

# ARE THE FEDERAL COURTHOUSE DOORS CLOSING? WHAT'S HAPPENED TO THE FEDERAL RULES OF CIVIL PROCEDURE?\*

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I'm assuming that most of you in the audience have completed your formal education in civil procedure. I say that because, a couple of years ago, I taught a first year civil procedure class here at Texas Tech School of Law.<sup>1</sup> So it's possible that a couple of the people in the class survived that experience and actually might be here this afternoon. I believe that an audience always should know where a speaker is coming from. So, in the spirit of full disclosure, I admit that your speaker today is an old fogey. Also, I freely acknowledge that civil procedure is all that I know—other than a great deal of useless information about the New York Yankees.

I was extremely fortunate to have learned the basics from a great procedure teacher at Harvard Law School—Benjamin Kaplan. Years later I served as a reporter to the Federal Rules Advisory Committee, and even later, served as a member of that Committee. So, my orientation is the Federal Rules of Civil Procedure and the federal courts. For better or worse, I've now been involved with federal procedure for over half a century, which gives me a great deal of experience, but perhaps colors my thinking in a dated sort of way. I believe in the purposes of those Rules as embedded in their text by the people who wrote them.

When the Federal Rules were promulgated—that was in 1938, over 70 years ago—they had a very liberal ethos to them.<sup>2</sup> As a result, the Rules established a relatively plainly worded, non-technical procedural system.<sup>3</sup> The rulemakers believed in citizen access to the courts and in the resolution

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1. In the fall of 2007, Professor Miller taught a first year Civil Procedure course at Texas Tech School of Law for one day. He was visiting the School for the inaugural *Sandra Day O'Connor's Distinguished Lecture Series*, on November 16, 2007, at which time Justice O'Connor addressed the law school's student body and faculty. See Justice Sandra Day O'Connor, *Remarks at the Inaugural Sandra Day O'Connor Distinguished Lecture Series*, 41 TEX. TECH L. REV. 1169 (2009).

2. See generally Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958) (supporting the states' adoption of notice pleadings in *Conley v. Gibson*, 355 U.S. 41 (1957)).

3. See AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed.) (1938) (debating the pros and cons of *Conley's* liberal pleading rules).

of disputes on their merits.<sup>4</sup> The Rules had a notice pleading regime that abjured factual detail and verbosity.<sup>5</sup> It demanded relatively little of the pleader. Just tell us where it hurts, sort of like *Oliver Twist*'s request in the Charles Dickens novel for "more gruel please." Where does it hurt and what do you want? Because the people who wrote the Federal Rules were deeply steeped in the history of code and common-law procedure, they came to the conclusion that there was very little reason to require endless detail in the pleadings and be bogged down at that early stage of the litigation.<sup>6</sup> Let's just get into it was the objective. Let's get into the merits with open discovery; the parties should be permitted to secure access to anything relevant to the subject matter of the action, and each of them was provided equal access to all of that relevant data.<sup>7</sup> Trial on the basis of the revealed facts, not on the basis of who was better at playing tricks or hiding the ball, was the goal. A summary judgment procedure was available, but that motion was rarely granted.<sup>8</sup> Afterward, the merits were to be determined by using a gold resolution standard: trial.<sup>9</sup> When appropriate, that meant trial by jury.

That was the conception in 1938, and for many, many years that conception was pursued by the bench and bar.<sup>10</sup> But of course, the earth has moved and American civil litigation has changed dramatically.<sup>11</sup> Whereas in 1938 the typical lawsuit was a single plaintiff versus a single defendant about a discrete number of issues, we now have complex litigation, mass litigation, and litigation about a tremendous range of highly complex matters that gifted attorneys like this school's super-loyal alumnus, Mark Lanier, are so effective at pursuing—dangerous pharmaceuticals, asbestos, mass disasters, defective products, and the impropriety of certain governmental conduct.<sup>12</sup>

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4. *Id.*

5. Conley, 355 U.S. at 47.

6. AMERICAN BAR ASSOCIATION, *supra* note 3, at 240.

7. *Id.*

8. *See* Clark, *supra* note 2, at 177-80; Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

9. *See* AMERICAN BAR ASSOCIATION, *supra* note 3, at 240.

10. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1029 (3d ed. 2004); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised Summary Judgments)*, 25 WASH. U. J.L. & POL'Y 61, 62-65 (2007) (arguing that Conley's notice pleading is not conducive to complex modern litigation).

11. *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the Comm. on the Judiciary*, 111th Cong. 3-7 (2009) [hereinafter *Access to Justice Denied*] (statement of Arthur R. Miller, Professor, New York University School of Law) (Portions of this essay are based on Professor Miller's statement to the United States House of Representatives' Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary.); *see generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003) (discussing the history and social costs of "adversarial legalism").

12. *Access to Justice Denied*, *supra* note 11, at 4; *see, e.g., Vioxx® Litigation at the Lanier Firm*, THE LANIER LAW FIRM, [http://www.lanierlawfirm.com/legal\\_practice\\_areas/pharmaceutical\\_liability/vioxx.htm](http://www.lanierlawfirm.com/legal_practice_areas/pharmaceutical_liability/vioxx.htm) (describing Mr. Lanier's involvement in personal injury Vioxx® lawsuits) (last visited Oct. 31, 2010). As one of the nation's top trial attorneys, Mr. Lanier has had several multi-million dollar

Over the past seventy years, we have had the most extraordinary growth in federal substantive law in the history of this country.<sup>13</sup> When you consider federal question jurisdiction in the 1930s, the reality is that there were only a limited number of substantive areas in play—a touch of antitrust, a little copyright, a few patent cases, and various interstate commerce matters.<sup>14</sup> Remember, for example, the world of discrimination litigation basically did not exist and the securities laws weren't enacted until 1933 and 1934, and civil litigation about those statutes didn't really emerge until the '40s and '50s.<sup>15</sup>

And, many of the fields that did exist then represent a very a small element of what is on the dockets of the federal courts today. The centerpiece of contemporary federal civil litigation involves civil rights, employment discrimination, the environment, consumerism, and safety.<sup>16</sup> None of these subjects really existed when the Federal Rules were formulated.<sup>17</sup> Indeed, most of these areas of law didn't exist when I was in law school. There were no courses that matched those subjects in the 1950s. So we now have areas of very significant federal substantive law, which really constitute the backbone of the civil workload of the federal courts. Moreover, litigation no longer is typically between one plaintiff and one defendant.<sup>18</sup> As you know, we have experienced a tremendous growth in multi-party, multi-claim litigation, and, of course, an extraordinary development and expansion of the class action—something several other nations are starting to examine and considering adopting in one form of aggregate litigation or other.<sup>19</sup>

Additionally, law has become a business as much as a profession. I mourn that, being an old fogey. Law practice today is competitive. It is territorial. Lawyers play turf games. The mega-law firms, some global in character, are partnerships in name only. The Supreme Court, sadly in my view, has validated lawyer advertising.<sup>20</sup> On a more positive note, because of the tremendous development of federal substantive law designed to meet the desire for social justice that developed in post-WWII America, we have

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verdicts. *Mark Lanier Biography*, THE LANIER LAW FIRM, [http://www.lanierlawfirm.com/attorneys/w\\_mark\\_lanier.htm](http://www.lanierlawfirm.com/attorneys/w_mark_lanier.htm) (describing Mr. Lanier's professional accomplishment on The Lanier Law Firm website) (last visited Oct. 31, 2010). Mr. Lanier arranged for Professor Miller's visit to the Texas Tech School of Law's campus on April 26, 2010.

13. *Access to Justice Denied*, *supra* note 11, at 3-4.

14. Epstein, *supra* note 10, at 65.

15. See, e.g., *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946) (providing an example of litigation over securities laws).

16. *Access to Justice Denied*, *supra* note 11, at 3.

17. See *id.* at 6-7.

18. See *id.* at 4.

19. JOHN H. BEISNER & CHARLES E. BORDEN, ON THE ROAD TO LITIGATION ABUSE: THE CONTINUING EXPORT OF U.S. CLASS ACTION AND ANTITRUST LAW 4-11 (U.S. Chamber Institute for Legal Reform, Oct. 2006), available at [www.instituteforlegalreform.com/get\\_ilmr\\_doc.php?id=1061](http://www.instituteforlegalreform.com/get_ilmr_doc.php?id=1061).

20. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 382-84 (1977).

something we didn't have in 1938—the public interest and social action bars.<sup>21</sup> These “do-gooders,” and I say that with great respect, are people who resort to the civil justice system for various ideological reasons to expand rights and remedies for the groups they represent.<sup>22</sup> Another phenomenon we did not have at the time the Federal Rules came into being was the coexistence of private enforcement and public enforcement of a wide range of constitutional and statutory rights.<sup>23</sup> For example, today there are private civil actions under the antitrust laws, securities laws, civil rights laws, employment discrimination laws, laws protecting the disabled, and my personal favorite, age discrimination laws.<sup>24</sup>

Of course it must be recognized that these private enforcers, who we sometimes call private attorneys general, often operate out of mixed motivation.<sup>25</sup> Many of them are entrepreneurial in outlook, but embedded in their entrepreneurial activity there usually also is a strong desire to further the public interest regarding the rights they seek to vindicate.<sup>26</sup> Asbestos was banned from our living environment by the private bar.<sup>27</sup> Tobacco was cabined by the private bar.<sup>28</sup> Defective pharmaceuticals and other products often are removed from our midst by the private bar.<sup>29</sup> Yes, it is true, some of these attorneys get very, very wealthy; more importantly, however, some Americans don't die or become incapacitated from defective products or toxic substances and important social and economic policies are enforced because of what these attorneys do.<sup>30</sup>

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21. See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1183-86 (2009).

22. See *id.*

23. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377-84 (1983); *Kardan v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 514-15 (E.D. Pa. 1946).

24. See generally Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation*, 26 YALE J. INT'L L. 219, 222-23 (2001) (explaining that private enforcement of statutory rights extend to various areas of the law).

25. See Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 3-12 (2008).

26. See *id.* at 12-20.

27. See Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 899-914 (1996) (discussing asbestos litigation by private attorneys); see also Steve Olafson, *21 Steelworkers Who Contracted Asbestos Disease Win \$115 Million*, HOUSTON CHRON. (Feb. 20, 1998), [http://www.lanierlawfirm.com/law\\_firm\\_news/asbestos\\_disease\\_lawsuit\\_brazoria.htm](http://www.lanierlawfirm.com/law_firm_news/asbestos_disease_lawsuit_brazoria.htm) (describing Mr. Lanier's verdict against The Carborundum Co.).

28. See Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 226-28 (2001).

29. See Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451, 484 (2000); see also Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES (Aug. 20, 2005), <http://www.nytimes.com/2005/08/20/business/20vioxx.html> (discussing Mr. Lanier's verdict against Vioxx).

30. See Reingold, *supra* note 25, at 12-31.

Moreover, since 1938 we have witnessed an increase in litigation (although there is no epidemic as certain interests allege), as well as higher litigation costs, the protraction of cases, and the development of transnational litigation presenting new complexities.<sup>31</sup> Recently, for example, a massive securities class action brought on behalf of shareholders from numerous nations was tried to a jury verdict in New York City. The case involved the French company Vivendi.<sup>32</sup> How much of that verdict will remain intact is unclear because, as I speak, the lawyers anxiously await the Supreme Court's decision in *Morrison v. National Bank of Australia*, which involves the right of various groups of foreign investors to sue for alleged fraud under this country's securities laws. I suspect the current Court will lean toward corporate interests by limiting the territorial reach of our regulatory statutes.<sup>33</sup>

Finally, while all of this has been going on, we have witnessed a contemporaneous movement in our procedural system regarding the operation of my beloved Federal Rules that seeks the earlier and earlier disposition of litigation.<sup>34</sup> Remember the image that I suggested earlier—the civil litigation gold standard—trial before a jury. Vivendi was as unique as a three dollar bill because it did reach the jury. Today, there are hardly any trials—let alone trials to twelve jurors; now it's trial to six or eight people when we have a jury trial at all.<sup>35</sup> Most courtrooms in the federal courthouses of this country are empty much of the time.<sup>36</sup> We do not try many cases anymore. We no longer are wed to the traditional gold standard of adjudication.

