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Litigation and Democracy: Restoring a Realistic Prospect of Trial

Stephen B. Burbank† & Stephen N. Subrin††

ABSTRACT

In this essay we review some of the evidence confirming, and some of the reasons underlying, the phenomenon of the vanishing trial in federal civil cases and examine some of the costs of that phenomenon for democratic values, including in particular democratic values represented by the right to a jury trial under the Seventh Amendment. We discuss the Supreme Court's recent pleading decisions in Twombly *and* Iqbal *as examples of procedural attacks on democracy in four dimensions: (1) they put the right to jury trial in jeopardy; (2) they undercut the effectiveness of congressional statutes designed to compensate citizens for injury and/or to enable implementation of important social norms through private enforcement; (3) they side-step not only congressional review but the entire rulemaking process that Congress prescribed, including multiple steps designed to facilitate broad public participation, and (4) they reward the lawlessness of lower courts that had ignored prior Court precedent proscribing fact-pleading requirements imposed by judicial decision with comparable lawlessness (and reportedly have spurred another cycle of lawlessness in district courts that have ignored them). We then suggest some remedial measures that might restore a realistic prospect of trial, a number of which would depart from the norm of trans-substantive procedure. We propose that the rulemakers develop a separate track for simple cases – a category that would not include cases for which there is objective evidence of congressional reliance on private enforcement -- that would employ bright-line rules permitting very limited discovery and virtually no case management. Recognizing that document discovery presents the most difficult reform challenge, we suggest a rule requiring that document requests in simple cases be specific. For discovery in complex cases, we stress the need for empirical study, particularly in light of the recent Federal Rule amendments concerning electronic discovery. We also suggest the development of discovery protocols by the stakeholders in substantive law litigation areas believed (or, in the event of additional empirical work, found) to involve disproportionate discovery. Finally, doubting that rule amendments could fix what is wrong with summary judgment today, we argue that courts should be given the resources necessary to allow judges to do what judges used to do. Believing that the current state of destructive friction between civil litigation and democracy is a product not just of inadequate resources, but also of the triumph of institutional and professional self-interest and both legislative and judicial politics, we contend that our citizens deserve better. The aspirations of our founders for trials in open court and jury trials are not obsolete, and neither is the duty of the judiciary, within constitutional limits, to respect clearly articulated statutory norms and clearly articulated legislative policy.*

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The Vanishing Trial

It struck us as odd. At some time, probably in the middle 1970s or early 1980s, we heard that major law firms were conducting mock trials so that their young lawyers could experience what it was like to be in a courtroom. This was something new. Historically, young lawyers witnessed cases in real courts, argued motions before judges, and watched partners and older associates try cases. Young lawyers soon tried simple cases before judges, and later with juries. This is how they learned to be trial lawyers and not just litigators.

At about the same time, what Professor David Shapiro described as a "sea-change" was taking place among federal trial judges.[1] Many no longer perceived their primary tasks as deciding motions after oral argument and presiding as neutral referees at trials. They were encouraged to consider themselves managers whose job was to dispose of cases expeditiously. From that perspective trials came to seem wasteful. As early as 1971, one federal district court judge candidly said: "[My] goal is to settle all my cases… Most of the time when I try a case I consider that I have somehow failed the lawyers and litigants."[2]

This change in judicial attitude and behavior began well before 1983 amendments to the Federal Rules of Civil Procedure explicitly broadened the managerial obligations of judges.

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[1] David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989).
[2] Fred J. Cassibry, Federal District Court Judge, E.D. Louisiana from 1966 to 1986. The quote is found in David Neubauer, *Judicial Role and Case Management*, 4 JUST. SYS. J. 223, 228 (1979-80), *citing* Seminars for Newly Appointed United States District Judges (West Publishing Company, 1971).

Under amended Rule 16, judges were now encouraged to help in "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."

