

THE HISTORY OF THE CIVIL PROCEDURE COURSE: A Study In Evolving Pedagogy

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I. THE EARLIEST AMERICAN COURSE IN CIVIL PROCEDURE

A. The Practice Origins of Early American Law Schools

Despite the current position of most American law schools within the academic community, the original law schools were trade schools, not affiliated with universities. There were courses in law at early American colleges, but they did not, in general, provide a route to the practice of law. In the late eighteenth century, a number of colleges in the new Republic instituted professorships of law, as opposed to separate law schools.¹¹ The course of study under most—but not all—of these teachers, however, was about “the theory rather than the practice of law.”¹² Such study was meant “to furnish a rational and useful entertainment to gentlemen of all professions,”¹³ not to train practitioners.¹⁴ Although, for example, Transylvania University’s Law department was “intended for other than under graduates,”¹⁵ in the early years of the American Republic, young men¹⁶ generally entered the practice of law after a period of apprenticeship.¹⁷ In turn, legal historians have found that “[f]ormalized apprenticeship . . . led to the establishment of private law schools. [These schools] were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular, as teachers.”¹⁸

Education in early American law schools generally consisted of lectures or recitations on material assigned from available legal texts.²⁵ Instruction often began with Blackstone and would include other major treatises.²⁶ The pupils would study one text or topic at a time—*seriatim*—until they had completed their legal training.²⁷ This program generally took one or two years,²⁸ that is if the student stayed for the full cycle of lectures. Since law school was not a requirement for the practice of law, aspiring lawyers often began their studies in the middle of the curriculum and did not always stay for the full cycle.²⁹ Instead, apprenticeship was the most common means of admission to the bar.³⁰

Assuming that an aspiring lawyer attended law school, what would he study? In 1921, at the behest of the American Bar Association, Alfred Z. Reed³¹ published an analysis of early legal education in the United States.³² He examined early law school curricula and found that “[t]he working classifications devised by early law schools were of two main types, according as a narrowly technical or an ambitiously broad field of study was contemplated.”³³

Whichever model a law school followed, instruction in civil procedure was integral to the curriculum. Reed discovered that a student who completed law school probably devoted ten to twenty percent of his time to studying pleading and practice.³⁴ The vast majority of that time was spent on common law pleading.³⁵

The early course on Pleading was very different from our study of the subject today.³⁶ It included not only an examination of the rules of a much more complicated system of pleading, but also instruction in the various forms of action. It was in Pleading that the students would learn the differences between debt and assumpsit, for example. Thus, the basic procedural course included a large amount of what we regard as substantive material today. One historian noted that this organization of the law “will disconcert the modern reader.”³⁷ He reminded us, however, that “substantive and adjective law were far from disentangled [at that time].”³⁸

The students' exposure to pleading consisted of reading the popular text books on the subject, which included Blackstone,³⁹ Chitty's Pleading,⁴⁰ and Stephen's Pleading.⁴¹ The actual practice of drafting the writs, for example, generally came during apprenticeship.⁴²

B. Procedure in the Harvard Curriculum

1. The Procedure Offerings

In 1870, when Dean Langdell arrived at Harvard Law School, he had a rare opportunity to influence the development of American civil procedure. By adopting the case method, Harvard was destined to change the way schools taught law. With the new curriculum, Harvard Law School was in a position to affect *what* schools taught, and thus to help shape the attitudes of young practitioners and future policy makers. While Harvard proselytized other faculties to its way of teaching, its faculty produced both the professors and the books to go with it. Harvard graduates joined the faculties of most American law schools.⁶⁶ Furthermore, for many years, the only casebooks available were edited by Harvard professors.⁶⁷

Harvard's ascendancy, moreover, came at an especially important moment in the development of American adjective law. Common law pleading had been under attack for years. Critics maintained that a problem with the old system was

the unbending character of the different causes of action at common law, and the narrow and rigid way in which the judges administered the same. Every suitor had to elect his cause of action at his peril, for if he mistook it he was thrown out of court and saddled with the costs. Moreover, if the injury sustained did not fit any existing writ or cause of action, he was without remedy at law. . . . This had two results. It greatly extended chancery jurisdiction and it caused the invention of the writ of Trespass on the Case and the manifold applications of this writ by means of legal fictions, nearly all of a highly artificial character. Thus the old common-law pleading became highly technical, artificial and pedantic.⁶⁸

The code pleading movement, started in the United States by David Dudley Field, had made great inroads on these problems. In particular, it was commended for merging equity and law and disposing of the ancient forms of action: "To escape from this mediaeval scholasticism and to remold legal procedure to suit modern practical life and relationships the codes have been adopted, the central and controlling feature being the reduction of all forms of action at law or suits in equity, to a 'single form of action.'"⁶⁹ From New York's adoption of the Field Code in 1848 until Langdell came to Harvard in

1870, twenty-five states and territories had enacted a procedure code.⁷⁰ The codes, however, also were coming under attack.⁷¹

With a fresh new look at the defects and the strengths of the systems in place, perhaps eager young minds could be influenced or given the insights to reform procedure. Unfortunately for those who wanted forward movement, Harvard did not provide any leadership in the field of procedure. Instead, the procedure course that Langdell put into the first year was the same one Harvard Law School had offered virtually every year since 1846, when a curriculum had come into existence there:⁷² Pleading.⁷³ Despite the move toward merger, Langdell maintained Equity as a separate course and put it into the upper level.⁷⁴

Harvard offered very little else to the student in the field of procedure. Code Pleading, which some considered "basely mechanical and beneath the attention of the scholarly mind,"⁷⁵ was not offered.

Other law schools followed this pattern, although quite a few schools offered Code Pleading as an upper-level course or as an alternative to Common Law Pleading.⁸¹ However, Common Law Pleading had such a grip on the academy that even schools in code pleading states like Wisconsin, still required the students to take Common Law Pleading.⁸² As for additional procedural courses, the curriculum at other schools remained as sparse as Harvard's.

III. THE TWENTIETH CENTURY

A. Problems Created by the Nineteenth-Century Procedure Curriculum: A Crisis of Faith

By the early twentieth century, there was strong and growing criticism of the procedure curriculum. For one thing, the introductory course at the leading law schools taught a procedure that was almost completely out of date. By 1900, not only had over half the states in the Union adopted code pleading,¹³⁷ but those states that had not yet adopted a procedural code "departed substantially from the common-law system."¹³⁸ Thus, while the students delved deeply into the old common law pleading rules, they were not being given the tools of their trade.¹³⁹

C. The Modern Era

1. The Impact of the Federal Rules of Civil Procedure

As the 1930s waned, the debate still raged as to what was the ideal first-year procedure course.¹⁹² Although there was "an apparent tendency to swing the trial practice material to the first year course,"¹⁹³ in 1936, the AALS Curriculum Committee reported that the member schools were "about evenly divided between the plan of giving . . . a course in common-law pleading and the plan of giving a broader procedure course in the first year."¹⁹⁴ In 1938, however, something happened that was destined to change the introductory procedure course: The Federal Rules of Civil Procedure were promulgated.

2. The New Paradigm

Before the 1930s, very few schools offered a course in Federal Jurisdiction. With the growth of federal litigation in the twentieth century and the promulgation of the new rules, the course increased in importance.²²² It had originally been a course on the ins and outs of federal practice. In the 1930s, Felix Frankfurter of the Harvard Law School attempted to change the course to one on public law, exploring the interesting tensions inherent in "Our Federalism."²²³ Although subsequent Federal Jurisdiction casebooks were more theoretical than the earliest ones, the majority published before 1953 remained more or less procedural in orientation.²²⁴ How much of federal procedure and jurisdiction could be offered in Civil Procedure without making the Federal Jurisdiction course redundant?

Proceduralists, moreover, recognized the "growing need for a course of study that emphasizes not only the inter-relationship of the procedural courses, but also the bearing thereon of certain phases of constitutional law, conflict of laws, and administrative law."²²⁵ Procedure teachers proposed various solutions to meet this need. For example, in 1940, Percival William Viesselman of the University of Kansas added such topics as judicial power and subject matter jurisdiction to his upper-level book on Trial Practice.²²⁶ In contrast, Edson Sunderland added material on "the organization, operation, and jurisdiction of courts and of the judicial power" to his book on Pleading.²²⁷ In the late 1940s and early 1950s, the next generation of Michigan faculty proposed a new division of procedural topics. The so-called "Michigan plan"²²⁸ divided most of the material into two courses:²²⁹ a "traditional" course on Pleading and Joinder²³⁰ and a new course on Jurisdiction and Judgments.²³¹ The latter course "includes material on federal jurisdiction that is not generally found in civil procedure books."²³² As such, it "would entail the elimination of a separate course in Federal Jurisdiction," and "[t]he course in Conflict of Laws would have to be rather drastically revised."²³³

The allocation of procedural topics was decided, however, at least for the modern era, in 1953, when two paradigmatic books were published in Civil Procedure and Federal Courts. Richard H. Field and Benjamin Kaplan of the Harvard Law School federalized the first-year course in Procedure.²³⁴ This course was not repetitive of the upper-level course in Federal Jurisdiction because in the same year, Henry M. Hart, Jr., of Harvard and Herbert Wechsler of Columbia completed a change in the direction of the latter course.²³⁵

The Field and Kaplan book presented "a radical departure from traditional concepts of teaching civil procedure to the beginner."²³⁶ First, instead of taking the earlier approach, which used a mixture of decisions from all jurisdictions, Field and Kaplan presented the procedure of a single system, the Federal Rules of Civil Procedure. Reviewers praised this move because it gave the students a sense of direction.²³⁷ The advantages of using the federal system were also recognized: it was simple and it was influencing the procedure of the states. Second, the Field and Kaplan book defined the topics that we teach our students today in the basic Civil Procedure course. Not only did the authors include traditional topics, such as pleading, joinder, and directed verdicts, they added such federal subjects as federal subject matter jurisdiction and the impact on federal procedure of *Erie Railroad Co. v. Tompkins*.²³⁸

Meanwhile, Hart and Wechsler

wrought substantial changes in the subject generally known as "Federal Jurisdiction" Departing from the usual pattern which focuses almost exclusively on the rules for entering and proceeding in the United States courts, this book explores "[t]he jurisdiction of courts in a federal system [as] an aspect of the distribution of power between the states and the federal government." Except as relevant to this theme, federal procedure is turned back to the procedure courses.²³⁹

This paradigmatic allocation of subjects between the two courses has not been universally accepted.²⁴⁰

By and large, however, the two paradigms published in 1953 have defined the basic scope of the Civil Procedure and Federal Courts courses to the present day.

PROCEDURALISM, CIVIL JUSTICE, AND AMERICAN LEGAL THOUGHT

PAUL MACMAHON*

3.1. *The Centrality of Procedure in American Civil Justice*

The obvious place to start is civil procedure. Civil procedure is at the heart of American legal curriculum. By "civil procedure," of course, I mean the rules and principles governing how a legal system enforces the rights and duties created by substantive law: in which court an action may be brought, the standards for pleading and summary judgment, the scope of pre-trial discovery, the allocation of responsibility for lawyers' fees, and so on. In the first-year curriculum, these procedural questions stand on a similar footing to questions of substantive law. This insight may seem either surprising or obvious to American readers, but I hope to establish that it is both true and significant.

American law schools aspire to be professional schools, so it is unsurprising that the rules governing litigation appear somewhere on the curriculum. However, students don't just learn civil procedure as preparation for the bar exam. Rather, it is an integral component of the standard first-year curriculum. Every American law student takes civil procedure, and the professors who teach the subject engage in vigorous scholarly debates and discuss a steady stream of major Supreme Court decisions.⁶¹ The cultural prominence of civil procedure is impressed on the American law student from day one.⁶² Law students are taught to approach procedural questions not simply as technical rules they need to learn if they are to argue about substantive questions. Rather, procedural questions are *themselves* the site of intellectually challenging arguments about justice, rights, efficiency, and sovereignty. This is true even in more doctrinally focused civil procedure courses that focus on the Federal Rules.

Often, American civil procedure courses begin with the topic of personal jurisdiction. What might otherwise seem a technical issue becomes, in the hands of any reasonably competent American law professor, a vehicle for exploring questions of state sovereignty, individual fairness, and legal method. Students become familiar with the formalistic territorial approach exemplified by *Pennoyer v. Neff*,⁶³ the "minimum contacts" revolution of *International Shoe*

Company v. Washington,⁶⁴ and the more recent reassertion of formal reasoning in cases like *Burnham v. Superior Court of California*.⁶⁵ The Supreme Court produced two major fresh personal jurisdiction decisions in 2011.⁶⁶ Immediately, the American student sees civil procedure as vital—worthy of strident debate by Supreme Court Justices⁶⁷—rather than as a dry set of rules subservient to substantive law.