There are many reasons why cases are not tried. For example, one reality is that today's lawyers either lack trial experience or are forgetting how to try cases, particularly large scale cases. My friend Mark Lanier may

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31. *Access to Justice Denied*, *supra* note 11, at 3-4.

32. The Associated Press, *Court Finds Vivendi Liable for Misleading Investors*, N.Y. TIMES (Jan. 29, 2010), <http://www.nytimes.com/2010/01/30/business/30vivendi.html>.

33. See *Morrison v. Nat'l Bank of Australia*, 130 S. Ct. 2869, 2888 (2010) (decided on June 24, 2010). The Court affirmed the district court's dismissal of the foreign investors' claims because it concluded that § 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action for misconduct in connection with securities that are not listed on a domestic exchange. The reach of the Court's decision is not yet entirely clear.

34. *Access to Justice Denied*, *supra* note 11, at 4-5 (discussing amendments to the Federal Rules that enhance the power of judges to manage cases throughout the pretrial process); see FED. R. CIV. P. 16, 26.

35. See FED. R. CIV. P. 48(a) (setting the number of jurors between six and twelve); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 1-5 (2010) [hereinafter Miller, *Double Play*]. Many of the themes of this lecture and the events recounted in text are explored in greater depth in that article.

36. See Miller, *Double Play*, *supra* note 35, at 1-5 n.24 (discussing the decreasing number of federal jury trials); see generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (illustrating that less than 2% of the cases started in federal court reach trial); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U.L. REV. 67 (2006) (same).

be an artifact, he may be among the last of a dying breed of litigators who embrace trial. Another possibility is that we don't try cases anymore because each side deems it too risky, especially when the stakes are high. But most assuredly, another of the reasons is because the system is strangling and disposing of cases earlier and earlier in the litigation process.<sup>37</sup>

A few examples. In 1986, the Supreme Court decided a trilogy of cases invigorating the summary judgment motion, thereby encouraging the making of the motion more frequently and increasing the likelihood of termination short of trial.<sup>38</sup> The defensive strategy became clear: Don't let them get to trial; kill them before they get into the courtroom; terminate them on paper! And federal judges, resonating to those three decisions and possibly looking at the length and number of cases on their dockets and the increasing pressure created by court generated statistics showing the age of cases on their dockets, began to use summary judgment as a way of reducing their burdens, occasionally, one fears, inappropriately resolving disputed fact issues.<sup>39</sup> The statistics indicate that at the two moments in time every year that mark the six-month aging date of cases, the dismissal rates climb as federal judges eliminate matters thought to be stale.<sup>40</sup> Some judges apparently don't want to have older entries on their dockets—in short, the computer may well be affecting judicial behavior.<sup>41</sup>

The 1993 Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* continued the trend started by the 1986 summary judgment trilogy.<sup>42</sup> Gate keeping became a slogan as a result of that case; today, judges are obliged to gate keep.<sup>43</sup> What were they gate keeping in *Daubert*? Scientific evidence. If you are a plaintiff's attorney in a technological, environmental, pharmaceutical, or even a civil rights case, you probably will find it necessary to provide expert testimony or reports about the technology, or as to why you believe the pharmacology is wrong, why the environment is being damaged, or why your client was a victim of discrimination by an economic entity. Gate keeping requires screening every expert, which means another procedural obstacle, another motion, another hearing, and another way a plaintiff can get tripped up

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37. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

38. See *Matsushita*, 475 U.S. at 587-88; *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 247-48.

39. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016 (2003) [hereinafter Miller, *Rush to Judgment*].

40. *Id.* at 999 n.79; Leonidas Ralph Mecham, *The Civil Justice Reform Act of 1990*, 175 F.R.D. 62, 78 (1997).

41. Miller, *Rush to Judgment*, *supra* note 39, at 1048-58.

42. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

43. See *id.*

short of trial. Once the defense has eliminated the plaintiff's expert, as a practical matter, a mortal blow has been struck and the case has been set up for summary judgment.