We now also know that the increased use of summary judgment to terminate cases short of trial started many years before the Supreme Court encouraged it in a trilogy of decisions in 1985-86.[3] Although definitive data are not available, "[t]here probably is sufficient and sufficiently reliable evidence … to believe that the rate of case termination as a result of summary judgment rose substantially in federal first-instance courts as a whole in the period from 1960 to 2000, with one plausible (and perhaps conservative) range being from 1.8 percent in 1960 to approximately 7.7% in 2000."[4]

Similarly, the 12(b)(6) motion to dismiss complaints for failure to state a claim early in the litigation process had become considerably more defendant-friendly in many Federal District Courts before recent Supreme Court cases blessed the change by effectively amending the relevant Federal Rules under the guise of interpretation.[5] Without rule change and on some occasions in direct violation of Supreme Court case law,[6] grants of 12(b)(6) motions had already increased in the federal trial courts, particularly in case-types that some judges disfavored.[7] One study suggests that before these recent decisions, 46% of all 12(b)(6) motions to dismiss were granted. According to the same study, after the recent decisions, 56% of all 12(b)(6) motions

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[3] *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 620-21 (2004).
[4] Burbank, *supra* note 3, at 617, 618.
[5] *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly and Iqbal *Matter Empirically*?, 59 AM. U. L. REV. 553, 556 (2010).
[6] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 514 (2002); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).
[7] *See, e.g.*, Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

were granted, 60% in constitutional civil rights cases.[8] These dismissals are almost always for defendants and occur before plaintiffs have had the opportunity for formal discovery.

In sum, the experience in both areas recalls Professor Shapiro's memorable image when discussing the amendments to the case management rule: "At best, the argument might run, the task of rule makers is like the task of those who lay out the walks in the Cambridge Common: Figure out where people go and cover up the grass with cement on those routes.[9]

It thus was for good reason that major firms started to create their own in-house moot courts, and later to farm out young associates to attorney general, legal service, and public defender offices, in order to provide training in courtroom behavior and trials. The data are astonishing. When the Federal Rules of Civil Procedure became law in 1938, about 18% of cases terminated in Federal Court were resolved by trial.[10] In the early 1960's, the figure was down to about 12%; in 2002 it was below 2%.[11] "More startling was the 60% decline in the absolute number of trials since the mid-1980s."[12]

Why the Vanishing Trial and Some of its Causes Diminish Democracy

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[8] *See* Hatamyar, *supra* note 5, at 556.
[9] Shapiro, *supra* note 1, at 1992 (footnote omitted).
[10] Marc Galanter, *A World Without Trials*?, 2006 J. DISP. RESOL. 7, 12. (hereinafter Galanter, *World Without Trials*); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459, 464 (2004) (hereinafter Galanter, *Vanishing Trial*).
[11] Galanter, *Vanishing Trial*, *supra* note 10, at 459.
[12] *Id.*

Why does it matter? Isn't it a good thing to dispose of cases without trial? After all, over one hundred and fifty years ago Abraham Lincoln proclaimed the advantages of settlement over trial.[13]

If one believes in the underlying values of American democracy, these developments are deeply troubling for a number of reasons. Since the founding of our country, trials in open court, resulting in decisions by either a judge or a jury, have been thought to be constitutive of American democracy.[14] Consider what it means for there to be trials open to the public, with the orderly presentation of evidence, oral testimony, judges explaining the law (in jury trials), and lawyers synthesizing the law and facts in an attempt to persuade a judge or jury of what justice requires. Those who are accused of a legal infraction have the right to appear in public and tell their side of the story. This right to be heard, the core of due process of law, has been integral to democratic thought and institutions at least since the English Magna Carta in the thirteenth century. Public trials insure that each of us has the opportunity to see that the laws our representatives have chosen to replace the state of nature are more than empty promises (or threats) -- that the community can and will enforce them.

Of course most cases settle. But some trials are essential, if only to ensure informed settlement. Without the realistic possibility of a trial, settlements in large measure reflect and discount the costs of discovery and trial. As a result some plaintiffs receive less than the value of their cases if tried on the merits, while some defendants settle non-meritorious cases in order to

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[13] "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850) in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953).

[14] *See, e.g.,* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 40-68, 112-135 ((2009).

avoid transaction costs. Moreover, apart from the value of litigated judgments as guides to settlement, many legal norms need community input for decisions applying them to be accepted by that community. Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration. Nor are they pure questions of law. Rather, they are concepts mixing elements of fact and law that become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decide what the community deems acceptable. In addition, a public trial reminds the decision maker, judge or jury, that the lives of real human beings may be deeply affected by the decision. Finally, unlike confidential settlements, decisions after trial have the potential to affect the behavior of others, which may be a primary goal of the relevant legal norm.

