

REVISITING THE INTEGRATION OF LAW AND FACT IN CONTEMPORARY FEDERAL CIVIL LITIGATION

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INTRODUCTION

In 2004, Steve Subrin and Thomas Main published an intriguing title: *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*.¹ It has always been one of my favorite Subrin articles and was published in a volume honoring David Shapiro. So I want to carry on this tradition for this volume honoring Subrin's important contributions to procedure scholarship. I want to revisit many of the issues raised in that article, in light of new developments over the last ten years, along with Subrin and Main's most recent work, *The Fourth Era of American Civil Procedure*.²

Steve Subrin is one of the few civil procedure scholars who has closely analyzed the integration of law and fact.³ *Parallel Procedural Universe* criticizes traditional litigation under the Federal Rules of Civil Procedure ("FRCP" or "the Rules") and argues that the formal litigation process does not adequately provide for the integration of law and fact. Subrin and Main look at what they called the "uncharted parallel procedural universe" of litigation statements and demand letters that are "outside" but "parallel" to the formal litigation system. They argue that these documents do a better job of integrating law and fact than the formal litigation process. They also do empirical research interviewing lawyers and examining "parallel universe" documents, which is fascinating.

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¹ Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004).

² Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

³ See, e.g., Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 243–52 (1992).

The interrelationship between law and fact should be a crucial and foundational issue in legal scholarship, legal education, and legal advocacy. Yet, there is little scholarship that focuses on the distinctions and interrelationship between law and fact, and it is under-theorized. I think many law teachers and legal scholars take it for granted; perhaps it is viewed as “old school,” “obvious,” and “should not have to be spelled out.” There is also little focus on how law and fact are integrated in legal advocacy. This absence is especially problematic in civil procedure scholarship and teaching, but in many other areas as well. In my own teaching of civil procedure, always in the first semester of law school, I emphasize the constant back and forth process between law and fact that lawyers must understand. If law students do not get this crucial insight, it is difficult for them to understand what they are doing for the next three years, and what they will be doing as lawyers. I also emphasize the distinctions between law and fact, central to so many areas of procedure, as I have detailed elsewhere.⁴

In this essay, I reassess the critique that Subrin and Main made of the formal procedural system in failing to integrate fact and law. I also look at this critique in light of recent judicial decisions, rule-making, and scholarly developments. I conclude that there are now even more hurdles to the integration of law and fact in the formal procedural system. Integration of law and fact in the formal procedural system is now further abbreviated, fractured, random, and piecemeal. Procedural opportunities for narrative that combine both law and fact are fast disappearing because of Supreme Court decisions, rulemaking efforts, and the ways in which judges are making decisions.

I. INTEGRATION OF LAW AND FACT: THE FORMAL PROCEDURAL SYSTEM

In *Parallel Procedural Universe*, Subrin and Main explain that, within civil litigation, two different systems are at work procedurally. “One of these is the formal system of procedural rules and doctrine that govern pleadings and motion practice in state or federal courts. The other system has no procedural rule-book, is largely ignored in law schools, and is seldom mentioned by judges.”⁵

The second is “the universe of correspondence and other materials that flow between adversaries but seldom appear in the pleadings, motions, or other

⁴ See Elizabeth M. Schneider & Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 768–69 (2012–13) [hereinafter Schneider & Gertner, *Only Procedural*]; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 530 & n.59 (2010) [hereinafter Schneider, *Changing Shape*]; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 718 (2007) [hereinafter Schneider, *Dangers of Summary Judgment*].