Another important topic for the first-year law student is pleading: what must the plaintiff include in the complaint to survive a pre-answer motion to dismiss for failure to state a claim? Again, this might sound at first like a minor question, but in America it raises basic questions about citizens' rights of access to the courts. Formally, the Federal Rules of Civil Procedure require only "notice pleading," but two recent Supreme Court decisions hold that plaintiffs ought, in fairness to defendants, to put more flesh on the bones of their complaints.⁶⁸ A federal-court plaintiff is now required to state a claim for relief that is facially plausible,⁶⁹ a development that has inspired a predictably vast amount of scholarly commentary.⁷⁰

The focus on procedure does not end with the first year of law school. Students often have a variety of procedural options to choose from in their second and third years. Indeed, the elective course often considered most rigorous and demanding in American law schools—named "Federal Courts," "Federal Courts and the Federal System," "Federal Jurisdiction," or some variation thereon—includes a healthy dose of civil procedure, integrated with grand constitutional themes of federalism and separation of powers.⁷¹ "Fed Courts" is a kind of finishing school for the elite law student interested in litigation. The class is most often anchored by a famous casebook penned in the 1950s by Hart and Wechsler,⁷² though there are alternative texts.⁷³ The subject-matter of Federal Courts includes the following topics: the extent of federal-court jurisdiction; the States' sovereign immunity from suits and Congress' power to abrogate that immunity; Supreme Court review of state-court decisions; choice of law in the federal courts (including another helping of *Erie* doctrine); remedies for violations of constitutional rights; justiciability (ripeness, mootness, and the "political question" doctrine); and the power of federal district courts to abstain from exercising their jurisdiction. The course requires an understanding of the relations between, on the one hand, states and their court systems and, on the other, the federal government and its courts system. These relations are inseparable from ideological and political conflicts in American history, from the founding of the Republic, through the era of Jacksonian Democracy, the Civil War, the Reconstruction Period, the New Deal, the Civil Rights Era, and so on.

A PARTING REPRISE

LONNY SHEINKOPF HOFFMAN*

It is hard to imagine the semester is already at an end. Finals are just around the corner. Before long, you will be through your second and third years of law school and, thereafter, to lives as lawyers. Less than fifteen weeks ago our journey together began. We have covered much terrain since then, you and I; and yet, in perspective, what a short and fleeting span. Is it not presumptuous of me to think of having accomplished with you anything substantial, to say nothing of having made an indelible mark on your education and training? Still, in even less time, Lawrence managed to cross the Nefud desert and lead disparate tribal bands to successful revolt against the Turkish army in Aqaba. Our conquests have been less grandiose—less cinematic, to be sure—but still I say conquests we have made. After having come this far, we are entitled to sit back and reflect on the journey taken.

Between now and the time you enter the world as lawyers, there is twice as much schooling still before you to complete. Yet, in many respects, you have already taken the first and most difficult step. You have begun to lay a foundation for how to approach the law: intellectually, professionally and ethically. As your teacher, it is my hope that you will remember some of the lessons I intended to impart. What teacher does not wish it to be so! In the maddening rush through your first semester of law school, though, I fear you may have been distracted at times by what must have felt like a wild footrace to keep up with the course reading, by the demands of your other classes, and—dare I say—even of your own personal lives (yes, the world outside of school defiantly continued turning, unabated by your recent anointment as first-year law students). I want to take this opportunity, then, to spend a little time summarizing what I sought to accomplish in the course and what it is I would like you to take away from this experience. If I have done my job well,

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then much of what I am about to say will sound unnecessary and transparent, like I am clubbing you over the head with lessons already assimilated.

As I endeavored to stress from the outset, a single theme characterizes my pedagogic choices in organizing this course. That theme is that the most exciting, effective, and enriching way for me to teach the first-year class in Civil Procedure is to teach "by example." It is a concept with three different, but associated, meanings.

Teaching by example signifies that I place little emphasis on rote memorization of rules and doctrines, preferring instead to focus on how the law actually works. Acquiring knowledge of written law (that is, in the sense of the open-a-book-and-find-it variety) is a part of what is required of your legal studies, but it is only one part. Beyond knowledge, there is comprehension, application, analysis, synthesis and evaluation.¹ To encourage you toward more constructive and advanced learning, we worked with concrete exercises and hypothetical problems as a complement to our reading. By placing the law of procedure into a problem-oriented learning process, you were exposed to authentic examples of legal decision-making and asked, thereby, to respond to the material by thinking about law as lawyers must.

Teaching by example also means that I focus on a smaller number of subjects in procedure—that is, on a few *examples* of the law of procedure—rather than try to expose you to a smorgasbord of topics, not a single one of which you know in any detail or for which you have any appreciation of its true complexities. Through careful consideration and rigorous dissection of the material we do cover, my aim is for you to begin to acquire independent tools of legal reasoning that you may then apply on other occasions. Broadly stated, I seek to train and encourage you to think through and assess legal questions on your own and to help you construct a well deep with self-sustaining analytic abilities from which you will be able to draw for years and years to come.

The third, and last, respect in which I invoke teaching by example is as shorthand for saying that this course is concerned not only with the "law of procedure," but also with emphasizing and identifying the ethical boundaries and context in which legal problems and issues necessarily arise. The technical term for this is teaching ethical norms through the pervasive method.²

1. See TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom et al. eds., 1956) (classifying different degrees or levels of intellectual tasks relevant in learning); see also DONALD H. JONASSEN ET AL., HANDBOOK OF TASK ANALYSIS PROCEDURES, ch. 12 (1989) (discussing "Bloom's Taxonomy of Educational Objectives").

2. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, at xxix (1994) (observing that "[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives").

In plainer English, it means I do not believe it wise to teach a subject as powerful and as potent as Civil Procedure without trying to install some sense of the professional responsibilities that ought to flow from its embrace.

TEACHING BY EXAMPLE STRESSES ANALYSIS AND APPLICATION OVER
MEMORIZATION OF RULES AND DOCTRINES

The first sense in which I mean I teach by example is that I value studying cases and problems not because they are vehicles for memorizing legal rules and doctrine, but because they can be used to introduce you to the kind of rigorous cognitive exercises in which all good lawyers must engage. Rather than working exclusively from the cases, statutes and rules contained in our casebook, we wrestled with hypothetical problems and exercises throughout the semester as a supplement to and overall framework for our studies. The goal was to have you not just think abstractly and passively about a legal issue or a set of facts, but to push you to create something tangible: draft a pleading, frame a request for relief, lodge an objection, or make an argument. My objective, thus, was to encourage you toward active learning—toward the constitution of the tangible. The end product of your study became something you could pick up and hold in your hand and in your mind; something you could turn over and critique, analyze, assess and improve upon; something more than just a summary you read about what someone else had done.

I have found that students do not come to this style of learning easily or with much enthusiasm. Conventional teaching, as typified by the lecturing model, is based on the idea that teachers impart knowledge into empty, expectant vessels waiting passively to be filled. Having been conditioned to accept this traditional form of educational instruction, what Paulo Freire and bell hooks have called the “banking system of education,”³ most of the vessels find the traditional pedagogic approach unthreatening. In law school, the belief that course material can be imparted through straightforward recitation of the law comports jurisprudentially with a formalist view of our legal system. For formalists, rules and doctrines are assumed to be definite and ascertainable.⁴ As a result, the lecturing style of teaching fits comfortably with a formalist approach to teaching law that assumes there are answers to be gleaned and conveyed from careful study of the relevant authorities; and answers, especially for those who have just begun their studies in the field, are welcome indeed.⁵

3. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 5, 14 (1994).

4. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (discussing the rise of formalism in America in the latter part of the nineteenth century).

5. Note that the “Socratic” style of teaching, usually associated with law school teaching,

It must surely, then, have caused a great deal of anxiety for many of you that this course always seemed woefully short of answers. Although those early dog days of August may seem a distant memory now, think back to our earliest classes and you may recall the confusion and uncertainty you felt then. Consider, for instance, how we treated the subject of Rule 8's pleading requirements. After you had read some of the relevant cases, I asked you to draft a complaint, based on the results of an in-class mock client interview we had previously conducted. Your first reaction to all of the demands being made on you to create and think, not merely to read and regurgitate, naturally might have been: "I have no idea what should go into a complaint. I'm not a lawyer. I've only just begun law school. Why can't we see an example of what a lawsuit should look like so that we can use it as a model for drafting this one?"

I must confess these reactions were hardly unexpected. The question you may be asking, then, is why did I insist on this exercise if I thought that many or most of you would dislike it or be even further frustrated by it? My explanation is thus: drafting a lawsuit forced you to wrestle with the actual application of the case law you read to a particular fact pattern you had been given, rather than just debating how close or how far any particular case was from the standard promulgated by Rule 8 and as refined by common law precedents. If I had asked you how much factual information needs to go into a pleading to satisfy Rule 8, based on your reading of the Supreme Court's precedents in *Conley v. Gibson*,⁶ *Leatherman v. Tarrant County Narcotics & Coordination Unit*,⁷ or of particularly important lower court decisions like Judge Keeton's in *Cash Energy, Inc. v. Weiner*,⁸ what kind of answer would you have given? Indeed, is there an answer to this question in the abstract? By insisting that you take the doctrinal background and apply it to a particular fact pattern, you were forced to synthesize, as much as possible, the relevant authorities. In the language of educational theory, you were being asked to produce an authentic response to what you read about the law of procedure—

could just as easily as not be bottomed on a formalist view of law. One could prod students by asking a series of questions about the material covered and still maintain that the law is definite and ascertainable. Indeed, Christopher Columbus Langdell, the iconic image of formalism in the law school classroom, was also the popularizer of the Socratic style of teaching at Harvard Law School. See generally KRONMAN, *supra* note 4, at 170-74. Relating formalism to Socratic technique may be merely an entirely academic exercise anyway, insofar as the most reliable figures suggest that less than a third of professors teaching first-year courses rely primarily on the Socratic method, while nearly 95% of those teaching upper level classes lecture, at least some of the time, to their students. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28-29 (1996).

6. 355 U.S. 41 (1957).

7. 507 U.S. 163 (1993).

8. 768 F. Supp. 892 (D. Mass. 1991).

that is, you were directed to act as lawyers must act when addressing legal issues as they arise.

At the end of the exercise, most of you may not have fully digested the lesson. Many, of course, still yearned for a definitive answer about pleading and still urged that we pinpoint precisely how much detail must be included in a complaint. But even as old habits and attitudes die hard, the process of working through problems and trying your hand at drafting exercises—rather than viewing the question only from the perspective of a dry appellate record—slowly, but surely, began to make some sense. As the semester wore on, more and more of you gradually became less and less uncomfortable with the idea that we were not going to provide answers in class. Having undertaken one exercise after another, the thought eventually began to percolate around the room that there might be more than one right way to put together the allegations of a lawsuit, or to draft discovery requests, or to respond to a summary judgment motion, and on and on. You began to see that there was no Answer, in the sense of some all-encompassing Truth, whether we were talking about the requirements of notice pleading or most of the other topics we addressed. There are boundaries to the law with which one must be familiar, to be sure, but the rules rarely come in one-size-fits-all packages.

My preference for active learning and for framing the in-class conversation around constructive understanding gained through application and analysis over recitation of formal rules is hardly revolutionary. Long before I began teaching, formalism's once firm hold on law school classrooms already had been thoroughly loosened.⁹ Today, it is surely right that most law professors favor more nuanced approaches to legal study than Christopher Columbus Langdell would have recognized or understood. Yet, if formalism's heyday has come and gone (as Jerome Frank¹⁰ and, more recently, Andrew Taslitz¹¹ remind us), the ghost of our Langdellian past still haunts the modern law classroom. How could it be otherwise? I have argued elsewhere that the assumptions about law embodied in formalist thinking are firmly rooted into our societal constructs about the rule of law in general and, to a large extent, may be inherent in the essential base of legitimacy upon which our American judicial system rests.¹²

In the context of the law school classroom, students certainly welcome the traditional approach to legal study. They instinctively feel less threatened by more straightforward recitation of the subject matter. From the instructor's

9. See generally KRONMAN, *supra* note 4 (discussing the demise of formalism, and the role of legal realism, law and economics, and critical legal studies).

10. See Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 21 (1951).

11. See Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 143 (1991) (book review).

12. See generally Lonny Sheinkopf Hoffman, *A Window Into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (book review).

vantage point, teaching is not only made easier by reciting that which is knowable and certain, but it also serves as a measure of academic validation. "I am *sir Oracle*—and when I ope my mouth let no dog bark."¹³ If I, as your professor, lack some superior body of finite and complete knowledge (something upon which I may *profess*), what claim do I have to the podium? Answers—definite answers in the form of black and white rules and clear doctrinal principles—are instant gratification to the newcomer and barometers of accomplishment for the teacher. Formalism is dead; long live formalism.

As with much else in life, I think the more sensible view is to recognize that the pedagogic debate about formalism and its place in legal pedagogy is a matter of emphasis and degree. With other like-minded souls,¹⁴ I believe I endeavor with greater fervor than most to move far away from a doctrinally-centered view of law. On the whole, I prefer application to answers; rigorous thinking to rote recitation of authorities. One of the perceived costs of this pedagogic orientation is that it engenders feelings among students of uncertainty and indeterminacy, at least in the short run. The law never seems settled with the rules pliable to the point of breaking. In practice, however, and over the long run, I think you will find that the kind of intellectual efforts we cultivated here will turn out to be the bread and butter of what you will be asked to do for your own clients. Our in-class efforts were meant, in some measure, to be a valuable practical experience and to provide a training ground of sorts for your future work. By insisting on placing legal questions in a concrete context, the main objective is to encourage students toward the kind of active, applicative learning I think ought to be an integral component of the legal education experience.