With the diminution of trials generally has come the diminution of jury trials.[15] This is a tragedy. It is unlikely that there would have been a United States of America without the Bill of Rights, because the founders insisted on assurances of protection for their liberties before they would ratify the Constitution. And there would not have been an acceptable Bill of Rights without a right of trial by jury.[16] Distrust of concentrated authority is a central feature of our system of government. All thirteen colonies, when they became states, ensured the right to trial by jury in both criminal and civil cases of consequence.[17] They insisted on the same for

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[15] In 1982 there were 4771 jury trials of the federal cases that terminated that year, or 2.6% of all terminated cases. In 2002, there were 3006 jury trials in the federal cases that terminated that year, or 1.2% of all terminated cases. In the same 20 year period, however, jury trials have become a higher percentage of all trials: 42.3% in 1982 and 65.8% in 2002. *See* Galanter, *Vanishing Trial*, *supra* note 10, at 462-63.

[16] *See* BURNS, *supra* note 14, at 54-56.

[17] *See* Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 655 (1973).

litigation in the new federal courts.[18] Just as our federal system of many states and one federal government and the separation of powers between the executive, legislative, and judicial branches are thought to dilute power by dispersing it, trial by jury counterbalances the authority of judges.

The founders believed that twelve heads are better than one in finding facts. Since jurors would only decide one or a few cases, they would be less jaded than professional judges. The inevitable prejudice of any one person would be offset by having to consult with many others. Along with voting, jury service was, and it remains, one of the few ways for ordinary citizens to participate in their own government, making decisions that resolve formal disputes legitimate in the eyes of the population at large. As Toqueville observed in describing the newly created American state, participating as jurors and witnessing trials were critical means of educating Americans about the law and giving them a stake in their courts and country.[19]

Jury bashing has been a recurrent theme in the attacks on litigation that have been waged by those seeking "tort reform" and/or changes in procedural rules. Yet, again and again those consulting systematic empirical evidence rather than anecdotes find that the attacks on the jury are unsupported .[20] Virtually everyone who has studied the American jury, including judges who preside over jury trials, find that jurors listen carefully to and follow the judge's instructions on the law and obey their oaths to apply the law to the facts with impressive gravity and skill.

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[18] The Fifth, Sixth, and Seventh Amendments to the Constitution feature and protect the right to jury trial.

[19] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, PT. I, 283, 284 (1999).

[20] Attacks on the American civil jury and the empirical evidence supporting the soundness of most jury deliberations are described in STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN, CIVIL PROCEDURE – DOCTRINE, PRACTICE, AND CONTEXT 427-37 (3d. ed. 2008).

Moreover, empirical studies show that most Americans do not rush to court with every petty grievance. Notwithstanding occasional silly lawsuits, Americans "lump" most of their legitimate grievances rather than litigate.

Recent Procedural Attacks on Democracy

Two recent Supreme Court decisions that require more factual detail in complaints are an implicit attack on the jury trial and, in turn, on our democracy. In *Bell Atlantic Corp. v. Twombly*,[21] decided in 2007, the Court reinstated the dismissal under Rule 12(b)(6) of an antitrust conspiracy complaint brought under the Sherman Act against the regional telecommunication service providers remaining after the breakup of AT&T. In reversing a panel of the Second Circuit, the Court "retired" the language in *Conley v. Gibson* 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."[22] *Conley* was a 1957 case that had been cited with approval by the Supreme Court, lower federal courts, and state courts literally thousands of times in the half-century after it was decided. In addition, the *Twombly* Court interpreted the requirement that plaintiffs give fair notice to defendants so that defendants can prepare their cases to now mean that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]"[23] Disregarding the plaintiffs' direct allegations of conspiracy as conclusory, the Court held that the plaintiffs' claims were not plausible because

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[21] 550 U.S. 544 (2007).
[22] 355 U.S, 41, 45-46. *See Twombly*, 550 U.S. at 563.
[23] *Twombly*, 550 U.S. at 555.

they rested on "parallel conduct and not on any independent allegations of agreement among [defendants]."[24]

For a time some courts and commentators read *Twombly* as applying only to antitrust cases, or perhaps also to other complex cases portending massive, expensive discovery. The Court had expressed doubt that judicial management could control such discovery.[25] It turned out, however, that a majority of the Justices had a more radical agenda: They were determined to change the Federal Rules relating to pleading and motions to dismiss without following the statutory process that requires notice and comment rulemaking and affords Congress the opportunity to review, and if necessary to block, any prospective policy choices before they become effective.[26]

The majority found their opportunity in *Ashcroft v Iqbal*,[27] which was decided in 2009. *Iqbal* involved claims brought by a citizen of Pakistan whom federal officials arrested after the 9/11 attacks and who was detained in a Brooklyn federal detention center on charges of fraud in connection with identification documents. He pleaded guilty, leading to his removal to Pakistan. His complaint alleged that he was confined for seven months in highly restrictive conditions and that Robert Mueller, the Director of the F.B.I., and John Ashcroft, the Attorney General of the

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[24] *Id.* at 564.
[25] *See id.* at 559-60.
[26] *See* 28 U.S.C. § 2072 et seq. (2006).
[27] 129 S. Ct. 1937 (2009).