⁵ Subrin & Main, *supra* note 1, at 1983.

papers contemplated, ordered or even received by any formal procedural system.”⁶ Subrin and Main note:

We have observed that many civil litigators, particularly those representing plaintiffs, seem to find it both desirable and necessary (in order to achieve optimum results for their clients) to prepare various written documents, notebooks, and even videos containing narratives that integrate the law and facts of their cases in ways that may persuade their relevant audiences—the opposing lawyer, the opposing lawyer’s client, their own client, insurance companies, and mediators. These advocacy materials appear in myriad forms, including demand letters, other settlement correspondence, notebooks, mediation statements, edifying brochures, and documentary videos. . . . Although we recognize that pleadings, motions and other papers filed with courts may occasionally contain integrated narratives of law and fact, we were intrigued because the procedural rules of the formal system seldom require it.⁷

Subrin and Main argue that this “dichotomy” between the formal procedural system and the “uncharted parallel procedural universe” creates “an interesting challenge for federal practice and procedure in the new century.”⁸ They review the opportunities for integration of law and fact in the formal procedural system, find them wanting, and recognize the need for lawyers to develop alternative methods of integrating law and fact to different audiences, such as their adversaries, rather than judges. In the new “settlement culture” of federal civil litigation, in which cases mostly settle and are not tried, these audiences may be more important than judges.

In the formal procedural system, there are four main stages of litigation that are traditionally recognized as providing opportunities for the integration of law and fact: the complaint, including the 12(b)(6) motion to dismiss on the sufficiency of the complaint; discovery; motion for summary judgment; and trial. Sadly, trial—the greatest opportunity to tell the story of the case in a way that integrates fact and law—is virtually out of the picture in contemporary federal civil litigation.⁹ In the other three contexts, as I argue below, not only do the Rules not require the integration between law and fact, but also application of the Rules does not provide opportunities for such integration, which is now more difficult. Without the likelihood of trial, the pressure on these other early litigation stages to provide some integration of law and fact is more crucial, though increasingly elusive.

⁶ *Id.*

⁷ *Id.* at 1983–84 (footnotes omitted).

⁸ *Id.* at 1983.

⁹ See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 572–73 (2004); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592–94 (2004).

A. *Pleading*¹⁰

In the complaint, the plaintiff must set out both law and fact. The facts are set out first, and then the legal claims that the pleaders believe are invoked by the facts in a “plain statement of the claim showing that the pleader is entitled to relief.”¹¹ The complaint will be tested by the defendant through a 12(b)(6) motion to dismiss.¹² The complaint is evaluated as to whether it is legally sufficient, but that has been understood to involve both legal and factual determinations.¹³

Until 2007, modern pleading rules described the standards for evaluating complaints as the standard of “notice pleading.”¹⁴ Under *Conley v. Gibson*, dismissals under Rule 12(b)(6) required that when considering whether a pleading states a claim upon which relief can be granted, “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.”¹⁵ In effect, the litigation was supposed to continue even if the plaintiff’s allegations did not seem credible to the judge or were unlikely to be proven. The standard was a forgiving one, in contrast to the ponderous common law pleading system it replaced.¹⁶

All that changed with *Bell Atlantic Corp. v. Twombly*¹⁷ and later *Ashcroft v. Iqbal*.¹⁸ With *Twombly*, the Supreme Court underscored that the governing approach was whether the allegations were “plausible,” and that the plain statement “possess enough heft to show that the pleader is entitled to relief.”¹⁹ In order to avoid falling “short of the line between possibility and plausibility,” complaints must have “further factual enhancement.”²⁰ In *Iqbal*, the Court reiterated the “plausibility standard” and held that the evaluation of the plausibility of complaints was a “context-specific task” in which judges were to “draw on [their] judicial experience and common sense.”²¹

On a motion to dismiss, the judicial process of evaluation now involves more than determining whether the pleading is consistent with liability, an approach that required nothing more than a rational examination of the complaint

¹⁰ Substantial portions of this Part appeared first in Schneider & Gertner, *Only Procedural*, *supra* note 4, at 772–74.

¹¹ FED. R. CIV. P. 8.

¹² FED. R. CIV. P. 12(b)(6).

¹³ See Schneider & Gertner, *Only Procedural*, *supra* note 4, at 773–75.

