contrary: discovery works well (or is not used at all) in most cases, and where used is commensurate to the stakes involved.[57] The Court needlessly applies its new and harsher pleading standards to all cases, as a result of their reliance on the trans-substantive nature of the Federal Rules, to the detriment of plaintiffs in all types of cases. This is particularly unfair to plaintiffs in cases in which the needed evidence is largely in the minds and files of defendants. The intent element of employment discrimination cases comes to mind.

Ever since the Federal Rules became law, there have been multiple attempts to amend them in order to achieve fact pleading, all of which have failed.[58] It is fair to assume that defense lawyers initiated the attempts at reform, as heightened pleading standards negatively impact plaintiffs far more

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[54] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

[55] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007).

[56] *See* Burbank, *supra* note 5, at 113.

[57] *See* James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 618 (1998) (half of the 5,222 cases studied involved no discovery at all); Thomas E. Willing et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998) ("[T]he typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases." (footnotes omitted)). *See generally* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc Galanter, *The Day After the Litigation Explosion,* 46 MD. L. REV. 3 (1986).

[58] *See* Letter from Nancy J. Smith, Senior Assistant Att'y. Gen. of N.H., to Peter G. McCabe, Sec'y to the Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. (Jun. 17, 2002), *available at* http://www.uscourts.gov/uscourts/RulesandPolicies/rules/CV%20Suggestions%202002/02-CV-E-Suggestion-Smith.pdf (proposed amendment advocating that the " 'short and plain statement of the claim' allege facts sufficient to establish a prima facie case " as the standard for employment discrimination action); *Civil Rules Suggestions Docket (Historical)*, U.S. COURTS, http://www.uscourts.gov/uscourts/RulesandPolicies/rules/2010-CVDocket.pdf (last visited Mar. 11, 2012) (proposed amendment to return to more particularized pleading, submitted by Elliot Spector, July 22, 1993); Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L. J. 177, 188 (1958); Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45 (1957); ADVISORY COMM. ON THE

frequently than defendants. Having failed in attempts to disadvantage plaintiffs through legal means, defense lawyers have finally persuaded the Supreme Court to make the change, disregarding the clear meaning of Federal Rules, the clear language of Rule 9(b) and the Enabling Act, and the import of the Seventh Amendment right to jury trial. In so doing, they have given broad discretion to federal judges, with no realistic guidance—for none is possible—on when allegations are to be deemed conclusory and when a case is to be deemed "plausible." And they have done this for all cases.

Some proponents of these two decisions have argued that we shouldn't worry.[59] They point out that many judges have been applying more rigorous pleading standards to some types of cases all along, and some judges will find that the new pleading standards have been met—without getting rid of conclusory statements and without careful analysis of plausibility—regardless of *Twombly* and *Iqbal*. Empirical data may show that the cases haven't increased the number of 12(b)(6) motions or of such motions being granted.[60] And this should give comfort? We should find relief that judges previously ignored such cases as *Leatherman* and *Swierkiewicz* and that they may now ignore the new rules in *Twombly* and *Iqbal*? And what about those meritorious plaintiffs who are thrown out of court because the new rules are followed or whose lawyers will not bring the cases because of that fear? Should we applaud triple lawlessness: trial judges not following prior Supreme Court holdings, the Supreme Court making new law in violation of the Enabling Act, and trial judges not following the new Supreme Court rulings?

The effects of this lawless behavior are clear. Defense counsel is encouraged to bring 12(b)(6) motions; they have little to lose and a great deal to win. The new rules will rarely increase the pleading burdens of defendants. Defendants can bring their 12(b)(6) motions, as in *Twombly* and *Iqbal,* without ever filing a pleading. Plaintiffs, particularly in tort and discrimination cases where discovery is frequently needed to determine the facts, states of mind and otherwise, that reside in the defendants' minds and files, and in the minds and files of defendant-friendly witnesses, will be left out in the cold. Like so much of the Supreme Court's body of decisions since the mid-1980s, this is another example of decision making that substantially aids defendants at the expense of particular types of plaintiffs.[61] But in this instance, it is not only defendant-

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RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (1955).

[59] *See, e.g.*, *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary,* 111th Cong. 6–7 (2009) (statement of Gregory C. Garre, Partner, Latham & Watkins LLP, Washington, D.C., and Former Solicitor General of the United States).

[60] *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal* (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf; *cf.* Patricia W. Hatamyar, The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?, 59 AM. U. L. REV. 553, 556 (2010).

[61] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

friendliness: *Iqbal* is contemptuous of history, rules, statutes, the Constitution, and principles of fairness to plaintiffs with rights that should be vindicated, but cannot be without discovery.