United States, adopted and/or approved policies and directives pursuant to which he was confined, policies and directives that purposely discriminated on the basis of religion and race.[28]

Over the dissent of four justices, including the author of the Court's opinion in *Twombly* and another justice who joined that opinion, the Court in *Iqbal* inconsistently treated some of the complaint's assertions as factual allegations and others as conclusions. Most notably, the Court disregarded direct allegations of intentional discrimination, notwithstanding Fed. R. Civ. P. 9(b)'s explicit assurance that "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally."[29] That move enabled the Court, however breezily, to assess the plausibility of the inferential basis for the theory of the plaintiff's case. Relying on "judicial experience and common sense,"[30] the Court found the complaint implausible. Because the Federal Rules are transsubstantive (the same rules for all types and sizes of cases), the Court was constrained to make clear that its approach applies across the board – that *Twombly* cannot be confined to antitrust cases, nor *Iqbal* to cases involving national security or the qualified immunity of government officials.[31]

The *Twombly and Iqbal* decisions, together with the decisions of some lower federal courts that ignored pre-*Twombly* precedent, can be seen as attacks on American democracy in at least four ways. First, the cases put the Seventh Amendment right to jury trial in federal court (and state jury rights in states that follow the decisions) in jeopardy. Charles Clark, the principal architect of the Federal Rules, was convinced that the line between facts, evidence, and legal

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[28] Iqbal also alleged that other federal officials subjected him to the unconstitutional use of excessive force, unreasonable and unnecessary strip and body-cavity searches and denial of medical care while in detention.
[29] *See Iqbal*, 129 S. Ct. at 1954.
[30] *Id.* at 1950.
[31] *See id*. at 1953.

conclusions was impossible to draw coherently.[32] Clark argued for years against the fact pleading requirement of the nineteenth century Field Code because it led to unproductive disputes about what was a fact, evidence, or legal conclusion. Consequently, the drafters of the Federal Rules refused to put the word "fact" in the pleading rules.[33]

The power to excise what a judge finds to be a conclusory allegation and the addition of a plausibility requirement mean that enormous discretionary power to dismiss complaints has now been explicitly granted to trial judges. Since the Court has eliminated Rule 9(b)'s permission to allege states of mind generally, and intent must be proved in many discrimination cases, it has become even easier than in the past for judges who disfavor such cases to dismiss them prior to discovery. The same is true for any lawsuit, such as tort and antitrust cases, in which the most important evidence is in the minds and files of defendants. Many cases that were entitled to a jury trial – or any trial for that matter - and that would be found meritorious after discovery, will now be dismissed at the pleading stage.[34] So much for the historic role of juries to decide factual issues and thus check judicial power.

The second prong of this attack on democracy results from undercutting the effectiveness of congressional statutes designed to compensate citizens for injury and/or to enable enforcement of important social norms. For decades, when enacting such statutes, Congress had the legitimate expectation that the Federal Rules as originally understood and long interpreted would

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[32] For Clark's views on pleading see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 966 (1987) (hereinafter Subrin, *Equity*); Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules* in JUDGE CHARLES EDWARD CLARK 115, 139-143, (Peninah Petruck ed. 1991).
[33] Subrin, *Equity*, *supra* note 32, at 976.
[34] *See* Alex Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. ___ (forthcoming 2011), *available at* http://ssrn.com/abstract=1666770

be applied in federal civil litigation and thus that discovery would permit plaintiffs proceeding on the basis of a complaint stating a valid legal theory to assemble the evidence necessary to prove illegal conduct.[35] Congress has frequently included pro-plaintiff fee-shifting and/or multiple damages provisions that encourage lawyers to serve as private attorneys general to enforce the rights conferred.[36] Professor Paul Carrington, former Reporter to the Advisory Committee on Civil Rules, explained the point this way:

> We should keep clearly in mind that discovery is the American alternative to the administrative state … every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.[37]

Judge Patrick Higginbotham, former Chair of the Advisory Committee on Civil Rules, also emphasized the relationship of discovery to the ability to enforce congressional statutes:

> Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress."[38]

The drafters of the original Federal Rules emphatically reduced the importance of pleadings and largely left the disposition of cases to post-discovery settlement, summary judgment, or trial. To put it another way, the notice pleading requirement and the right to discovery were intermeshed in the entire Federal Rule structure. By altering the pleading rules,

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[35] *See* Califano v. Yamasaki, 442 U.S. 682, 700 (1979).
[36] For a comprehensive study of private enforcement of federal statutory law, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).
[37] Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).
[38] Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997).

the Supreme Court has eliminated discovery for potentially meritorious cases and thwarted presumed congressional intent.