¹⁴ *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

¹⁵ *Id.* at 45–46.

¹⁶ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 127–29 (2011).

¹⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁹ *Twombly*, 550 U.S. at 556–57 (internal quotation marks omitted).

²⁰ *Id.* at 557.

²¹ *Iqbal*, 556 U.S. at 678–79.

by measuring the factual allegations to see if they fit the legal claims. Now, district judges have been told to ask whether alternative explanations for the events complained of are “more likely” than the allegations.²² In light of the sparse legal or factual record on which district court judges would be making a decision to dismiss the complaint, this has been viewed as an invitation for the exercise of judicial subjectivity, for judges to “fill in the gaps” of the truncated legal and factual record with what “they know” or more significantly, what they think they know.²³

But there is a more fundamental problem. Although much of the scholarly and practitioner literature that has discussed the implications of *Twombly* and *Iqbal* for plaintiffs has interpreted the mandate of these cases as requiring greater “fact pleading,” the judicial determination of plausibility is obviously both law- and fact-dependent. After these cases, the complaint now has to bear the brunt of a much heightened analysis on both fronts. Complaints are not the place for elaborate factual narratives, much less nuanced legal arguments. To meet the new demands of *Iqbal* and *Twombly*, law and facts now have to be wedged into a document that has traditionally been viewed to be very basic and in many instances is ill-suited for this kind of review.

Rule 12(b)(6) motions are now filed in almost every case and present a conundrum for judges. Since federal judges recognize that this is a preliminary stage, some judges will allow amendments of pleadings or early pre-dismissal discovery in order to assess the claims and determine whether or not they should go forward.²⁴ But many are dismissing claims outright.

Scholars who have analyzed district court determinations of motions to dismiss the complaint post-*Iqbal* suggest that 12(b)(6) decisions are now formulaic.²⁵ If the complaint invokes the “magic words” that spell out the factual elements of a claim in a way that is recognizable to the judge, and the judge believes that the claim is “plausible,” the judge will allow the case to proceed. Alternatively, the judge will dismiss the case because of a lack of “factual specificity” and “conclusory allegations.”²⁶ The law is rarely mentioned, unless there is a specific legal requirement on which the plaintiff is basing her claim that does not have a “factual hook” in the complaint. The judge is necessarily applying the law as she understands it, in her assessment of the facts, in her understanding of which facts are salient and which are not, in her determination of what may or may not be proof in the case. Thus, at this early stage, the judge is

²² See *id.* at 680.

²³ See Schneider & Gertner, *Only Procedural*, *supra* note 4, at 773.

²⁴ *Id.* at 774.

²⁵ Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 278–79, 284–87 (2011); Reinert, *supra* note 16, at 120–27, 161–69.

²⁶ See Schneider & Gertner, *Only Procedural*, *supra* note 4, at 774.

ruling on the law implicit in the complaint, often without any explicit law or nuanced legal argument to go on.²⁷

B. Discovery

Historically, the concept of notice pleading in the FRCP was premised on the centrality of discovery to elaborate facts. Pleading could be limited and just give notice to the other party of the basic facts and nature of the legal claims because the facts would be filled out in discovery, and then the legal consequences of those facts could be developed and tested on summary judgment. The Supreme Court was explicit in *Twombly* that the new heightened pleading standard was adopted in order to end cases and omit the need for discovery, especially in cases against corporate defendants.²⁸ Accordingly, the Supreme Court is encouraging district judges to dismiss cases on 12(b)(6) motions, on the hope that these cases will not make it to discovery.

Even if cases do make it to discovery, discovery is now likely to be more limited. The Advisory Committee on the FRCP recently proposed some very drastic changes in discovery. The proposals have wended their way through the rulemaking process, were approved by the Standing Committee,²⁹ and have just been adopted by the Supreme Court.³⁰ These proposals amend the discovery rules to require that the district court rule on the proportionality of the discovery at an early stage, and originally proposed limits on the FRCP with respect to methods of discovery. There has been a huge outcry to these proposals by lawyers and law professors.³¹ This proportionality determination is problematic, since it puts the judge in a position to have to make an early evaluation on the merits of the case, without any real factual or legal development, or integration thereof, as part of the proportionality determination.