I have watched a handful of truly great lawyers represent their clients and, without exception, all of them share at least one remarkable skill: the sage ability to discern that in the hard cases it is usually the *facts*, and not the law, that matter most. The law is never irrelevant, of course, but where there is a legitimate dispute between two or more persons, the relevant rules serve only to frame the context of the debate; by themselves, they do not predetermine outcomes. Memorizing case holdings and legal doctrine will never lead you closer to becoming a great lawyer; and while a successful career surely is not defined solely by the ability to apply your knowledge of the facts of a particular case to the relevant law and then to analyze wisely, these are, nonetheless, essential traits that you must have if you are to be a valued counselor and advocate for others.

13. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 105 (1960).

14. See, e.g., Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289 (2000) (discussing his CaseFile Method of study); see also EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* (4th ed. 2000) (applying problem-based approach to property law casebook).

TEACHING BY EXAMPLE EMPHASIZES CAREFUL ATTENTION TO DETAIL OVER
A BROAD SWEEP THROUGH AN ENTIRE FIELD

The second sense in which I have tried to teach this course by example is by focusing in detail on a smaller number of subjects in procedure rather than undertaking a broad sweeping coverage of the entire field. I have grand ambitions here: to produce students capable of thinking on their own and, thereafter, capable, thinking lawyers. The ambition is grand precisely because it is all too often the case that law students are not trained in a manner that encourages the development of independent reasoning ability. Students then matriculate to the profession without having worked on strengthening this essential skill set. Rigorous teaching can and does take place in law school but the forum, more often than not, is a smaller setting than the first year, large class experience (such as seminars, other small, intensively-focused classes and independent study projects with faculty members). By the time students take these courses, however, attitudes toward law and legal study largely have been set. Eventually, experience in the workplace may fill the holes left by formal legal education but the costs borne will have been substantial: for the lawyer, for her employer and, most of all, for the client. To my mind, as educators, we should strive in the very beginning of a student's studies to inspire good intellectual habits by sifting of the vast riches that can be mined from the development of keen analytic capabilities and from the cultivation of a temperament willing to endure the hard, lonely work that careful and rigorous study usually requires.

In consciously narrowing the number of procedure topics covered in the course, I recognize I am inviting controversy from both students and colleagues who may be concerned that an insufficient quantum of knowledge is being imparted. If I am going to make a convincing case for my pedagogic approach, then it is necessary to begin by recounting what was covered and what was left out from the class, though from having sat through the course you may already have some sense of the lacunas. Our syllabus provides a summary of the topics we examined, broken down into the eight main subject areas as they were addressed:

- (i) Pleadings and related issues (fair notice and special pleading requirements; sanctions; answers and affirmative defenses; amendments; counterclaims and cross claims);
- (ii) Personal jurisdiction and related issues (statutory and constitutional limits on the exercise of territorial jurisdiction; notice and service of process; venue and transfer; forum non conveniens);

- (iii) Subject matter jurisdiction (diversity jurisdiction; federal question jurisdiction; supplemental jurisdiction and removal);
- (iv) Choice of law (brief discussion of *Erie*);
- (v) Pretrial discovery (scope of discovery; written discovery; depositions; initial disclosures and other timing issues; responding/objecting to discovery; discovery disputes);
- (vi) Judgment as a matter of law;
- (vii) Additional parties/claims; and
- (viii) Preclusion law (brief discussion of general principles of res judicata and collateral estoppel).

Even this list is misleading insofar as we did not devote equal attention to all of these subject areas. Noticeably absent are several major topics that nearly all procedure casebooks and—I suspect—a good number of my procedure colleagues around the country do cover. Class actions and complex litigation were omitted entirely. We never addressed the subject of interpleader. The subject of prejudgment remedies was left out. We spent virtually no time either on trial practice and procedure or on appellate procedures, except as certain discrete subjects arose coincidentally with some other part of our conversation. I have no doubt that this list of topics not addressed surely could be expanded further and further. It is, quite clearly, then, an incomplete list. By extension, has not your exposure to the subject of Civil Procedure also been incomplete? Should you ask for your money back?

I have two answers to offer in defense of my pedagogic decision to focus on depth over coverage, although I hasten to add that I regard the former as less my reason for acting than is the latter.

I left off certain topics, not because I think they are unimportant, but rather for the more pedestrian reason that most of you, over the course of your entire careers, will either never come across these legal topics directly in practice, or you will address them very, very infrequently. For my own part, I find virtually the entire field of procedure fascinating. After this year is done, I would be delighted to work with you, through independent study or as a mentor on a law review note, regarding any of these or other topics. For those who know they will need more in-depth coverage of a subject, I encourage further exploration. If you are inclined toward banking law, then take our banking law offerings and immerse yourself in the mud of interpleader actions to your heart's content. My own, best pedagogic judgment, however, is that the topics we covered in class will arise most frequently in the practices of the

vast majority of students—and here I have tried to keep in mind that this room may be filled with as many future transactional lawyers as litigators—and that it is a better service to concentrate our efforts on the issues most of you are most likely to encounter.

There is a second answer I want to give to explain my pedagogic choice. It is, as I indicated before, the more compelling motivation for my adoption of this approach. Through my decision to focus on fewer topics in more detail, I endeavor to challenge you to truly learn something, to digest an issue fully and precisely so that you can draw upon your acquired skills in future study or work. I choose this path instead of seeking to expose you to “everything” related to procedure, as though that were even possible. I believe I have done my job well if I succeed in producing students who are able to think and reason through legal issues on their own, rather than merely attaining a passing familiarity with a topic but no real sense or understanding of it. In short, my guiding philosophy is that I care much more *that* you learn and *how* you learn than about *what* you learn.

Educational theorists would describe this approach as pushing students beyond the “zone of proximal development”; that is, beyond the level of learning they could otherwise obtain on their own.¹⁵ Put another way, rather than merely urging fluency in the vocabulary of the law, I believe that as a teacher I ought to be asking, “What can I do to help students gain a more lasting and deeper intellectual framework than they would otherwise possess if they had not taken this course?” By teaching a smaller number of subjects in greater detail, my firm pedagogic belief is that students will leave more capable of applying their acquired legal acumen to any problem, whether the particular issues were addressed specifically in one of their law school classes or not.

I believe it bolsters the case for teaching procedure by example to say that the subjects one could cover in this course, to a large degree, are fungible. I have created my own list of must-cover topics. Other syllabi may look somewhat, or even markedly, different than mine. Rather than regard these differences as indictments, I view them as confirmations that the subject of procedure is an excellent tool for teaching students how to think critically. Because procedure cuts across the entire legal landscape, I am able to address the entire class at once, without regard to whether you will become estate law lawyers or tax lawyers, environmental lawyers or lawyers who specialize in tort law. It also does not matter whether your career choice is litigation or transactional work. Procedure is relevant to everyone. As a result, I can employ any number of subjects falling under the general rubric of procedure to aid in the development of the skills that are important to all students in

15. L. S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 86-87 (Michael Cole et al. eds., 1978).

becoming successful lawyers and critical thinkers. I could not do the same if I were teaching an advanced course with a specific focus. It is precisely because the contexts in which you will encounter procedural issues are so vast and so innumerable, that I believe it makes little sense to try to pretend it is possible to cover all subjects in the field. Instead, my role is to help sharpen the intellectual tools that will serve you well in a number of different contexts.

There is time enough in later classes, and later in life, for you to become familiar in detail with particular questions and points of law. This course and law school, in general, are of most value if you are pushed to truly dissect a problem, to turn it upside down, to examine it from every side and then, finally, to carefully produce a thoughtful answer. This is a fundamental part of real teaching and learning. By contrast, I do not comprehend how students are served by wide, unfiltered sweeps through vast terrains. Even if the sole measure is how many right answers to legal doctrinal questions will students get after they have taken the final exam and moved on to other courses, conventional law school teaching, particularly as found throughout the first-year curriculum, usually disappoints.¹⁶

A Jewish fable recounts how a famous pianist once was asked how he managed to be so adept in playing the musical notes. To the question, he replied, "The notes I handle no better than many musicians, but the pauses between the notes—ah! That is where the art resides." In law, the pauses between the notes may be likened to the exacting skill of knowing when and how to slow down long enough to ponder a question more deeply than the next. The rules that may apply to any one particular case are readily ascertainable; any conscientious person ought to be able to find them, along with the pertinent case law. But it is the student who has not merely knowledge but a *command* of the law who is exceptional. Stand back! For when you hand her the same rule book, the words may fly off the page. Watch her wield the law, as a sharpened tool—no, better still, as a precisely tuned instrument—to reach the desired result for her client. Having mastered this rare ability, she is one of the few who is capable of recognizing and then invoking the enormous power that lies within the formal rules.

TEACHING BY EXAMPLE EMPHASIZES THE ETHICAL CHOICES AND RESPONSIBILITIES INVOLVED IN BEING A LAWYER

There is, finally, a third respect in which I have tried to teach Civil Procedure by example. I have stressed that there is much more to being a lawyer than merely knowing the law. There is also the challenge of recognizing and then acting on one's ethical obligations: to clients, to other lawyers and to the judicial system.

16. See, e.g., Leslie, *supra* note 14, at 1293 (discussing results following pop quiz given to students).

One irreducible component of a lawyer's professional responsibilities is to treat people with respect and to honor the views, opinions and arguments of others. In the classroom, I regard respect—both as a matter between teacher and student and among students—as an essential element that must be nurtured. In this regard, consider Leigh Van Horn's description of how vibrant educational environments are created and sustained at the secondary school level in her book, *Creating Literary Communities in the Middle School*:

There must be more to my role in developing and sustaining the community than my outward expressions of enthusiasm. The word "respect" is one that is frequently used by my students as they describe aspects of teacher behavior they consider important to their own growth. How is it that we show our students that we have respect for them? It occurs to me that respect is reflected in various ways—our willingness to participate in the learning experience as we work alongside our students, the emphasis we place on learning from one another, the way that we honor the products of our learning, and in the way that we care for one another.¹⁷

I have long felt that law academia has much to learn from the scholarship of teaching and education in other fields. Although we teach to different students, and for different purposes, what we do is fundamentally no different, in my estimation, than what any instructor must do to teach effectively. In my law school classroom, creating an environment of mutual respect is paramount. I never call on students to intimidate them. Rather, I do so to encourage students to wrestle outside of class with the ideas, arguments and issues about which they have read and to come prepared to defend a viewpoint (or, at least, be able to articulate various sides of a debate). I recognize that it is a tricky business at times, particularly since I want to encourage volunteers to answer as well, and not set up a culture that only the person who is "on" should be involved in the discussion. Moreover, it is obvious that some are not as keen on speaking out in class as others.

I regard it, therefore, as one of the most rewarding compliments I have received to be told that those who choose in other settings to be silent, out of fear, intimidation, or merely disinterest, choose instead to come to my class prepared and ready to engage in the daily classroom dialogue. This evidence of the blossoming of mutual respect—as it occurs between teacher and students, and among students—helps create the trust upon which a vibrant learning community depends. And make no mistake, the yield that is produced by the fostering of a healthy and dynamic learning environment truly should be valued at a price far above rubies. Students come prepared to converse, argue and debate, but also with a willingness to consider and listen to the viewpoints of others. Class discussions are made richer by having a greater and wider

17. LEIGH VAN HORN, *CREATING LITERACY COMMUNITIES IN THE MIDDLE SCHOOL* 18-19 (2001).

degree of student participation. Best of all, the dialogue often does not travel unilaterally merely from teacher to student and back again, but flows multilaterally. A chart of many of our discussions would trace a path from teacher to Student 1, then to Student 2, back to teacher, to Student 3, back to Student 1, and so forth. In this more complex web of dialogue and discussion, both individualized and collective learning experiences take root. As the professor, I cannot ask for more.

Building on our classroom experiences, I emphasized throughout the semester the importance of taking these lessons about respect and applying them to thinking about your soon-to-be future lives as lawyers. The responsibility of being a lawyer triggers professional obligations of decency, honesty, promptness, diligence, and general professional courtesy to other lawyers, to your clients, and to the judicial system. Some of these traits are naturally self-enforcing. In seven years of trial practice, I rarely saw a lawyer behave badly in court. Like the unruly child in grade school, unprofessionalism in lawyers tends to rear its ugly head only when the teacher is not looking. Acting professionally should not depend upon whether there is oversight, though. It should be instinctive and expected. Alas, we cannot depend entirely on people doing the right thing only for the sake of doing the right thing. As a result, there are punitive rules in place to deter malfeasance. The extent to which they do so, however, is a matter of some debate.

In addition to the exogenous rules the system imposes on all lawyers, I want to suggest there is another incentive that is particularly potent in encouraging lawyers to strive to take the highest ethical and professional road available. I am referring to the enormous power produced through the cultivation of an upright, honorable reputation. A personal story may help illustrate this point.

When I was in practice, I represented an investment brokerage house against one of its former clients. The client alleged that the company and her agent, in particular, had treated her very badly by churning the account. By this allegation it was meant that the agent (and through the agent, the company) encouraged her to make many small stock transactions that, on the whole, benefited the company and the agent more than the individual by generating commissions through investments that were not always client-appropriate and on which the returns were often sub-par.