The third and fourth prongs of this assault on our democracy stem from the methods by which the change in pleading requirements took place. In some ways they are the most demonstrably undemocratic and thus the most egregious of the attacks. Congress granted the Supreme Court the power to promulgate Federal Rules of Civil Procedure through the Rules Enabling Act of 1934, which explicitly prescribed that if those rules were to cover both law and equity cases, they must be presented to Congress before they became law.[39] Since that time, Congress has mandated a number of additional steps that must be taken before Federal Rules become law, but the reporting requirement has remained.[40] These steps insure that there is notice and opportunity for public comment and debate – transparency and accountability --before Federal Rules are changed.

Judge Anthony J. Scirica (3rd Cir.) was until recently the Chair of the Executive Committee of the Judicial Conference, and for many years he served as both a member and chair of key committees in the federal rule-making process. He explained why the Enabling Act process is so vital to our democracy as follows:

> The primary responsibility of the Standing Rules Committee on Practice and Procedure is to implement the Rules Enabling Act. The Act was a brilliant solution to the making of procedural law. Described as a treaty between the legislative and judicial branches, it provides a dispassionate, neutral forum that

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[39] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. "Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

[40] These additions to the process can now be found in 28 U.S.C. §§ 2071, 2073, 2077. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

> allows procedural law to be written in a deliberate and thoughtful manner. Key members of the Executive Branch (such as the Deputy Attorney General and the Solicitor General) have seats on the Rules Committees. The openness mandated by Congress invites public comment, and new rules are enacted only after approval by the Judicial Conference, adoption by the Supreme Court, and after a [seven]-month interval while Congress considers whether to permit the rules to become law. All of this ensures the rigorous scrutiny and public review essential to establish the credibility and legitimacy of the rulemaking process.[41]

The Supreme Court in *Twombly* and *Iqbal* did not just interpret a few Federal Rules. It (1) replaced *the system of notice pleading* (of which broad discovery was a part) with something close to the nineteenth century Code fact pleading and (2) turned a motion that was designed to deal with rare complaints that lacked a valid legal theory into a potent weapon to dismiss complaints that, without any discovery at all, strike judges as counter-intuitive. In *Iqbal*, the Supreme Court also eliminated, in one paragraph and with no citation to prior case law, Federal Rule 9(b)'s clear language that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." This drastic change, like the unacknowledged amendments of Rule 8(a) and Rule 12(b)(6), substantially adds to a plaintiff's pleading burden in employment discrimination and other civil rights cases, in which the intent or knowledge of the defendant is difficult or impossible to substantiate without discovery.

Such changes are precisely what the Supreme Court told lower courts could not be effected except through the Enabling Act process or by Congress.[42] In *Twombly* and *Iqbal, t*he Supreme Court side-stepped not only congressional review, but the entire rule-making process that Congress prescribed, including multiple steps designed to facilitate broad public participation. And the Supreme Court's rule changes apply to all civil cases.

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[41] Interview, To Speak With One Clear Voice: The Executive Committee's Role in the Judiciary (interview of Anthony J. Scirica), 41 THE THIRD BRANCH 10, 11 (December 2009)
[42] *See, e.g.,* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 515 (2002); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

Finally, as we have noted, before *Twombly and Iqbal* some lower federal courts ignored the Supreme Court's repeated reminders about the proper process for amending Federal Rules by requiring more rigorous pleading in a broad ranges of cases.[43] Now, of course, the Court, in *Twombly and Iqbal*, has rewarded that lawlessness with its own acts of lawlessness, sidestepping the carefully crafted and democracy- enhancing Enabling Act process. Can it be a surprise that we have heard repeatedly that some lower courts are ignoring *Iqbal* – lawlessness cubed?

What Should Be Done?