²⁷ *See id.*

²⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007).

²⁹ Patricia W. Moore, *Standing Committee Approves Proposed FRCP Amendments*, CIV. PROC. & FED. CTS. BLOG (June 7, 2014), <http://lawprofessors.typepad.com/civpro/2014/06/standing-committee-approves-proposed-frcp-amendments.html>.

³⁰ Letters to Hon. John A. Boehner & Hon. Joseph R. Biden from Chief Justice John G. Roberts, submitting to Congress the FRCP Amendments Adopted by the Supreme Court of the United States, April 29, 2015., available at [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

³¹ *See* Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, & Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure, submitted to the Committee on Rules of Practice and Procedure, (Feb. 5, 2014), available at <http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf> (signed by 170 additional law professors); Email from Erika Duthely, Alliance for Justice, to author (Feb. 20, 2014) (on file with author).

C. Summary Judgment

Historically, Rule 56³² is the major place in the pretrial process where fact and law are both distinguished and need to be integrated. Summary judgment requires the movant to show that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.³³ The Supreme Court hopes that district judges will dismiss at the pleading stage, but if discovery is conducted and the case does not settle, defendants will likely move for summary judgment.

Historically, summary judgment was a disfavored motion in the federal court, with trial as the preferred method of resolution, but that has dramatically changed. Prior to *Iqbal* and *Twombly*, I examined the problems and dangers of summary judgment,³⁴ as did many other procedure scholars.³⁵ Now, the opportunity for plaintiffs to even reach summary judgment looks like a win.

But any nostalgia for summary judgment obscures the continuing difficulties that judges have with summary judgment. As I have argued, both in my scholarship and comments to the Civil Rules Committee, summary judgment poses an incredible intellectual challenge for judges on this very issue of integration of fact and law. District judges make serious errors as they slice and dice, mixing law with facts. They do not take a careful, holistic view of the entire record and rely too often on the motions and briefs of movants and non-movants.³⁶ The structure of summary judgment presentations are not as bad as they could have been, because a mandatory point/counterpoint proposal was ultimately rejected by the Advisory Committee (after an outcry by lawyers and judges). The proposal would have required the movant to structure and limit the presentation and not allowed the non-movant to present its narrative view of the case.³⁷ But some districts have point/counterpoint local rules.³⁸ Law clerks

³² FED. R. CIV. P. 56.

³³ *Id.*

³⁴ Schneider, *Dangers of Summary Judgment*, *supra* note 4, at 710–13.

³⁵ Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 96–99 (1988); see also Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

³⁶ See, e.g., Schneider & Gertner, *Only Procedural*, *supra* note 4, at 773–75.

³⁷ See Schneider, *Changing Shape*, *supra* note 4, at 521, 557–61.

³⁸ See, e.g., S.D. Fla. R. 56.1(a) (“Statements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering scheme used by the movant . . .”); N.D. Ga. Civ. R. 56.1(B)(2)(a)(1) (“A respondent to a summary judgment motion shall include the following documents with the responsive brief: A response to the movant’s statement of undisputed facts. This response shall contain individually numbered, concise, nonargumentative responses corresponding to each of the movant’s numbered undisputed material facts.”); E.D. Wash. R. 561.(b) (“Any party opposing a motion for summary judgment must file with its responsive memorandum a statement in the form prescribed in (a), setting forth the specific facts which the opposing party asserts establishes a genuine issue of material fact precluding summary judgment. Each fact must explicitly identify any fact(s) asserted by the moving party which the opposing party disputes or clarifies. (E.g.: ‘Defendant’s fact #1: Contrary to plaintiff’s fact #1, . . .’)”).