One of my main client representatives was the compliance officer for the company. His job was to oversee all of the investments made by the brokerage agents on behalf of their clients, in order to ensure that these transactions were all proper and that everything done was in compliance with the existing securities laws, rules and regulations. During the pretrial phase of the case, I worked with this compliance officer to collect and then produce for the other side all of the documents that the company maintained that were relevant to the case. After I was satisfied I had done a thorough investigation to locate all

relevant records, I submitted all of the material that had been gathered to counsel for the claimant.

Opposing counsel and I disagreed on plenty of occasions throughout the case. Notwithstanding these differences, we managed to treat each other decently, courteously and respectfully. In effect, we amicably agreed to disagree. In this manner, each of us represented our respective clients' interests zealously, but still acted within the bounds of our professional obligations to each other.

The day of trial finally arrived. After opening statements, opposing counsel called their first witness to the stand. By mid-afternoon, several more witnesses had testified briefly and things appeared to be proceeding slowly, but surely, forward. Then, just before our afternoon break, opposing counsel called the company's compliance officer to the stand. The compliance officer had only been on the stand for about half an hour or so when the judges decided to take a brief fifteen-minute break. I never could have predicted what was to happen next.

Immediately upon the recess being called, the compliance officer approached me to ask if we could talk in private. For reasons that I do not think I will ever fully understand, for the first time ever in the case, the compliance officer confessed that he had withheld documents. As he now told me, about a month before this lawsuit had been filed, he had taken some files pertaining to the claimant and put them into his garage.

"Why are you telling me this only now?" I asked, stunned. Silence followed. "And why did you take them to your garage in the first place?" But he offered no explanation that made (or makes, even today) any sense.¹⁸ In retrospect, my best guess as to why he decided to come forward at all rather than remain silent is that this man suddenly found himself jolted into confession. It was as though his appearance on the stand as a sworn witness somehow ignited within him a profound sense of ethical torment. Possibly, this feeling had already been building inside of him for some time, and his sitting on the witness chair was a final straw, the necessary spark, to cause this eruption. I do not know for sure, and I suspect I will never know. I certainly did not know at the time. What I did know was that he was about to return to the witness stand to continue testifying and I had to do something about this new information I had just been given.

Returning to the proceedings, I began by explaining I had just been informed by the witness—literally out in the hallway—that there were additional documents relating to the claimant at the compliance officer's home.

18. What surely makes the story stranger still is that when the documents were finally produced, it turned out that none were particularly probative of the claims being made in this case, although we had little sense of this at the time he made his abrupt announcement in the middle of the hearing. What mattered then, of course, was the appearance of impropriety.

I explained that I had not been told of the existence of these documents before and that, to my knowledge, no other company official had known about them. I expressed my commitment to proceed in whatever fashion the court and the claimant's lawyer thought best, given the extraordinary circumstances.

I can still recall the silence that followed my short remarks. It was palpable and tense. After some time, the lawyer representing the claimant spoke. "I am deeply troubled by this announcement," he began,

and I beg the Court's indulgence to consider what is the best approach to take, under the circumstances. I suspect that an immediate suspension of the trial is in order so that we be given an opportunity to review these newly-discovered documents. After we have an opportunity to do so, I will be in a better position to advise the court on how I think we should proceed.

He then turned and looked directly at me.

I want to add, however, that I do not doubt for a minute that Mr. Hoffman was as taken aback by this announcement as I have been. Throughout my dealings with him, I can say without qualification that he has always acted professionally and with the highest degree of integrity. We have not always agreed about all things in this case, but I am certain that if he had known about these missing records beforehand, he would never have kept it secret. I am not as confident about the integrity of his client, but this should cast no black mark on his record.

As I reflect on the moral of the story, I am reminded of my childhood little league experience. I was never a very good baseball player. When I found myself at bat (which was rare, since that necessitated having me occupy right field, which I did far less adeptly than occupying the right side of the dugout bench), I would often shut my eyes just before the pitcher's release. At times, I liken the experience of being a lawyer to standing there in the batter's box, unprotected and blind. More often than not, we do not see the pitch coming. It whizzes by, and the hot wind trailing behind sends a surge of adrenaline through the body, but it is already too late. The collision either has happened or it has not. Even if we manage to keep our eyes open, unexpected occurrences in our work, as in life, are inevitable.

One of the lessons I take away from my experience in this case is that we ought to act honorably not solely because it is the honorable and right thing to do. We ought to act honorably, as well, precisely because it is not possible to foresee all difficulties we will face in the future. If this sounds pretextual, it is not intended in that way. I did not treat my opposing counsel with respect because I anticipated problems would arise later in the case, and I certainly did not work at building a reputation as a lawyer whose word could be relied upon because I thought I might need to cash in down the road. But knowing that reputation matters—that for a lawyer it is often all that matters—can serve as a powerful reminder that even if there is no way to insure against all unforeseen occurrences, it is still prudent to try, in the main, to fortify ourselves in

advance. We are still going to get hit, of course, though probably not as frequently, and the resulting damage may often be sustainable.

CONCLUSION

One of my intellectual heroes, Karl Llewellyn, once spoke to his own class of students at Columbia, exhorting them to rise to the challenges they would face in law school and beyond:

What I am trying to write in fire on the wall is that the task before you is immense, is overwhelming, and that the official courses of the school are not enough to compass it. "TEKEL: thou art weighed in the balance and found wanting." To do the work is not: to do the classes. Rather must you immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in the law—it is your only hope.¹⁹

The effort required of you is great, but there is no other way around it. This is how it must be with your education and training. I can provide a suitable and encouraging forum in which learning can take place. I can create an environment that is conducive to rigorous thinking and study; but I cannot do it for you. As Llewellyn put it, "[W]e do not teach—you learn."²⁰ At the end of the day, when this course is over, and you have graduated from this place and entered the world as lawyers, you will be on your own. Still, take comfort: the work you have done here and the habits you form as students *can* carry you a great way. The question is only whether we have provided a brilliant space in which you may thrive, and whether, then, you will make the commitment to do so.

19. LLEWELLYN, *supra* note 13, at 110.

20. *Id.* at 109.

The U.S. Legal System: A Short Description

Federal Judicial Center

BACKGROUND

The U.S. Constitution establishes a federal system of government. The constitution gives specific powers to the federal (national) government. All power not delegated to the federal government remains with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary.

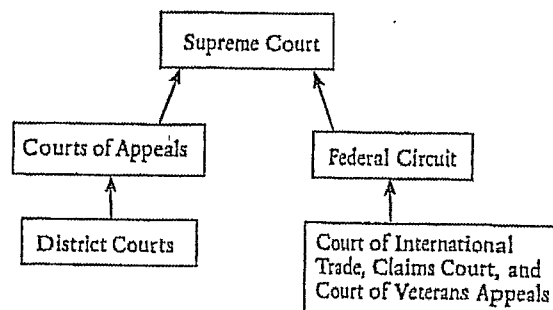
The U.S. Constitution establishes the judicial branch of the federal government and specifies the authority of the federal courts. Federal courts have exclusive jurisdiction only over certain types of cases, such as cases involving federal laws, controversies between states, and cases involving foreign governments. In certain other areas federal courts share jurisdiction with state courts. For example, both federal and state courts may decide cases involving parties who live in different states. State courts have exclusive jurisdiction over the vast majority of cases.

Parties have a right to trial by jury in all criminal and most civil cases. A jury usually consists of a panel of 12 citizens who hear the evidence and apply the law stated by the judge to reach a decision based on the facts as the jury has determined them from the evidence at trial. However, most legal disputes in the United States are resolved before a case reaches a jury. They are resolved by legal motion or settlement, not by trial.

STRUCTURE OF THE FEDERAL COURT SYSTEM

The U.S. Constitution establishes the U.S. Supreme Court and gives Congress the authority to establish the lower federal courts. Congress has established two levels of federal courts below the Supreme Court: the U.S. district courts and the U.S. circuit courts of appeals.

U.S. district courts are the courts of first instance in the federal system. There are 94 such district courts throughout the nation. At least one district court is located in each state. District judges sit individually to hear cases. In addition to district judges, bankruptcy judges (who hear only bankruptcy cases) and magistrate judges (who perform many judicial duties under the general supervision of district judges) are located within the district courts. U.S. circuit courts of appeals are on the next level. There are 12 of these regional intermediate appellate courts located in different parts of the



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THE U.S. LEGAL SYSTEM: A SHORT DESCRIPTION

country. Panels of three judges hear appeals from the district courts. A party to a case may appeal as a matter of right to the circuit court of appeals (except that the government has no right of appeal in a criminal case if the verdict is "not guilty.") These regional circuit courts also hear appeals from decisions of federal administrative agencies. One non-regional circuit court (the Federal Circuit) hears appeals in specialized cases such as cases involving patent laws and claims against the federal government.

At the top of the federal court system is the U.S. Supreme Court, made up of nine justices who sit together to hear cases. At its discretion, the U.S. Supreme Court may hear appeals from the federal circuit courts of appeals as well as the highest state courts if the appeal involves the U.S. Constitution or federal law.

STRUCTURE OF STATE COURT SYSTEMS

The structure of state court systems varies from state to state. Each state court system has unique features; however, some generalizations can be made. Most states have courts of limited jurisdiction presided over by a single judge who hears minor civil and criminal cases. States also have general jurisdiction trial courts that are presided over by a single judge. These trial courts are usually called circuit courts or superior courts and hear major civil and criminal cases. Some states have specialized courts that hear only certain kinds of cases such as traffic or family law cases.

All states have a highest court, usually called a state supreme court, that serves as an appellate court. Many states also have an intermediate appellate court called a court of appeals that hears appeals from the trial court. A party in a case generally has one right of appeal.

COURT ADMINISTRATION

The judicial branches of the federal and state governments are separate from the legislative and executive branches. To insure judicial independence, the judicial branches of the federal and state governments control the administration of the courts. Court administration includes managing court budgets, prescribing rules of trial and appellate procedure, reviewing judicial discipline matters, offering continuing educational programs for judges, and studying court performance.

In the federal judiciary, the Judicial Conference of the United States, made up of 27 members (the Chief Justice of the United States and 26 judges from each geographic region of the United States) has overall administrative responsibility for the courts and has primary authority to make policy regarding the operation of the judicial branch of the government. The Judicial Conference is assisted by a large number of committees made up of federal judges (and sometimes also state court judges and attorneys) who study different parts of the federal court system and make recommendations. An important re-

sponsibility of the Judicial Conference is to recommend changes in the rules of procedure used by all federal courts.

Congress has created three administrative agencies within the judicial branch. The Administrative Office of the U.S. Courts manages the day-to-day operations of the courts, including such matters as payroll, equipment, and supplies. The Federal Judicial Center conducts educational and training programs for judges and court personnel and does research in the fields of court operations and administration. The U.S. Sentencing Commission develops advisory guidelines for federal judges in imposing criminal sentences.

In most state court systems, the state supreme court has overall administrative authority over the court system. It is assisted by an administrative office. The chief justice of the state supreme court usually appoints the director of the state court administrative office.

JUDGES

Justices of the U.S. Supreme Court and circuit and district judges are appointed by the President of the United States if approved by a majority vote of the U.S. Senate. These justices and judges serve "during good behavior"—in effect, a life term. Presidents usually nominate persons to be judges who are members of their own political party. Persons appointed are usually distinguished lawyers, law professors, or lower federal court or state court judges. Once these judges are appointed their salaries cannot be reduced. Federal judges may only be removed from office through an impeachment process in which charges are made by the House of Representatives and a trial is conducted by the Senate. In the entire history of the United States, only a few judges have been impeached and those removed were found to have committed serious misconduct. These protections allow federal judges to exercise independent judgment without political or outside interference or influence.

The methods of selecting state judges vary from state to state and are often different within a state, depending on the type of court. The most common selection systems are by commission nomination and by popular election. In the commission nomination system, judges are appointed by the governor (the state's chief executive) who must choose from a list of candidates selected by an independent commission made up of lawyers, legislators, lay citizens, and sometimes judges. In many states judges are selected by popular election. These elections may be partisan or non-partisan. Candidates for judicial appointment or election must meet certain qualifications, such as being a practicing lawyer for a certain number of years. With very few exceptions, state judges serve specified, renewable terms. All states have procedures governing judicial conduct, discipline, and removal.

In both the federal and state systems, judicial candidates are almost always lawyers with many years of experience. There is no specific course of training for judges and no examination. Some states require judges to attend continuing education programs to learn about developments in the law. Both the federal and state court systems offer beginning and continuing education programs for judges.

PROSECUTORS

Prosecutors in the federal system are part of the U.S. Department of Justice in the executive branch. The Attorney General of the United States, who heads the Department of Justice, is appointed by the President with Senate confirmation. The chief prosecutors in the federal court districts are called U.S. attorneys and are also appointed by the President with Senate confirmation. Within the Department of Justice is the Federal Bureau of Investigation, which investigates crimes against the United States.

Each state also has an attorney general in the state executive branch who is usually elected by the citizens of that state. There are also prosecutors in different regions of the state, called state's attorneys or district attorneys. These prosecutors are also usually elected.

LAWYERS

The U.S. legal system uses the adversarial process. Lawyers are essential to this process. Lawyers are responsible for presenting their clients' evidence and legal arguments to the court. Based on the lawyers' presentations, a trial judge or jury determines the facts and applies the law to reach a decision before judgment is entered.