The new pleading requirements in *Twombly* and *Iqbal* should be promptly reversed by Congress. Bills pending in both Houses would accomplish this. The potential diminution of the Seventh Amendment right to trial by jury, the thwarting of the legislature's expectation that its laws would be privately enforced as they have been since 1938 until and unless Congress had the opportunity to consider some other system, and the stark attempt to avoid the entire Enabling Act process warrant such action. If Congress later finds that some issue, such as the qualified immunity defense that was at play in *Iqbal* or the question of conspiracy in anti-trust cases that was central to *Twombly*, requires more stringent pleading requirements, this can be addressed in legislation.[44] If judges, lawyers, legislators, or interest groups think that the pleading rules should be changed for all cases, then such an amendment should go through the legislatively mandated process. These are the ways – congressional action or the Enabling Act process – in which our democracy has long since decided to handle such controversial questions about civil procedure and civil litigation.

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[43] *See supra* text accompanying note 7.
[44] As was done for securities and prisoner litigation. For procedural provisions of the Private Securities Litigation Reform Act of 1995, see 15 U.S.C.§78 (2006) For procedural provisions of the Prison Litigation Reform Act, see 42 U.S.C. §§ 1915, 1997 (2006).

There are at least three other ways in which the trend that has led to the drastic reduction of trials may yet be reversed. Two suggestions require that we rethink the transsubstantive assumption of the Federal Rules.[45] The third, changing attorney and judge attitudes, may be enhanced by the first two.

Our first proposal advocates categorical restrictions on discovery as part of a separate set of rules for "simple" cases. A number of states have such separate tracks,[46] as does England and Wales.[47] We are not prepared to specify all the details of such a track, an effort that should be informed by experience in jurisdictions that already employ tracking. We can, however, set forth a few central features of the proposal.

We would retain notice pleading as the norm, mindful that the claim to effective court access of those initiating simple cases is as strong as that of those initiating complex cases. But we share the view, which animates recent reforms in England and Wales, that proportionality

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[45] There is nothing sacred about the transsubstantivity assumption. Congress has enacted specialized procedural rules for securities and prisoner litigation, among others. In 2009, the Final Report of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System supported departures from transsubstantive procedural rules:

> The one size fits all approach of the current federal and most state rules is useful in many cases but the rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently

Am. Coll. Of Trial Lawyers Task Force on Discovery & Inst. For the Advancement of the Am. Legal Sys., Final Report 4 (2009), http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Report%20Revised%204-15-09.pdf.

[46] Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377, 394. nn. 74, 75 (2010).

[47] *See* Civil Procedure Rule (CPR) 26.2 (2010) ("There are three tracks – (a) the small claims track; (b) the fast track; and (c) the multi-track.").

should be a foundational principle underlying procedural rules.[48] For many simple cases, discovery of the breadth permitted by the existing Federal Rules would not be proportional, and its availability would be an invitation to economic oppression. Moreover, many observers of current federal practice have asserted that it is more expensive to litigate the same case in federal court than state court.[49] If true (and we believe it is), this is in part due not just to the many opportunities for extensive discovery but also to the multiple required steps that have been introduced to try to obviate the need for such discovery: mandatory disclosure, discovery conferences, pretrial conferences, lists of witnesses and their expected testimony. The high cost of litigation dissuades some potential litigants with meritorious claims from commencing suit and forces some of those who do sue, and some defendants, into settlements that do not truly reflect the merits.

Less discovery for simple cases thus does not mean second-class justice for those cases. Rather, by reducing transaction costs and forcing lawyers to focus on the heart of the dispute, that and other features of the simple case track should enhance the realistic prospects of a trial and thus the possibility that settlements will do justice to the parties – in short, that the law will actually be enforced.

The rulemakers have appeared to heed, even if faint-heartedly, the lessons of empirical studies that suggest the value of bright-line rules. In a series of amendments, they have introduced presumptive limits on the number of interrogatories and depositions and on the length

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[48] *See id.* at 1.1(2) (specifying as an overriding objective that "dealing with the case justly includes … dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party"").

[49] *See* Subrin, *supra* note 46, at 389-90 n.56.

of depositions. We say “faint-heartedly” because such limits can be avoided by stipulation and court order for good cause shown. Moreover, the limits are so high (i.e., ten depositions per side) that they are either irrelevant or an invitation to economic oppression in many lawsuits. This suggests to us that, in addition to tolerating very little pretrial case management and mandating virtually unchangeable discovery and trial schedules – subject perhaps to alteration to prevent manifest injustice – the rules for a simple case track should include non-negotiable limits on the number of interrogatories and depositions and on the length of depositions, with dispensation available only by court order according to a similarly daunting standard. Some of those numbers might vary within the simple case track depending on whether the case is subject to mandatory disclosure.