More recently, judicially established heightened class action certification requirements have become a form of pre-trying the merits of the plaintiff's case, at least in part. Here in Texas, in the heart of the Fifth Circuit, a plaintiff basically has to prove certain elements of his or her case to succeed on a class certification motion.<sup>44</sup> If the class is prevented from getting over the pretrial certification hurdle successfully, it represents another way of destroying the economic viability of a litigation and effectively terminating it short of a merit adjudication, let alone trial or jury trial.<sup>45</sup> The class certification motion thus has become yet another pretrial procedural stop sign!

And what is the latest impediment on the procedural road map? Pleading. Unless you took civil procedure within the last year or two, you might not have been exposed to the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, let alone last year's expansion of *Twombly* in *Iqbal v. Ashcroft*.<sup>46</sup> The effect of these cases, which turn their back on over sixty years of jurisprudence, has been so dramatic that cartoons have appeared about people "Iqballing" other people.<sup>47</sup>

An old fogey like me thinks fondly about the actual language of the federal pleading rule, which only requires a "short and plain statement . . . showing that the pleader is entitled to relief"<sup>48</sup> and remembers why the rulemakers drafted it that way. The rule was designed to permit relatively easy entrance into the federal civil justice system; in effect it is saying: Feel aggrieved? Well come on in, the system will sort the merits out later on. Even before the two Supreme Court decisions, however, a number of federal courts—despite those many years of simplified pleading jurisprudence, including a string of Supreme Court decisions—had begun to deviate from the simple federal pleading requirement. Some judges—one of academe's most respected proceduralists would call them "lawless judges"—had moved the system from a notice pleading structure, which is

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44. See, e.g., *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007); see also *In re Hydrogen Peroxide Antitrust Litigation*, 522 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

45. See *id.*; see also *Schleicher v. Wendt*, 2010 WL 3271964, at \*4 (7th Cir. Aug. 20, 2010) (refusing to apply the Fifth Circuit's approach to class certification).

46. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

47. COURTOONS, <http://www.courtoons.net/2009/10/23/twombly/> (last visited Feb. 22, 2011) ("I just got Twomblyed in the Iqbals.").

48. FED. R. CIV. P. 8(a); see generally 5 WRIGHT & MILLER, *supra* note 10, at §§ 1215-54 (3d ed. 2004).

what Rule 8 is intended to be, to a semi-fact pleading structure, which is exactly what the Federal Rules were not intended to be.<sup>49</sup>

In the first of the two recent pleading cases, *Twombly*, Rule 8 essentially was rewritten without so much as an acknowledgement of the statutory rulemaking process that is in place.<sup>50</sup> As a result of that decision, a plaintiff now has to plead facts—not conclusions.<sup>51</sup> According to the Court, the pleader must allege facts showing that the claim is plausible.<sup>52</sup> Plausible? What does plausible mean? Well, the Court tells us it's something more than purely speculative or possible, but less than probable.<sup>53</sup> But that's not very helpful.

Fortunately (although unfortunately in my view), in the second case, the Court purports to be more specific about what is required. In *Iqbal*, the Court (after its decision in *Twombly* had been chastised in some legal journals) decided to provide some guidance on what “plausible” means.<sup>54</sup> Plausible means that the pleading must indicate there is a reasonable possibility of relief.<sup>55</sup> And how are district judges supposed to determine that? The Court invites them to use their judicial experience and common sense.<sup>56</sup> Hmm, so—to be a bit sarcastic—that means a newly appointed judge has no judicial experience to consider and we make believe that common sense is equally distributed among federal judges. The court also is to compare the challenged conduct to a hypothesized innocent explanation of the defendant's conduct, which sounds very much like evaluating the merits of a case without having the benefit of discovery, let alone anything remotely approximating a trial.

Let me remind you that the pleading rule only calls for a short and plain statement, which if established entitles the pleader to a right to relief.<sup>57</sup> A pleading's sufficiency is to be tested by another procedure, the motion to dismiss. Remember that rule? Rule 12(b)(6), the motion to dismiss? And, being an old fogey, let me also remind you that the motion to dismiss classically has been viewed—for hundreds of years—as a motion that only determines the legal sufficiency of the complaint.<sup>58</sup> For example, suppose I

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49. See *Access to Justice Denied*, *supra* note 11, at 7 & n.17 (listing cases in which the federal courts have applied the enhanced factual pleading established by *Twombly* and *Iqbal* in a variety of substantive contexts); see also Miller, *Double Play*, *supra* note 35, at 25 n.63 (same).