Individuals are free to represent themselves in American courts, but lawyers are often necessary to present cases effectively. An individual who cannot afford to hire a lawyer may attempt to obtain one through a local legal aid society. Persons accused of crimes who cannot afford a lawyer are represented by a court-appointed attorney or by federal or state public defender offices.

American lawyers are licensed by the individual states in which they practice law. There is no national authority that licenses lawyers. Most states require applicants to hold a law degree (Juris Doctor) from an accredited law school. An American law degree is a post-graduate degree awarded at the end of a three-year course of study. (Normally individuals complete four years of college/university before attending law school). Also, most states require that applicants for a license to practice law pass a written bar examination and meet certain standards of character. Some states allow lawyers to become bar members based on membership in another state's bar. All states provide for out-of-state lawyers to practice in the state in a particular case under certain conditions. Lawyers can engage in any kind of practice. Although there is no formal distinction among types of legal practice, there is much informal specialization.

I. THE ACCIDENT

Lloyd Hull knew he had a serious drinking problem. Ever since his retirement from the Navy two years before, it seemed as though he needed to get a little high, or better, every day. After getting off work on September 21, 1977, in Berryville, Arkansas, Lloyd was on his way to visit his older sister in Okarche, Oklahoma. Next to the bottle of Jim Beam on the front seat was a loaded .22 Magnum pistol for shooting jack rabbits on his sister's farm. Lloyd was driving a 1971 Ford Torino he had bought just the week before, paying \$500 down. It had a large V-8 engine, good tires and brakes, and was in perfect working condition.

As he drove along, Lloyd took shots from the bottle of bourbon. After passing through Tulsa around nightfall, he relaxed as he got on the Turner Turnpike that runs to Oklahoma City. He was not in any particular hurry to get to his sister's place, and he was not paying attention to his speed. Later he assumed he must have been driving too fast on account of the liquor. Lloyd did not notice the small car ahead of him until he was nearly on top of it. By the time he managed to hit his brakes, it was too late to avoid the car. His Torino slammed into the other car, a little off center on the driver's side. Lloyd saw the small car continue down the road for a few seconds after the collision, come to a stop, and then catch on fire. Lloyd pulled over and watched the small car burn, but he did not get out of his Torino. He noticed that the needle on his speedometer was jammed at seventy-five miles per hour.

Harry Robinson suffered from arthritis. During the long winters in Massena, New York, a small town on the St. Lawrence Seaway next to Canada, his ankles and knees would swell up and bleed so badly that he had to stay in bed for two or three months at a time. His doctor had told him he needed a dry, warmer climate, and so he and his wife, Kay, had sold their restaurant and were moving to Tucson, Arizona, with their three children. Kay was driving the 1976 Audi 100 LS that she and Harry had purchased new the year before from Seaway Volkswagen in Massena. Their daughter, Eva, age thirteen, and oldest son, Sam, sixteen, rode with her. Harry had rented a U-Haul truck for the furniture, and he and their other son, Sidney, age fifteen, were riding in the truck about fifty yards ahead of the Audi.

Sam was in the front seat of the Audi, and he was the first to see the approaching headlights through the rear window. Sam yelled to his mother that the car behind was going to hit them, and as Kay looked in her rearview mirror, the Torino crashed into the back of the Audi. Sam saw the fire start in the area over the rear seat right after they were hit. Kay took her foot off the gas pedal and pulled the car off to the side of the road and put it in park. The fire covered the area above the rear seat and was spewing out gray sooty smoke. The blaze spread quickly over the rear seat, and the inside of the car got hot rapidly. Sam and Kay both tried to open their front doors but could not open either of them even though the doors were not locked. Somehow they had been jammed shut by the collision. Sam and Kay tried the rear doors, but they were jammed, too. Eva jumped from the back into the front seat. By that time flames were shooting out of the space where the seat back and the bottom cushion met in the rear seat. All the windows were rolled up, except for the side vent on Kay's side, and none of them would open either. Kay, Eva, and Sam were trapped.

By the time they tried to open all the doors and windows, the fire had spread to the front of the car. Kay lay down on the front seat and tried to kick out the side window, but could not. The car was full of smoke and she could not see anything. Sam tried desperately to break the window with his fist. Kay heard people moving outside the car, but she could not see them. She heard Eva's hair catch on fire; it

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sounded like a torch. Harry Robinson noticed the Audi's headlights moving back and forth in the side mirrors of the U-Haul truck. His son, Sidney, looked out the right mirror and saw the flames ignite. He said, "That's Mama's car," and Harry pulled over and got out of the cab. The Audi was moving toward them sliding sideways, and fire and smoke were coming out of the trunk. The Audi came to a stop and rolled backwards onto the grass by the side of the road. Due to his arthritis, Harry was only able to hobble toward the car and Sidney reached it first. Harry tried to open the doors on the driver's side, and then moved around the car to try the doors on the other side. When he reached the passenger side, the rear window blew out, and the fire seemed to erupt at the back of the car. Harry could see his family struggling inside. Sam appeared to be banging his head against the window, trying to break out. Meanwhile, Sidney was pounding on the outside of the windshield with his fist. Just when it seemed that Kay, Eva, and Sam would never get out of the car alive, a hero came to their rescue.

Mike Miller first noticed the Ford Torino when he passed it on the right. As he looked over at the driver, Mike could tell he was drunk. At a curve further down the highway, the Torino nearly came to a stop and nearly went off the road, but it got back on the highway, practically running over some barrels beside the road. Then it picked up speed and passed Mike. A short time later Mike saw a ball of fire. He immediately stopped and ran over to the burning Audi, leaving his car door open and the engine running. As he ran, he thought perhaps he should have driven back to the tollgate at the entrance to the Turner Turnpike to report the accident instead of trying to help the people in the burning car himself.

By the time Mike reached the Audi, the passenger compartment was engulfed in flames and filled with smoke. All he could see inside were two dark figures moving around, but he could hear people in the car screaming and banging on the windows. Sidney was not doing any good beating on the windshield with his fist, so Mike pushed him aside and kicked at the windshield. As it started to cave in, he gave it another push and knocked a big hole through the windshield on the passenger side.

The fire was so intense by now that it looked as if there were a flamethrower in the back of the car with the blaze swirling around and concentrated on the driver's side. As flames curled around the hole that Mike had made in the windshield, two arms appeared. Mike reached down to grab Sam's arms above the elbows, but Mike's hands slipped off the burning flesh. He grabbed Sam again, this time by the wrists, and pulled his head and shoulders through the hole. While Mike dragged Sam off the hood of the car, another man on the scene, Etsel Warner, pulled Eva through the hole.

The fire continued to burn furiously, and Mike could not see anyone else through the thick black smoke in the car. Then he heard Harry yell, "Get my wife out of there." Mike looked through the hole and a hand suddenly appeared reaching through the smoke and flames. Kay had felt Sam and Eva go out of the car, and when nobody reached in for her, she figured that she must be on the wrong side. She moved over to the other side of the car and stuck her hand out. Mike grabbed her wrist and pulled as hard as he could. Luckily, Kay weighed only 98 pounds, and she practically flew through the hole and out of the inferno.

Mike helped the three victims move away from the burning car. After taking only a couple of steps, Mike heard a small explosion from inside the car. Mike did not look back, but kept walking, only faster, and he got the three victims to lie down. Kay and Eva had been wearing polyester blouses, which had melted and were stuck to their bodies.

The highway patrol arrived on the scene, then the fire department, and finally an ambulance. Highway Patrol Trooper Spencer walked to the Ford Torino to question Lloyd Hull, who had a two-inch gash on his lower lip, but was otherwise unharmed. Since Mr. Hull was obviously drunk, Trooper Spencer arrested him and took him to the hospital to have his lip sewn up, and then to jail, where he remained for fourteen days.

Kay, Sam, and Eva Robinson all received severe burns. Sam suffered first and second degree burns on his face, neck, upper back, and arms. A nostril was burned, and he had a deep scar on his right cheek, and keloid scars on his chin, arms, and hands. Because she had been in the burning car longer, Eva's injuries were more serious. She suffered third degree burns on her neck, shoulders, and arms. Her vocal chords were burned, and she required skin grafts on her back, shoulders, and right hand. Fortunately, though, Eva had covered her face, and it had not been burned as badly as it otherwise might

have been. Both Sam and Eva were hospitalized for six weeks in Tulsa, and spent many months undergoing physical therapy and reconstructive surgery.

Since Kay Robinson had been trapped in the burning car the longest, her burns were the most horrible of all. She had burns on forty-eight percent of her body - thirty-five percent of which were third degree. Kay was in the intensive care unit for seventy-seven days and was hospitalized in Tulsa for another several months. She underwent thirty-four operations, all but two of which were under general anesthetic, for skin grafts and other reconstructive surgery. Most of her fingers were amputated, and she had severe scarring over the entire upper part of her body. Eva and Kay also suffered severe psychological trauma both from the ordeal and from their permanent disfigurement.

With his wife and children hospitalized, Harry Robinson began the process of seeking redress for their injuries. The effort was to continue for more than fifteen years in state and federal trial courts in Oklahoma, a federal trial court in Arizona, the Oklahoma Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court. Along the way the litigation would produce a landmark Supreme Court decision in the area of personal jurisdiction, *World-Wide Volkswagen Corporation v. Woodson*.

II. FILING THE LAWSUIT

Harry Robinson first retained a Tulsa attorney named Charles Whitcomb who brought in the Tulsa law firm of Greer and Greer, headed by two brothers who had specialized in personal injury litigation for many years. Jefferson Greer was the lead attorney, but his younger brother Frank devoted a significant amount of his time to the case as well. Mr. Greer was a prominent member of the personal injury plaintiffs' bar, having served as President of the Oklahoma Trial Lawyers Association in 1966 and as a Governor of The Association of Trial Lawyers of America in 1977. He had more than twenty years of experience trying personal injury cases and had handled some of the earliest products liability cases in Oklahoma.

Lloyd Hull was an obvious defendant, but he had no liability insurance, and consequently any judgment the Robinsons could obtain against him would be uncollectible. To obtain an enforceable judgment, the Robinsons would have to sue the manufacturer of the Audi on a products liability claim. To prevail, they would need to establish that the Audi was defective and that its defects had caused their injuries.

At the time of the Robinsons' accident, the law of products liability was undergoing fundamental change in Oklahoma. Prior to 1974, a manufacturer's liability under Oklahoma law for injuries caused by a defective product could be based upon one of only two theories: negligence, or breach of express or implied warranties of the manufacturer. In 1974, the Oklahoma Supreme Court adopted a rule of strict liability for manufacturers for defects in their products in *Kirkland v. General Motors Corporation*, relying on section 402A of the Restatement (Second) of Torts. Thus, if the Robinsons could establish that the Audi was defective, its manufacturer would be strictly liable for their injuries, regardless of negligence.

The dollar amounts of jury verdicts in personal injury cases had been increasing dramatically during the 1970s. In February 1978, a California jury returned a verdict for \$128.5 million in *Grimshaw v. Ford Motor Company*. There were a number of similarities between the *Grimshaw* case and the Robinson's case against the manufacturer of the Audi. In *Grimshaw*, the gas tank of a 1972 Ford Pinto exploded when the Pinto was "rear-ended" while stalled on a freeway. The driver died as a result of the fire, and Richard Grimshaw, a thirteen-year-old passenger, suffered severe burns on his face and entire body. It was evident that there was the potential for the Robinsons to recover a substantial, perhaps multi-million dollar verdict. The extent of their injuries, the pain and suffering, and the psychological trauma would surely win a jury's sympathy. On the other hand, the Oklahoma law of products liability was in its early stages of development, and there were a number of unsettled legal issues. The trial would be complicated by the need for testimony by experts in automotive engineering and safety, as well as the usual medical experts and experts on damages. Moreover, the German auto manufacturers had earned a reputation for being particularly aggressive defendants. While Mr. Greer realized at the outset that the

case would be difficult to try, he could not have anticipated the extent of the obstacles he would encounter.

An aspect of the Robinsons' case that Mr. Greer immediately recognized as significant was the fact that the accident had occurred just a few miles outside of Tulsa County in Creek County, Oklahoma, making venue proper in Creek County. An oil boom had come to Creek County at the turn of the century, but had ended shortly after World War I, and it had been an especially depressed area during the 1930's. By the 1970's, Creek County was a blue-collar community that had become known to personal injury lawyers throughout the state as being particularly sympathetic to personal injury plaintiffs. The attractiveness of Creek County as a plaintiffs' venue was and is demonstrated by the numerous change of venue cases that have originated there. Mr. Greer regarded Creek County as one of the best venues in which to try a personal injury lawsuit in the United States. He rated it on a par with Dade County, Florida, or Cook County, Illinois, both notoriously high-verdict jurisdictions, and he estimated that a case in Creek County was worth twice as much as it would be in Tulsa County.