The rulemakers have not attempted any limit on document discovery presumably because they could not come up with any limiting principles that did not seem insupportably arbitrary. We acknowledge that document discovery is the hardest nut to crack. Progress should be possible, however, so long as we are guided by the proportionality principle, have the comfort of knowing that “simple” cases do not include those implicating the private enforcement of federal statutory norms (see below), and remember that broad discovery can be an instrument of economic oppression and a perverse incentive for lawyers billing by the hour. Document discovery under the Federal Rules required court approval (for good cause shown) prior to 1970, and it is hard not to associate the amendment in that year with growing interest in private enforcement of public law. In other common law countries that require disclosure and/or permit discovery of documents, but generally do not view private litigation as an enforcement tool, document disclosure pertains to specific categories of documents and document discovery requires a more precise specification of the documents sought than has been true under the

Federal Rules.[50] Precedent for requiring such specificity exists in this country in cases permitting direct discovery from abroad.[51]

From a narrow efficiency perspective, a rule requiring that document requests in simple track cases be specific may help to solve the problem of the cost of searching for responsive documents, but it may not be adequate for that purpose. One additional area that might be explored, but that we do not now advocate, is a time-window keyed to an objective characteristic of the litigation (such as a designated number of years from the date when allegedly harm-producing conduct took place). In addition, since the search costs in question may be most burdensome for electronic documents (particularly e-mail), unlike the Court in *Twombly*, which relied heavily on a twenty-year old theoretical article on discovery that antedated three sets of amendments to the discovery rules,[52] we would acknowledge the e-discovery amendments recently made and seek empirical evidence concerning their effectiveness.

Objections often made to tracking proposals include the difficulty of drawing the lines necessary to sort cases into tracks and the likelihood of costly satellite litigation over decisions made. The answer to the latter, we believe, is to provide sufficiently objective and determinate criteria for the initial decision and not to permit any appeal. In addition, we would give exclusive responsibility for case assignment to federal judges who are dedicated (in part) to the task. Because there would be no appeal, magistrate judges probably could not be used for this purpose, but District Judges serving in senior status might be ideal.

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[50] *See, e.g.,* CPR Part 31 ("disclosure and Inspection of Documents; id. at 31.17 ("Orders for disclosure against a person not a party"). Note, moreover, that in England and Wales document disclosure is or may be further restricted in the simple track and the fast track.

[51] See, e.g., Benton Graphics v. Uddeholm Corp., 118 F.R.D, 386 (D.N.J. 1987).

[52] *See Twombly*, 550 U.S. at 559, 560 n.6 (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

The task of defining "simple" cases is, to be sure, not simple. As indicated above, however, we conclude that cases implicating the private enforcement of public law should *not* be included because, among other things, broader discovery than that available in the simple case track may be necessary for adequate enforcement. Fortunately, some objective criteria for implementing this exclusion from the simple case track are to be found in statutory provisions for multiple damages and one-way pro-plaintiff fee-shifting. For more than a century Congress has used both to promote private enforcement of federal statutes.[53] Once that category is protected, it may be sufficient to define the rest of the landscape in terms of the amount in controversy. Any such amount – for instance, cases involving less than $500,000 are assigned to the simple case track -- is arbitrary, but the line must be drawn somewhere. In order to prevent costly satellite litigation, the judge with responsibility for case assignment should have unreviewable discretion to determine whether the case as pleaded realistically exceeds the limit.

Congressional action will probably be necessary to overcome the traditional judicial hostility to a simple case track. Creation of such a track would almost certainly lead to more litigation in federal court – the so-called highway effect. Congress should ensure that the federal judiciary has resources that are adequate to the task, with "adequate" defined in a fashion that honors the best traditions of the federal courts rather than the bare minimum.

The creation of a separate track for simple cases would not address problems in complex cases of the sort that supposedly prevented the Court in *Twombly* from following precedent on pleading and relying on judicial management of the discovery process to ensure that discovery costs did not get out of control. The Court, however, ignored the discovery amendments after

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[53] *See* FARHANG, *supra* note 36.

1989 (the date of the theoretical article on which it chiefly relied), most importantly the 2007 e-discovery amendments. We would insist on empirical evaluation of the effectiveness of those amendments.