50. *Twombly*, 550 U.S. at 544; see 28 U.S.C. § 2072 (2006).

51. *Twombly*, 550 U.S. at 556-57. As conclusions need not be accepted as true on a motion to dismiss, some of the post-*Twombly* cases indicate that federal courts are expanding that categorization to justify dismissals. See Miller, *Double Play*, *supra* note 35, at 23-26.

52. *Twombly*, 550 U.S. at 569.

53. *Id.*

54. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

55. *Id.*

56. *Id.* at 1950.

57. FED. R. CIV. P. 8(a); see also *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (interpreting Rule 8(a)); 5 WRIGHT & MILLER, *supra* note 10, at §§ 1216-17.

58. *Access to Justice Denied*, *supra* note 11, at 9-10.



allege that “Mark Lanier gave me a dirty look.” I don’t care what procedural system you test that pleading under—you could attack it under Rule 12(b)(6), you could code motion to dismiss it, or you could subject it to a common law demurrer—if there was no such thing as a dirty-look tort as a matter of substantive law, the plaintiff was gone from the courthouse.<sup>59</sup> If there were, the case would proceed. The challenge to the pleading had nothing to do with the factual sufficiency of the claim or who should win on the merits. Nothing. So in one “fell swoop,” as they say in the land of my youth, Brooklyn, these two Supreme Court cases have destabilized the pleading standard and destabilized the motion to dismiss practice of the Federal Rules.<sup>60</sup> If you had a good civil procedure instructor, he or she probably said to you that when a judge considers a motion to dismiss, he or she looks at the complaint—the four corners of the complaint and nothing else—to determine whether it is legally sufficient. Then the judge is supposed to bend over backwards, accept the facts as pleaded, and interpret the complaint in the light most favorable to the pleader.<sup>61</sup>

Is judicial experience to be found in the complaint? Is common sense reflected in the complaint? Is a hypothetical innocent explanation provided in the complaint? I don’t think so. So how is that plaintiff supposed to plead a legally cognizable claim against Mr. Lanier? Clearly facts are required, which represents a throwback to the discarded code procedural systems. I know lawyers who feel that *Twombly* and *Iqbal* have so twisted the pleading structure that they now must cover all the bases and negate potential defenses and any possible innocent explanations for the conduct being challenged.<sup>62</sup> That is not the type of pleading the rulemakers intended. It amounts to the plaintiff anticipating defenses in the complaint, which is inappropriate pleading in every American procedural system I have been exposed to.<sup>63</sup> The motion to dismiss may well become a trial-type hearing at the outset of a case based solely on the complaint.

Moreover, this change in pleading philosophy brings a new level to forum and judge shopping.<sup>64</sup> As a matter of self-interest, lawyers must look for a judge whose judicial experience and common sense meet their clients’

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59. *Id.* at 10-15.

60. *Id.* at 14-21; see Epstein, *supra* note 10, at 66, 98; Miller, *Double Play*, *supra* note 35, at 21-23.

61. See 5B WRIGHT & MILLER, *supra* note 10, at § 1257.

62. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) (asserting that the enhanced pleading standard “creat[es] a class of disfavored actions in which plaintiffs will face more hurdles to obtaining a resolution on their claims on the merits”).

63. See, e.g., *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149 (1908); see also *Access to Justice Denied*, *supra* note 11, at 15.

64. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Liberalism*, 122 HARV. L. REV. 837, 903-05 (2009); see also Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 769-74 (2009) (asserting that judges dismiss cases based on their own view of the facts).

needs.<sup>65</sup> How do lawyers do that? Well, there's a lot of scuttlebutt and gossip out there in the practicing bar about such things. And now, the ingenuity of American litigators may come to the fore. There is a website—therobingroom.com—that will tell you everything you ever wanted to know about any federal judge or magistrate.<sup>66</sup>

It may seem rather strange, but there is no secret about what has been happening. Previously we had a commitment to jury trial. Then we had just a possibility of trial as a settlement culture developed in the profession. Then the summary judgment motion began to replace the trial. Now we have a potentially dispositive pleading motion instead of the summary judgment motion, let alone a trial with or without a jury.