Mr. Greer knew he needed to be prepared for the defendants' attempt to defeat venue in Creek County through removal of the case to the United States District Court for the Northern District of Oklahoma in Tulsa, a standard defense strategy in cases involving nonresident defendants. Since the Robinsons had been citizens of New York, he would have to name defendants who were also citizens of New York to destroy diversity of citizenship and thereby block removal. After verifying that Seaway Volkswagen, Inc., the car dealer from whom the Robinsons had purchased the Audi, was incorporated in and had its principal place of business in New York, Mr. Greer named Seaway Volkswagen as one of the defendants in the case. He also named World-Wide Volkswagen, Inc., the distributor which supplied the Audi to Seaway Volkswagen, as another defendant. World-Wide Volkswagen was also a citizen of New York, since it was incorporated there. The other defendant originally named in the case was Volkswagen of America, Inc., which had imported the Audi from Germany and was a citizen of New Jersey.

Mr. Greer filed separate petitions on behalf of each of the Robinsons in the Bristow Division of the District Court of Creek County on October 18, 1977. The Presiding Judge was Charles S. Woodson. Each of the petitions alleged a single cause of action for products liability based on defects in the design and location of the Audi's gas tank.

On May 23, 1978, Mr. Greer filed amended petitions in which he added Volkswagenwerk Aktiengesellschaft (Volkswagen of Germany) as a defendant. At the time Mr. Greer understood that Volkswagen of Germany had manufactured the Audi. He later was informed through a conversation with defense counsel and in responses to his interrogatories that the manufacturer of the Audi was Audi NSU Auto Union Aktiengesellschaft (Audi NSU). Accordingly, on June 14, 1978, he obtained an order substituting Audi NSU for Volkswagen of Germany as the defendant manufacturer. The correct identity of the Audi's manufacturer would later become a crucial issue in the case.

Volkswagen of Germany, Volkswagen of America, and Audi NSU were affiliated companies, and all were represented in the United States by the prestigious Wall Street law firm of Herzfeld and Rubin. Rhodes, Hieronymus, Holloway and Wilson, a Tulsa law firm specializing in insurance defense, was retained as local counsel. Bert Jones, a senior partner at Rhodes, Hieronymus, took charge of the case in Tulsa. Separate counsel were needed for the other defendants, World-Wide and Seaway Volkswagen, and Mr. Jones recommended Tulsa lawyers Mike Barkley and Dan Rogers, respectively, to represent them.

Mike Barkley was twenty-nine years old at the time, and he had recently set up his own office. Before that, he had been an associate for several years at Rogers, Rogers and Jones, an insurance defense firm in which Dan Rogers was a named partner. Having been on his own for only a short while, Mike was thrilled to get the call from Mr. Jones concerning the case, and he was eager to defend his new client, World-Wide Volkswagen.

Volkswagen of America, World-Wide, and Seaway Volkswagen each filed special appearances to contest jurisdiction in Oklahoma and venue in Creek County, and after a hearing on December 21, 1977, Judge Woodson overruled their special appearances. Harry Robinson's deposition was taken on December 30, and the defendants learned that prior to the accident he and Kay Robinson had sold their

home and business in New York and had already purchased a new home in Arizona. On January 5, 1978, the defendants joined in a petition for removal to the United States District Court for the Northern District of Oklahoma, claiming that the Robinsons were no longer citizens of New York, and consequently, federal subject-matter jurisdiction existed based on diversity of citizenship.

Mr. Greer responded with a motion to remand in which he contended that although the Robinsons were in the process of changing their citizenship, they did not become citizens of Arizona until arriving there after their release from the hospital in Tulsa. He argued that when their petition was filed in Creek County, the Robinsons were still citizens of New York, like World-Wide Volkswagen and Seaway, and thus there could be no federal subject-matter jurisdiction based on diversity of citizenship.

[section on removal edited out]

III. THE BATTLE OVER JURISDICTION

Since removal had not been successful, World-Wide Volkswagen's only way to avoid trial in Creek County was by establishing that Oklahoma lacked personal jurisdiction over the company. On January 5, 1978, the same day the defendants had filed the petition for removal, World-Wide Volkswagen and Seaway Volkswagen had filed separate motions for Judge Woodson to reconsider his order overruling their special appearances. No action had been taken on the motions to reconsider while the case was in federal court, but once it was remanded to Creek County, Mike Barkley had the motions set for rehearing. . . .

In 1978, Oklahoma had two long-arm jurisdiction statutes that permitted its courts to exercise jurisdiction over nonresident defendants, sections 187 and 1701.03 of title 12 of the Oklahoma Statutes. Section 187 had been adopted in 1963 and was based on the Illinois long arm statute. Although section 187 authorized the assertion of personal jurisdiction over nonresidents with respect to causes of action arising from a variety of acts, none of these applied to World-Wide Volkswagen. Section 1701.03 had been adopted in 1965 as a part of the Uniform Interstate and International Procedure Act. It was somewhat broader than section 187 and authorized the exercise of personal jurisdiction over a nonresident defendant as to causes of action arising from either of the following:

- (3) causing tortious injury in this state by an act or omission in this state;
- (4) causing tortious injury in this state by an act or omission outside this state if the nonresident regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.

The Robinsons' injuries had occurred in Oklahoma, but the acts or omissions of World-Wide Volkswagen that were alleged to have caused the injuries would appear to have been in New York, rather than Oklahoma. Moreover, World-Wide Volkswagen's distribution franchise was limited to Connecticut, New York, and New Jersey, and it neither conducted business in Oklahoma nor derived any revenue from the state. Thus, there seemed to be a strong basis for arguing that World-Wide Volkswagen was not subject to personal jurisdiction under Oklahoma's long-arm statutes. On the other hand, only two years before, the Oklahoma Supreme Court had held that section 1701.03 authorized the assertion of jurisdiction over Volkswagen of America and a Volkswagen distributor in Texas in another products liability case.

[Attorney Claire] Eagan argued to Judge Woodson that Oklahoma did not have personal jurisdiction over her client under section 1701.03, because World-Wide Volkswagen did not sell any automobiles in Oklahoma. In addition, she maintained that construing section 1701.03 to extend personal jurisdiction over World-Wide Volkswagen would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Judge Woodson advised the inexperienced lawyer that the Fourteenth Amendment did not carry much weight in Creek County, and the motion to reconsider was denied.

Ms. Eagan was ready to abandon her effort, but Mike Barkley was convinced that Creek County had no jurisdiction over his client. He told her to prepare an application to assume original jurisdiction and a petition for a writ of prohibition and file it with the Oklahoma Supreme Court. Although Volkswagen of America and Audi NSU had also objected to jurisdiction at the trial court level, they did not join in World-Wide Volkswagen's petition to the Oklahoma Supreme Court. However, Seaway Volkswagen, the auto dealer, did join in the petition. Seaway Volkswagen's liability was based on its having sold a defective product that World-Wide Volkswagen had supplied, and therefore, it was entitled to indemnity from World-Wide Volkswagen. Moreover, as long as Seaway Volkswagen did not take a position that was adverse to World-Wide Volkswagen, it would be entitled to indemnification for its attorney's fees. Consequently, World-Wide Volkswagen assumed primary responsibility for defending the case against Seaway Volkswagen and itself, and Seaway Volkswagen took a passive role throughout the litigation, joining in all of World-Wide Volkswagen's actions.

The Oklahoma Supreme Court granted the application to assume original jurisdiction, but it denied the writ of prohibition. Mr. Greer maintained before the Oklahoma Supreme Court that jurisdiction existed under both paragraphs (3) and (4) of section 1701.03, citing the Illinois Supreme Court's holding in *Gray v. American Radiator & Standard Sanitary Corporation*. The Gray case involved an interpretation of the provision in the Illinois long-arm statute that authorized the assertion of jurisdiction arising from the "commission of a single tort within this State." Reasoning that a tort was not complete until a plaintiff sustained an injury, the Illinois Supreme Court decided that a defendant that had manufactured and sold a defective product in another state committed a tort in Illinois and was therefore subject to jurisdiction there, because the plaintiff's injury resulting from the defect was sustained in Illinois.

The Oklahoma Supreme Court ruled that a similar interpretation of paragraph (3) would render paragraph (4) nugatory, because it would make it impossible to have a tortious injury in the state caused by an act or omission outside the state. Nevertheless, it held that paragraph (4) conferred jurisdiction over World-Wide Volkswagen, because given the retail value of the Audi, World-Wide Volkswagen had derived substantial revenue from the Robinsons' use of the Audi in Oklahoma as well as from the sale of other automobiles that from time to time would foreseeably be used in Oklahoma. The Oklahoma Supreme Court explained its holding as follows:

The product being sold and distributed by World-Wide and Seaway Volkswagen is by its very design and purpose so mobile that World-Wide and Seaway Volkswagen can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by World-Wide and Seaway Volkswagen were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that World-Wide and Seaway Volkswagen derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that World-Wide and Seaway Volkswagen derive substantial revenue from goods used or consumed in this State.

As soon as the Oklahoma Supreme Court's decision came down, Mr. Barkley told Ms. Eagan to pack her bags because they were going to New York. Mr. Barkley was still not ready to give up, and he wanted to obtain authorization from his client to petition the United States Supreme Court for certiorari.

When Mr. Barkley and Ms. Eagan met with World-Wide Volkswagen's corporate counsel and its insurer in New York, both refused to authorize them to incur any additional legal expenses contesting the jurisdictional issue. Their justification was that World-Wide Volkswagen was entitled to indemnification against Volkswagen of America and Audi NSU for the same reason that Seaway Volkswagen was entitled to be indemnified by World-Wide Volkswagen. Since World-Wide Volkswagen was not willing to pay to take the case to the United States Supreme Court, Ms. Eagan thought the battle over jurisdiction was finally at an end.

But Mr. Barkley took Ms. Eagan across the street to the offices of Herzfeld and Rubin, the law firm representing Volkswagen of America and Audi NSU. Mr. Barkley explained to the lawyers at Herzfeld and Rubin that if World-Wide and Seaway Volkswagen were dismissed for lack of personal jurisdiction, Volkswagen of America and Audi NSU could remove the case to federal court and avoid a trial before a "plaintiff's jury" in Creek County. He managed to convince them that it was in their clients' interests to underwrite the legal expenses of taking the case to the United States Supreme Court, particularly since their clients were already obligated to indemnify World-Wide and Seaway Volkswagen's legal expenses. As a result of Mike Barkley's meeting with Herzfeld and Rubin, Volkswagen of America and Audi NSU agreed to pay for World-Wide Volkswagen's petition for certiorari. In addition, Herzfeld and Rubin would participate in the preparation of the briefs, and a senior partner of Herzfeld and Rubin, Herbert Rubin, would argue World-Wide Volkswagen's cause before the Supreme Court instead of Mike Barkley. Had the "upstream" defendants not paid World-Wide Volkswagen's legal expenses, there would have been no *World-Wide Volkswagen Corp. v. Woodson* decision by the United States Supreme Court.

The work began on the petition for certiorari. The weakest link in the Oklahoma Supreme Court's opinion was its conclusion that World-Wide and Seaway Volkswagen derived substantial revenue from the use of automobiles in Oklahoma, since it was likely that no automobiles they had ever sold, aside from the Robinsons' Audi, had been used in Oklahoma. However, the Oklahoma Supreme Court is the final authority on matters of Oklahoma law, such as the meaning of the phrase "derives substantial revenue from goods used . . . in this state" in section 1701.03(4). The only issue the United States Supreme Court could address was whether Oklahoma's exercise of jurisdiction over World-Wide and Seaway Volkswagen violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution.

The brief accompanying World-Wide and Seaway Volkswagen's petition for certiorari emphasized the Supreme Court's three most recent cases in which it had ruled in favor of defendants contesting personal jurisdiction. In *Hanson v. Denckla*, the Supreme Court first articulated the rule that for a defendant to be subject to a state court's jurisdiction, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The Supreme Court again employed this "purposeful availment" requirement to strike down state courts' assertion of jurisdiction over nonresident defendants in *Shaffer v. Heitner* and *Kulko v. Superior Court*, and World-Wide and Seaway Volkswagen urged its application in their own case. They pointed out that the Robinsons were responsible for the Audi's entering Oklahoma, and argued that they should not be subject to jurisdiction in Oklahoma because of "a fortuitous event precipitated by the unilateral, voluntary act of the Robinsons in driving through that state." World-Wide and Seaway Volkswagen further argued the mere fact it may have been foreseeable that the Robinsons might drive to Oklahoma should not be enough to permit its courts to exercise jurisdiction over the companies; otherwise, any local seller would become subject to suit in every state where a purchaser might take a product. They contended that to provide a sufficient basis for jurisdiction, foreseeability had to be coupled with the "affiliating circumstances" that the seller purposefully availed itself of the benefits of the forum state.

Mr. Greer responded that World-Wide and Seaway Volkswagen were parts of a national network of Audi dealers, including one located in Tulsa on Route 66. Consequently, both World-Wide and Seaway Volkswagen could reasonably anticipate that purchasers of their automobiles would travel to Oklahoma and require servicing there. He also cited a number of cases upholding jurisdiction where torts committed in another state resulted in injuries in the forum state. The Robinsons' brief in opposition to the petition for certiorari concluded with an appeal to the Supreme Court that it not return to the restrictive jurisdictional doctrine of *Fernoyer v. Naff*, which the Supreme Court had rejected twenty years before.