Our second proposal again abandons transsubstantive procedure, which is usually expressed in flexible, non-confining language designed to accommodate high-stakes, complex cases. We would encourage (or ask Congress to require) the rulemakers to work with the bar to develop discovery protocols for the types of litigation thought (or, preferably, found in empirical studies) to impose the most burdensome discovery costs. The protocols would permit lawyers to inform their clients what to expect in certain case-types and would permit judges to compel or adjust the limitations in the protocol as necessary or appropriate for a particular case. We do not believe that such an enterprise would be inconsistent with the Enabling Act, and even if it were, the Act could be amended, or the rulemakers could propose protocols for adoption, by Congress.

We turn finally to an area of reform that lies close to the heart of our concerns: summary judgment. This reform area forces one to look into the minds and hearts -- the attitudes -- of judges and lawyers. There is nothing obviously wrong with the governing Federal Rule (56), which attempts to identify those cases in which, after adequate time for discovery, a trial would be a waste of time and money and an invitation to irrational jury behavior. Put otherwise, it is not clear how, at least on a transsubstantive basis, one could fashion a replacement that would prevent the mischief of ad hoc judgments that, because of the amorphous nature of what constitutes an evidentiary foundation sufficient to support a jury finding, often appear arbitrary. That mischief, confirmed by empirical study, consists in a supposedly uniform rule in fact operating in radically different fashion in different parts of the country and in different categories

of cases, coupled with evidence that in some cases the actual application of the rule has unfairly deprived litigants (usually plaintiffs) of a trial by jury or a trial in open court.[54]

Rules probably cannot restore summary judgment to its proper role in civil litigation, and they cannot restore trial in open court, jury trial, and respect for statutory norms and legislative policy to their historic, honored positions in American law. We need widespread change in attitudes.

If federal judges were given the resources necessary to do their jobs, aggressive deployment of trial-aborting procedural devices could no longer be justified by docket pressures, and trials could no longer be regarded as failures. When everyone recognized that procedure is power, invocations of "adjective law" would no longer shield judges from criticism, including criticism in Congress, for privileging their personal policy preferences. That alone should help to induce greater judicial humility.

It would be better, however, if judges acknowledged the fragility of those preferences, which are often mere hunches uninformed by systematic empirical evidence and vulnerable to cultural biases.[55] Long ago, Justice Benjamin Cardozo famously put it this way:

> Of the power or favor of prejudice in any sordid or vulgar or evil sense I have found no trace, not even the faintest among judges I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as revealed in each of us, is too often only the spirit of the group in which accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of

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[54] *See* Burbank, *supra* note 3, at 618, 624.

[55] *See* Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009).

> mind will overthrow utterly or at all times the empire of these subconscious loyalties.[56]

Before condemning a case to summary disposition on the basis of "judicial experience and common sense," judges should heed the observation of the late, great Judge Richard Arnold: "Although you pick up a file and say, 'Well, there is a ninety-eight percent chance that this is frivolous,' that does not mean you read only two percent of the file."[57] Where the right to trial by jury is in question, judges should also heed Professor Burns' caution that "[p]aradoxically, by giving particularity and empirical truth their due, the trial provides a strong critique of commonsense generalizations … The trial provides a self-criticism of the overgeneralized 'scripts' within which much of our common sense is stored."[58]

If trials became an economically realistic option in substantially more cases, lawyers could no longer hide behind settlement, and law schools would once again know that they were training students for the world as it is rather than as it was. Jury service and the opportunity for direct participation in the democratic enterprise it provides would be available to a larger number of citizens. If trials became an economically realistic option in substantially more cases, private law enforcement would be enhanced.

Civil litigation and democracy should be, and they can be, mutually reinforcing. The current state of destructive friction between them is a product of inadequate resources, the triumph of institutional and professional self-interest, and both legislative and judicial politics. Our citizens deserve better. The aspirations of our founders for trials in open court and jury trial

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[56] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174, 175 (Yale Paperbound, 1961, 1st ed. 1921).
[57] Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 34 (1995-96).
[58] BURNS, *supra* note 14, at 35.

are not obsolete, and neither is the duty of the judiciary, within constitutional limits, to respect clearly articulated statutory norms and clearly articulated legislative policy.

Maybe both of us have spent too long in ivory towers, giving us the luxury to dream a bit. But is it too much to hope that in the not too distant future firms will no longer find it necessary to introduce their young lawyers to the courtroom through mock trials and that judges will enthusiastically embrace the notion "that the word 'judge' is a verb as well as a noun?"[59]

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[59] Harp v. Citty, 161 F.R.D. 398, 402 (E.D. Ark. 1995).