In other words, we are moving slowly toward a system in which an increasing number of civil actions may be stillborn. Case disposition is moving back in time and is based on less and less information. A trial provides live evidence, examination, cross-examination, and the deliberation of a jury. Summary judgment is based on the lawyers' papers, although typically it comes after the discovery process has been completed, when all the informational cards theoretically are face-up and everybody has had equal access to all relevant facts.<sup>67</sup> The motion to dismiss, however, is based only on the complaint.<sup>68</sup> No discovery. No evidence. No witness testimony. No voice of the community.

Moreover, *Twombly* and *Iqbal* both ignore the problem of information asymmetry? In many modern litigation contexts the critical information is in the possession of the defendant and unavailable to the plaintiff. I can understand requiring a plaintiff to plead what he or she knows or should know, but it is rather futile to tell the pleader to plead what is unknown. Discovery was designed to let each side have access to that type of information so that the litigation playing field would be level to promote more informed settlements and trials.

Think about employment discrimination cases as an example. The plaintiff has been fired. One of the first rules of discharging someone is don't tell the employee why he or she is being fired. If facts must be pleaded to state a claim for discriminatory discharge or failure to promote or some other nefarious practice, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct let alone a pattern of discrimination—whether it's race, gender, age, or disability—without access to the history of the employer's conduct

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65. See Kahan, *supra* note 64, at 903-05; Thomas, *supra* note 64, at 784.

66. THE ROBING ROOM.COM, <http://www.therobingroom.com/> (last visited Oct. 25, 2010). Judicial privacy may well be at stake.

67. *Access to Justice Denied*, *supra* note 11, at 20; FED. R. CIV. P. 56; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

68. *Access to Justice Denied*, *supra* note 11, at 20; FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

regarding other employees? A look at the statistics of employment discrimination cases shows that in some parts of the nation they are not being instituted anymore.<sup>69</sup> In a different context, how does a pleader challenge illegal or unconstitutional official action—whether by a municipal, state, or federal government employee—without deposing members of the department in which that challenged conduct took place?

Cases such as these, even when they may well have merit, are basically unmaintainable and will not be brought because the risks of loss without compensation for contingent fee lawyers are just too great. And yet the new pleading principles established in two, contextually, highly unique Supreme Court cases—one being an extremely large antitrust case and the other being an outgrowth of 9/11 involving claims against high ranking federal officials brought by a Muslim alleging that he was illicitly detained and harshly treated—was said by the Court in *Iqbal* to apply to all federal civil actions.<sup>70</sup>

To me, it is heresy to apply the new pleading standard to slip-and-fall cases, fender benders, and a wide swath of lawsuits that do not require this type of gate keeping. In this connection, there is one diversity of citizenship case I just love (in truth I hate it), in which, a person slipped in a grocery store and was seriously injured; the court dismissed the action.<sup>71</sup> Why? Because the plaintiff failed to plead what the substance on the floor was, how the substance got there, how long it had been there, and whether anyone else slipped and fell.<sup>72</sup> How was the plaintiff supposed to know these things without discovery? Next week perhaps some judge will require a parting of the Red Sea to gain access to the civil justice system. (Of course, I am being facetious.)

The Court has given primacy to gate keeping. It has accorded efficiency and cost reduction the status of primary systemic objectives. Yet Federal Rule 1 seeks the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>73</sup> That’s the system’s stated goal. But that is not how the Supreme Court justified its transformation of federal pleading. A majority of the Justices focused on three things: Litigation is expensive, there is a threat of abuse, and the possibility of extorted settlements against economic entities must be avoided.<sup>74</sup>

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69. See Laura Beth Nielsen, Robert L. Nelson & Ryan Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 191-201 (June 2010); see also Miller, *Double Play*, supra note 35, at 71-77.

70. See *Iqbal*, 129 S. Ct. at 1942, 1953; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548, 555-64 (2006).

71. *Branham v. Dolgencorp, Inc.*, 2009 WL 2604447, at \*3 (W.D. Va. Aug. 24, 2009).

72. *Id.* at \*2.