The Supreme Court grants fewer than five percent of the thousands of petitions for certiorari that are filed with it each year. The chances of having one's case heard by the High Court are therefore ordinarily slim, but the likelihood that the Court would grant World-Wide Volkswagen's petition seemed

especially remote. Not only had the Supreme Court heard few cases involving personal jurisdiction over the preceding two decades, but it had denied numerous petitions for certiorari presenting issues similar to those raised by World-Wide Volkswagen.

One aspect of World-Wide Volkswagen's case, however, distinguished it from the others: it was the first petition for certiorari in a products liability case where the allegedly defective product had been brought into the forum state by a consumer, rather than by the manufacturer or a distributor. This would prove to be crucial to the Supreme Court's decision that Oklahoma lacked jurisdiction over World-Wide Volkswagen and Seaway. Another factor that may have influenced the Supreme Court was the coincidental filing of an appeal in *Rush v. Savchuk*, a case from Minnesota involving an issue of quasi in rem jurisdiction. The Supreme Court noted probable jurisdiction in *Rush v. Savchuk* on the same day that it granted World-Wide and Seaway Volkswagen's petition for certiorari, and ordered the two cases set for argument together.

...
World-Wide and Seaway Volkswagen's battle over jurisdiction ended with the Supreme Court's decision (*WWWV v. Woodson, infra*), which has become a staple of civil procedure courses and casebooks since 1980. But the battle over jurisdiction was only a preliminary skirmish in the many years of litigation that lay ahead for the parties who remained in the case.

Subsequent History

On remand, case went to trial. Jury rendered verdict for D. That was appealed & there was a second trial, but ultimately, after 20 years of litigation, Robinsons received nothing.

HOW EQUITY CONQUERED COMMON LAW: THE FEDERAL RULES OF CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE

STEPHEN N. SUBRINT†

I. COMMON LAW, EQUITY, AND THE FEDERAL RULES OF CIVIL PROCEDURE

Much of the formal litigation in England historically took place in a two-court system: "common law" or "law" courts, and "Chancery" or "equity" courts.²³ Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences. The more formalized common law procedure has been so ridiculed that we tend to ignore its development to meet important needs, some of which still endure, and that many of its underlying purposes still make sense. Conversely, especially during this century, equity has been touted in ways that obscure the underlying drawbacks to its use as the procedural model.

A. *Common Law Procedure*

The law courts had three identifying characteristics: the writ or formulary system, the jury, and single issue pleading.²⁴ Each matured in England between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner.

²³ A rich variety of other courts also existed. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1047-89 (W. Lewis ed. 1898).

²⁴ See S. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969). The three Central law courts were King's Bench, Exchequer, and Common Pleas. For a description of the courts, see *id.* at 20-22; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king's secretary, adviser, and agent. The Chancellor's staff, the Chancery, sold writs, "royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant."²⁵ Clerks organized complaints into categories, and particular writs came to be used for particular types of oft-repeated complaints.²⁶ Over time, "plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to."²⁷

The writs gradually began to carry with them notions of what events would permit what result or remedy. Ultimately, an organized body of what is now commonly called substantive law evolved from the writs.²⁸ Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.²⁹ The writ of novel disseisin, for instance, was designed to provide for the rapid ejection of one who was wrongfully on the plaintiff's land. It was accompanied by more expeditious procedures than the writ of right, which decided the ultimate issue of ownership.³⁰ The writ system also confined adjudication. The

²⁵ S. MILSOM, *supra* note 24, at 22.

²⁶ See T. PLUCKNETT, *supra* note 24, at 353-54.

²⁷ S. MILSOM, *supra* note 24, at 25.

²⁸ See H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886) ("So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . .").

²⁹ See F. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES* 296-98 (A. Chaytor & W. Whittaker eds. 1920).

³⁰ See *id.* at 318-23. "Seisin" has a meaning similar to, but different from, possession. Feudalism renders dysfunctional our concepts of "possession," "right," or "title." See S. MILSOM, *supra* note 24, at 103-05. Other examples of the common law attempt to integrate substantive rights and methods for their enforcement can be seen in the writs of covenant and replevin. In covenant, the requirement of a seal for proof probably improved the likelihood that only honest claims were pursued. See *id.* at 213. In replevin, the distrainee (the plaintiff who says that his goods were wrongfully taken) is entitled to immediate possession of the goods upon giving a "bond for the value of the chattels, conditioned on his loss of the suit and failure to return the chattels to the defendant." S. COHN, *THE COMMON-LAW FOUNDATION OF CIVIL PROCEDURE* 19 (1971); see F. MAITLAND, *supra* note 29, at 355. This, too, should discourage frivolous suits, as well as self-help. For contemporary suggestions to integrate different areas of substantive law with different procedures, see Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 900 (1974); Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE*, *supra* note 6, at 65.

obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.³¹

Like the evolution of the writ, the development of the jury trial represented movement toward confinement, focus, rationality, and a legal system of defined rules to regulate human conduct. Before the development of the jury, parties at common law were tested before God through ordeal, battle, or the swearing of "compurgators."³² With the inception of juries, disputants began telling their respective stories to their peers, who determined which version was correct. Because human beings (rather than God) were to hear and decide the case, an individual might have found it favorable to present facts that might have changed the minds of the now-human dispute resolvers. Once the idea emerged that a special set of circumstances could necessitate a different verdict, the seed of substantive law had been planted: specific facts would trigger specific legal consequences. The jury concept brought with it, therefore, the idea of consistent and predictable law application by human beings, rather than divine justice by mysterious means. It now became logical for a trial to focus on proof relevant to those specific facts at issue that carry with them a legal consequence.³³

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse.³⁴ Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.³⁵

³¹ See F. JAMES, JR. & G. HAZARD, JR., *CIVIL PROCEDURE* 462 (3d ed. 1985) [hereinafter F. JAMES & G. HAZARD (3d)]; F. MAITLAND, *supra* note 29, at 298-99.

³² See H. LEA, *SUPERSTITION AND FORCE* 252, 279 (3d ed. 1878); T. PLUCKNETT, *supra* note 24, at 114-18; C. REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 186-87 (1980).

³³ See S. MILSOM, *supra* note 24, at 30-32; T. PLUCKNETT, *supra* note 24, at 124-30.

³⁴ See S. COHN, *supra* note 30, at 47; T. PLUCKNETT, *supra* note 24, at 409-10, 413-14.

³⁵ See 1 J. CHITTY, *TREATISE ON PLEADING* 261-63 (1879); S. COHN, *supra* note 30, at 46-48; T. PLUCKNETT, *supra* note 24, at 405-15; C. REMBAR, *supra* note 32, at 224-28. See generally H. STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW* (1824) (discussing the "science" of pleading under the common law system).

Lawyers well into the nineteenth century on both sides of the Atlantic viewed the "common law" procedural system as comprising the writ or form of action, the jury, and the technical pleading requirements that attempted to reduce cases to a single issue. This system became rigid and rarefied.³⁶ Due to the countless pleading rules, a party could easily lose on technical grounds.³⁷ Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action.³⁸ Lawyers also found other ways around the common law rigidities, such as asserting the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.³⁹

The common law procedural system, nonetheless, had its virtues. The formality and confining nature of the writs and pleading rules permitted judges, who were centralized in London, to attempt (and often to succeed) in forging a consistent, rational body of law, which provided lawyers with analytical cubbyholes.⁴⁰ The common law system, furthermore, permitted increased participation by the lay community. If the pleading resulted in the need for a factual determination, it could be sent to the county where the parties resided. A judge from the Central Court could easily carry the papers, reduced to a single issue, in his satchel, and convene a jury at an "assize."

The focusing of cases to a single issue also aided both judges and lawyers in their effort to understand and apply the law, as well as assisting lay jurors in resolving factual disputes. The use of known writs, each with their own process, substance, and remedy, allowed the integration of the ends sought and means used. The system presumably achieved—or at least tried to achieve—some degree of predictability about what legal consequences citizens could expect to flow from their conduct. Comparing the traditional common law system to that of his own day, Maitland (1850-1906) commented on the common law's attempt to control discretion: "Now-a-days all is regulated by general

³⁶ See T. PLUCKNETT, *supra* note 24, at 410.

³⁷ See J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 331; C. REMBAR, *supra* note 32, at 225-31. On the number and subtlety of writs, see 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 564-67 (2d ed., reissued 1968).

³⁸ See, e.g., C. REMBAR, *supra* note 32, at 224.

³⁹ See J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 338-39; F. MAITLAND, *supra* note 29, at 300-01; S. MILSON, *supra* note 24, at 247-52; C. REMBAR, *supra* note 32, at 207-12; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 520-21 (1907).

⁴⁰ For an example of the relationship of writs and common law pleading to the development of the legal profession, see S. MILSON, *supra* note 24, at 28-42; T. PLUCKNETT, *supra* note 24, at 216-17.

rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."⁴¹

B. *Equity Procedure*

By the early sixteenth century it was apparent that the common law system was accompanied by a substantially different one called equity. Equity was administered by the Chancellor, as distinguished from the three central common law courts with their common law judges.⁴² The contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.⁴³ As previously noted, although the writs had started as individualized commands from the Chancellor, by the fourteenth century several of the writs had become routinized.⁴⁴ Grievants, however, continued to petition the Chancellor for assistance in unusual circumstances, such as where the petitioner was aged or ill, or his adversary particularly influential.⁴⁵ Whereas the writ and single issue common law system forced disputes into narrow cubbyholes, these petitions to the Chancellor tended to tell more of the story behind a dispute. Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.⁴⁶ The bill in equity became the procedural vehicle for the exceptional case. The main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships.⁴⁷

The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's con-

⁴¹ F. MAITLAND, *supra* note 29, at 298.

⁴² Around 1523, Christopher St. Germain explored the relationship of equity to the common law system in *Dialogues Between a Doctor of Divinity and a Student of the Common Law*. For a discussion of this work and its impact, see S. MILSOM, *supra* note 24, at 79-83; T. PLUCKNETT, *supra* note 24, at 279-80.

⁴³ See S. MILSOM, *supra* note 24, at 74-87.

⁴⁴ See *supra* notes 25-27 and accompanying text.

⁴⁵ See F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-75, 77.

⁴⁶ See F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-79; T. PLUCKNETT, *supra* note 24, at 688-89.

⁴⁷ See F. MAITLAND, *supra* note 29, at 7-8. Maitland illustrates equity jurisdiction with "an old rhyme": "These three give place in court of conscience/Fraud, accident, and breach of confidence." *Id.* at 7. The idea that more formal legal rules should be accompanied by a more discretionary approach in order to prevent injustice was not new. On the Jewish notion of justice and mercy, see 10 ENCYCLOPEDIA JUDAICA 476, 476-77 (1977). On the Greek notion of *epieikeia*, connoting "clemency, leniency, indulgence, or forgiveness," see G. MCDOWELL, *supra* note 9, at 15.

science.⁴⁸ This had far-reaching repercussions. In a common law suit, the self-interest of the parties was thought too great to permit them to testify.⁴⁹ The Chancellor, however, compelled the defendant personally to come before him to answer under oath each sentence of the petitioner's bill. There were also questions attached. This was a precursor to modern pretrial discovery.⁵⁰ Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions.⁵¹

As the defendant was before the Chancellor to have his conscience searched, the Chancellor could order him personally to perform or not perform a specific act.⁵² Such authority was necessary to enforce a trust. If the defendant was found to be holding land in trust for another, he could be compelled to give the use and profit of the property to the beneficiary.⁵³ The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.⁵⁴

The Chancellors were usually bishops, and so the term "conscience" again became associated with equity.⁵⁵ Notwithstanding the writs and the common law that developed around the writs, the Chancellor was expected to consider all of the circumstances and interests of all affected parties. He consequently was also to consider the larger moral issues and questions of fairness.⁵⁶ The equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.⁵⁷ There was now a considerably larger litiga-

⁴⁸ See 5 W. HOLDSWORTH, A HISTORY OF THE COMMON LAW 216 (2d ed. 1937); S. MILSOM, *supra* note 24, at 81-82.

⁴⁹ See T. PLUCKNETT, *supra* note 24, at 689.

⁵⁰ See F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 171-72 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD (2d)].

⁵¹ See *id.*; C. REMBAR, *supra* note 32, at 298; Bowen, *supra* note 39, at 524-25.

⁵² See S. MILSOM, *supra* note 24, at 81-82; T. PLUCKNETT, *supra* note 24, at 689. It is appropriate to use "he" for defendants because during this period women were usually treated as incompetent to be parties to a suit. See F. JAMES & G. HAZARD (2d), *supra* note 50, at 415.

⁵³ See C. REMBAR, *supra* note 32, at 296.

⁵⁴ See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973); F. MAITLAND, *supra* note 29, at 254-67; S. MILSOM, *supra* note 24, at 81-82; Bowen, *supra* note 39, at 517-18.

⁵⁵ See T. PLUCKNETT, *supra* note 24, at 685-86, who wrote: "[T]he ecclesiastical chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law."

⁵⁶ See S. MILSOM, *supra* note 24, at 79-81. Sixteenth century theorists recognized "the appeal to the chancellor [as being] for the single [divine] justice, in circumstances in which the human [common law] machinery was going to fail." *Id.* at 80.