writing opinions often miss important facts because they do not necessarily understand the legal significance of those facts. A recent study of plaintiff lawyers' briefs on both Rule 12 and Rule 56 suggested that there was considerable room for improvement.³⁹

II. CHANGES IN HOW DISTRICT JUDGES DECIDE CASES THAT MAKE INTEGRATION MORE DIFFICULT

A. *Bench Presence and Informal Decision Making*

One of the facets of district court judging is what has been called "bench presence," a measure of the time that district judges spend adjudicating issues in an open forum.⁴⁰ In two recent articles, Jordan Singer and Judge William Young argue, based on empirical data, that there has been a growing lack of bench time among federal trial judges.⁴¹ In response, Steve Gensler and Judge Lee Rosenthal suggest that increased judicial case management is tied more directly to summary judgment.⁴² Is it possible that the informal discussion in case management conferences is where some integration of law and fact is happening?

The problem is that we do not know much detail on judicial case management conferences and how they happen, specifically what different district judges do or don't do. In any event, judicial case management meetings are more informal and likely to be random and piecemeal.

B. *Multiple Decision Makers*

In many cases, both district judges and magistrate judges may be involved in the same case. District judges may have magistrates monitoring discovery and sometimes dealing with other pretrial motions.⁴³ There might also be a special master or early neutral evaluator. Having multiple decision makers involved in a case can be complicated. How can one magistrate judge monitor discovery and another judge decide formal motions? Sometimes the functions are separated, but sometimes they may be overlapping.

³⁹ Scott A. Moss, *(In)competence in Appellate and District Court Brief Writing on Rule 12 and 56 Motions*, 57 N.Y.L. SCH. L. REV. 841, 842–44 (2012–13).

⁴⁰ William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 58 (2013).

⁴¹ Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 258–63 (2013); see also Young & Singer, *supra* note 40, at 56–59 (describing bench presence as a new mode of measurement and explaining the challenges, benefits, and opportunities for new research).

⁴² Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 518–19 (2012).

⁴³ R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 802–03, 832–33 (1993).

The use of different decision makers and the delegation of these functions by district judges can be timesaving, but can also be confusing for lawyers, decision makers, and litigants. Having multiple decision makers in one case can also impede efficient integration of fact and law. Information can “fall between stools.” This is a very different world of procedure than when cases were likely to go to trial, in which case one judge would have seen the case through all of its stages.

C. *No Oral Argument*

Now, commonly, district judges will not hold oral argument on most pre-trial motions, including Rule 12(b)(6) motions and summary judgment. This is a change that was not true in the past. As every lawyer who practices civil litigation in federal court knows, oral argument in both of these contexts is crucial. The whole case is at stake. It is where the lawyer and the judge can examine what is fact and what is law and explore that in the context of the specific case. It is where the judge can ask questions of the lawyers, hear answers, and probe more deeply into the heart of the case. In the absence of trial, oral argument would at least allow some narrative and focus on fact and law.

Since there is likely no oral argument on summary judgment, this lack of narrative is a big problem. Subrin and Main argue in *The Fourth Era* that this is a big loss of procedural rights to hearing, legitimacy, and open court.⁴⁴ Even Rosenthal and Gensler argue that the reason summary judgment needs to be “managed” is because of the absence of oral argument.⁴⁵ The problematic combination of lack of bench presence by judges and no oral argument means less possibility of direct dialogue and engagement between lawyers and the judge on fact and law.

CONCLUSION

The problem of lack of integration of fact and law in contemporary federal civil litigation lends additional support to the importance of Subrin and Main’s work. This problem has only worsened since they published their article, leading to even less opportunity for the development of a coherent picture of the case before a decision maker who must consider both fact and law.

⁴⁴ Subrin & Main, *supra* note 2, at 1880–82.

⁴⁵ Gensler & Rosenthal, *supra* note 42, at 555–56.