73. FED. R. CIV. P. 1; see generally 4 WRIGHT & MILLER, supra note 10, at §§ 1011-30.

74. *Access to Justice Denied*, supra note 11, at 21-22; *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 558.

When I was the Reporter to the Federal Rules Advisory Committee, the focus was on containing the pretrial process. At that time everybody in the defense bar and their clients were complaining about abuse and frivolous litigation and the need for cost reduction—there was a constant drumbeat of rhetoric about these matters. Urban legends and cosmic anecdotes were being propagated. I spent six months going to bar association meetings and judicial conferences asking people to tell me about abuse and frivolous litigation so that I could aid the Committee in pursuing intelligent rule revision. I listened and listened and listened. After six months, I reported to the Committee that I had learned a great deal about abuse and frivolous litigation. I could tell them with some confidence that according to the practicing bar, frivolous litigation is any case brought against your client, and abuse is anything the opposing lawyer is doing. It is now thirty-odd years later and I can't do any better in defining litigation abuse and frivolousness. We have never defined it; we have never measured its frequency. It lies in the eyes of the beholder. Extortionate settlements? How many times does that occur? Again, we don't know. What are extortionate settlements? We don't know. People settle cases for many different reasons, and some of them find it useful to then proclaim, oh, it was extorted. How do we know that really is true? And what about costs? Of course, we don't like them. But again we really don't know much about the economic aspects of litigation. The limited empirical evidence we have suggests they are less than what they often are claimed to be and that the very high cost cases represent only a small slice of the federal docket.<sup>75</sup>

Now that the judiciary has shifted the procedural system against plaintiffs by moving disposition forward in time, denying access to discovery, and requiring potential plaintiffs to engage in pre-institution investigation and to find snitches (which is what plaintiffs' lawyers often have to do in the hope of pleading enough to survive a motion to dismiss), could it be that the defense bar is really extorting low settlements from plaintiffs by imposing pre-action costs on them and engaging in procedural practices of attrition and dilatoriness? Maybe that is the real problem, rather than contingent fee plaintiffs extorting settlements from defendants? Or maybe it's a bit of both? Or maybe it really is a nonissue? We don't know. We do . . . not . . . know.

Despite this vacuum of knowledge, when you read the Court's opinions in *Twombly* and *Iqbal*, the Justices in the majority in both cases seems pre-occupied with a concern about the litigation burdens on corporations and governmental officials and little else.<sup>76</sup> Shouldn't we care about the litigation burdens on plaintiffs? Shouldn't we care that possible

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75. See Miller, *Double Play*, *supra* note 35, at 61-71.

76. *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 558.

antitrust and civil rights violations are not being remunerated or deterred or that people are being improperly detained by government action? Shouldn't we care about cases being dismissed prematurely despite obvious information asymmetry or not being brought because of pleading barriers? Shouldn't we care about adjudicating cases on their merits? What appears to be happening now simply isn't the procedural process that we old fogeys grew up with, and frankly, I don't think it befits the aspirations of the American civil justice system.

Moreover, there is another deleterious consequence of the procedural trends of the past quarter century. We have a longstanding legislative and judicial commitment to the private enforcement of various important public policies and constitutional principles. If the procedural rules are not conducive to maintaining litigation designed to vindicate those policies or if cases pursuing that end can't survive the motion to dismiss, they won't be instituted and those policies will not be furthered. Some people may say, "That's just Jim Dandy; it means fewer cases on the docket." But it seems to me, that is not what our procedural system, as reflected in Federal Rule 1, is designed to achieve. Yes, we would like some speed in resolving litigation. We also would like the process to be inexpensive. But there is a third word in Rule 1. That word is "just." It is shorter than the other two words. But that word seems to me, at a minimum, at least as important as the other two words. I think we are forgetting the importance of that third word, and after more than seventy years, the application of the Federal Rules seems to have lost its moorings and some of us in the bench and bar have lost sight of the direction a well-ordered procedural system should take.

I close with an analogy. In fascist Italy the government was able to get the trains to run on time. Many people considered that a great accomplishment. The trains were speedy, efficient, and ran on time. But the real question really should be, admittedly stretching my analogy to reach what I'm talking to you about so emphatically today, "Are those trains going anywhere we want to go?"