⁵⁷ See Bowen, *supra* note 39, at 516, 523-31 ("[I]t was a necessary maxim of the

tion package. This less individualized justice demanded and resulted in more discretionary power lodged in a single Chancellor, who resolved—often in a most leisurely manner—issues both of law and fact.⁵⁸ The lay jury was normally excluded.⁵⁹

By the sixteenth century, the development of common law jurisprudence thus reflected a very different legal consciousness from equity. Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. Just as the common law procedural rules and the growth of common law rights were related, so too were the wide-open equity procedures related to the scope of the Chancellor's discretion and his ability to create new legal principles. In equity, the Chancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.⁶⁰ The equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action, and a single issue, nor by being as bound by precedent; and they did not share power with lay juries.⁶¹

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.⁶² Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a “gloss” or “appendix” to the more structured common law.⁶³ An expansive equity practice developed as a necessary companion to common law.⁶⁴

Court of Chancery that all parties interested in the result must be parties to the suit.”)

⁵⁸ See S. MILSOM, *supra* note 24, at 82-83 (“It is a regular institution, but not applying rules; rather it is using its discretion to disturb their effect.”).

The length of equitable proceedings was notorious. This aspect of equitable proceedings has been attributed to the court's desire to effect complete rather than merely substantial justice, as well as the self-interest of Chancery officials who profited from lengthy suits. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 373-74 (3rd ed. 1944).

⁵⁹ See S. COHN, *supra* note 30, at 1.

⁶⁰ See C. REMBAR, *supra* note 32, at 275.

⁶¹ For summaries of the different approaches of law and equity, see L. FRIEDMAN, *supra* note 54, at 21-23; F. JAMES & G. HAZARD (3rd), *supra* note 31, at 11-14; S. MILSOM, *supra* note 24, at 74-83.

⁶² See R. HUGHES, *HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS* 418-20 (2d ed. 1913).

⁶³ See F. MAITLAND, *supra* note 29, at 18-19.

⁶⁴ On occasion, a new equity rule would become part of the law applied in the common law courts. See F. JAMES & G. HAZARD (3d), *supra* note 31, at 16; T.

The disparities between law and equity were not always stark. Not all common law declarations were incisive, and common law pleading did not always isolate tidy issues; sometimes there was joinder of parties or issues. Conversely, equity often developed its own formal rules of both substance and process.⁶⁵ It is true, however, that when looked at as a whole, the common law writ/single issue system took seriously the importance of defining the case; integrating forms of action with procedure and remedy; confining the size of disputes; and articulating the legal and factual issues. In short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences.

This Article will explore flaws in equity and law when we examine the evolution of procedure in America. It is important to note here, however, that from the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.⁶⁶ This is not to minimize the problems associated with common law practice, or the need for a more flexible counterpart to the common law. The point is that a less structured multiparty, multi-issue practice has always had significant burdens.⁶⁷

PLUCKNETT, *supra* note 24, at 689.

⁶⁵ For examples of permissible joinder of parties and forms of action at common law, see F. JAMES & G. HAZARD (2d), *supra* note 50, at 452-54, 463-64. Much of the writing of the legal realists emphasized the discretion inherent in all judging and dispute resolution. See, e.g., the Chapters on "Rule-Skepticism," "Fact-Skepticism," and "The Prediction of Decisions" in W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS* 48-182 (1968) (examining the realist movement's revolt against classical jurisprudence). See *infra* note 131 (on how equity practice became complicated).

⁶⁶ See, e.g., 1 W. HOLDSWORTH, *supra* note 58, at 425-28; C. REMBAR, *supra* note 32, at 298-303; R. WALKER AND M. WALKER, *THE ENGLISH LEGAL SYSTEM* 31 (3rd ed. 1972); Bowen, *supra* note 39, at 524-27. One commentator has noted that some of the problem in equity

no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court. Not until 1913 do we find the appointment of a Vice-Chancellor.

T. PLUCKNETT, *supra* note 24, at 689 (footnote omitted). For complaints about equity in America, see *infra* notes 90-106 and accompanying text.

⁶⁷ Equity also became associated with monarchy and nondemocratic principles, because of its inherent discretion, rejection of the lay jury, and clashes with Parliament and the law courts. See F. JAMES & G. HAZARD (3d), *supra* note 31, at 14-16. See generally Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 *ILL. L. REV.* 127 (1941) (exploring the power struggle between the courts of common law and equity in the 17th century).

C. *The Equity-Dominated Federal Rules of Civil Procedure*

In the twentieth century, Federal Rules proponents emphasized that they were not suggesting new procedures. They rather insisted that they were just combining the best and most enlightened rules adopted elsewhere.⁶⁸ For the most part the proponents were right, but their argument ignores the implications of their choices regarding what the "best" rules were. The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.⁶⁹ The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the Rules, equity procedure and jurisprudence historically had applied to only a small percentage of the totality of litigation.⁷⁰ Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. Moreover, the Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery.⁷¹

⁶⁸ See, e.g., AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE (E. Hammond ed. 1939) (proceedings of the Institute on the Federal Rules of Civil Procedure and the Symposium on the Federal Rules of Civil Procedure). For a description of the sources of various rules, see *Hearings on the Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 4 (1938) [hereinafter *1938 House Hearings*] (statement of Homer Cummings, U.S. Attorney General); AMERICAN BAR ASSOCIATION, *supra*, at 28, 32 (statement of Edgar E. Tolman, member of the drafting committees); *id.* at 45, 51, 54-55, 57, 59, 66 (statement of Charles E. Clark, Dean of Yale Law School).

⁶⁹ See *1938 House Hearings*, *supra* note 68, at 73 (statement of Edgar B. Tolman); P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 19, 20 (2d ed. 1977); 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008; Clark & Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 434-35 (1935) [hereinafter Clark & Moore I]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955).

⁷⁰ See Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-38 (1982).

⁷¹ Compare Rule 25 (Bill of Complaint—Contents) of the Federal Equity Rules of 1912 in J. HOPKINS, THE NEW FEDERAL EQUITY RULES (1913) [hereinafter FED. EQ. R.] (requiring, inter alia, "ultimate facts") with FED. R. CIV. P. 8(a)(2) (General Rules of Pleading: Claims for Relief); compare FED. EQ. R. 26 (Joinder of Causes of Action) (requiring that joined causes of action be "cognizable in equity," and that "when there is more than one plaintiff, the causes of action joined must be joint . . .") with FED. R. CIV. P. 18(a) (Joinder of Claims and Remedies: Joinder of Claims) and 20(a) (Permissive Joinder of Parties: Permissive Joinder); compare FED. EQ. R. 47 (Depositions—To Be Taken in Exceptional Instances) (permitting oral depositions only "upon application of either party, when allowed by statute, or for good and exceptional cause . . .") with FED. R. CIV. P. 30(a) (Depositions Upon Oral Examination: When Depositions May be Taken); and compare FED. EQ. R. 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (limiting interrogatories to "facts and documents material to the support or defense of the cause") with FED. R. CIV. P. 26(b)(1) (General Provisions Governing Discovery: Discovery Scope and Limits in General).

The purpose of this Article is not to show the derivation of each Federal Rule. The drafters of the Rules, treatises, and articles have already done this.⁷² This Article, however, will establish how different people and various historical currents ultimately joined together in a historic surge in the direction of an equity mentality. The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading;⁷³ broad joinder;⁷⁴ expansive discovery;⁷⁵ greater judicial power and discretion;⁷⁶ flexible remedies;⁷⁷ latitude for

⁷² They show the extensive borrowings from equity, particularly from the Federal Equity Rules of 1912, *supra* note 71. See, e.g., ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES app. at 83, 84 table 1 (March 1938) (showing "Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure"); C. WRIGHT & A. MILLER, *supra* note 1 (providing a rule by rule discussion); Holtzoff, *supra* note 69, at 1058.

⁷³ See, e.g., FED. R. CIV. P. 2 (One Form of Action), 8(a), (c), (e) (General Rules of Pleading: Claims for Relief, Affirmative Defenses, Pleading to be Concise and Direct; Consistency), 11 (Signing of Pleadings, Motions, and Other Papers; Sanctions), 15 (Amended and Supplemental Pleadings). For a comparison to previous American procedure, see *infra* text accompanying notes 93-97, 143-49. For a criticism of the leniency in pleading, see McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 124-25 (1952) [hereinafter McCaskill, *Philosophy of Pleading*].

⁷⁴ See, e.g., FED. R. CIV. P. 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 15 (Amended and Supplemental Pleadings), 18 (Joinder of Claims and Remedies), 19 (Joinder of Persons Needed for Just Adjudication), 20 (Permissive Joinder of Parties), 22 (Interpleader), 23 (Class Actions), 24 (Intervention), 25 (Substitution of Parties), 42 (Consolidation; Separate Trials). For comparative code provisions, see *infra* text accompanying notes 150-51.

⁷⁵ See FED. R. CIV. P. 26-37 (Depositions and Discovery). For contemporary discovery problems, see *supra* note 7. For comparative code provisions, see *infra* text accompanying notes 152-57.

⁷⁶ One lawyer complains: "It has become increasingly clear that if one can but find him, there is a federal judge anywhere who will order nearly anything." Publius, *Let's Kill All the Lawyers*, WASHINGTONIAN, Mar. 1981, at 67. For comments on the enlarged, amorphous, and multi-issued nature of lawsuits and the vast amount of law available to lawyers and judges, see discussions in THE POUND CONFERENCE, *supra* note 6. Examples of Federal Rules of Civil Procedure that lend themselves to, or specifically provide for, judicial discretion include: 1, 8(a), (c), 11, 12(e), 13, 14, 15, 16, 19(b), 20, 23, 26(b)(1), (c), (d), 35(a), 37(a)(4), (b)(2), 39(b), 41(a)(2), 42(a), (b), 49, 50(a), (b), 53(b), 54(b), 54(c), 55(c), 56(c), 59(a)(1), 50(b)(1), 60(b)(6), 61, 62(b), 65(c). I have used current numbers, but for the most part, they are identical or similar to the 1938 rules. The case law rarely has provided more predictability or better defined standards than the rules, as is demonstrated by looking up the aforementioned rules in J. MOORE, MOORE'S FEDERAL PRACTICE (2nd ed. 1984), or C. WRIGHT & A. MILLER, *supra* note 1. One usually finds in these treatises a wide range of cases offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself. On case management, see *supra* note 17.

⁷⁷ See Chayes, *supra* note 20, at 1292-96; Oakes, "A Plague of Lawyers?": Law and the Public Interest, 2 VT. L. REV. 7, 12-15 (1977).

lawyers,⁷⁸ control over juries,⁷⁹ reliance on professional experts,⁸⁰ reliance on documentation,⁸¹ and disengagement of substance, procedure, and remedy.⁸² This combination of procedural factors contributes to a procedural system and view of the law that markedly differs from ei-

⁷⁸ "Americans increasingly define as legal problems many forms of hurts and distresses they once would have accepted as endemic to an imperfect world or at all events as the responsibility of institutions other than courts." Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar*, N.Y. Times, May 18, 1977, at A1, col. 3, B9, col. 1 (quoting Professor Maurice Rosenberg, a Columbia University law professor); see also J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 18 (1981) (noting the role of attorneys in fostering litigation); Carpenter, *The Pampered Poodle and Other Trivia*, 6 LITIGATION 3 (Summer 1980) (discussing the enormous magnitude of trivial litigation); Taylor, *supra* note 12 (stating that lawyers find ways to keep each other busy based on their training to find potential conflicts in the simplest of relationships). At least one commentator, however, has cautioned about claims of litigiousness. See Galanter, *supra* note 12, at 36-69.

⁷⁹ Litigants must now claim the right to a jury trial at an earlier stage of the litigation than had been the norm. See FED. R. CIV. P. 38(b) (Jury Trial of Right; Demand). For the more jury-protective provision of the Field Code, see 1848 N.Y. Laws, ch. 379, § 221 [hereinafter 1848 CODE]; see also FED. R. CIV. P. 50(a), (b) (Motion for a Direct Verdict and Judgment Notwithstanding the Verdict), 56 (Summary Judgment). On previous constitutional doubts as to directed verdict and judgment n.o.v., see *Galloway v. United States*, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 376-400 (1913). Cases such as *Galloway*, which stated that the practice of granting a directed verdict was approved explicitly in the Federal Rules of Civil Procedure, see 319 U.S. at 389, were considered by some as making inroads on the quality of the right to a jury trial, notwithstanding the language in the Enabling Act (currently codified at 28 U.S.C. § 2072 (1982)) that the rules should not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is true that some cases under the Federal Rules are jury-protective. See, e.g., *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). These cases do not alter the essential point, however, that the major thrust of the Federal rules is pro-judge rather than anti-jury. See *infra* text accompanying notes 512-13.

⁸⁰ For example, under the Enabling Act of 1934, the Supreme Court and the Advisory Committee, rather than Congress or state legislatures, formulated the procedural rules. Those rules empowered judges at the expense of juries. The rules facilitated the role of courts to deal with larger societal problems, perhaps making it easier for other branches to refrain from resolving those issues. See, e.g., Chayes, *supra* note 20, at 1288-1302; Oakes, *supra* note 77, at 8-10. Public policy cases, as well as personal injury and commercial cases, in turn increasingly relied on experts to aid the court, both because lawyers prepared and presented the cases, and because experts were widely utilized as witnesses.

⁸¹ See Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28, 28-29 (Spring 1981); Sherman & Kinnard, *supra* note 7, at 246; *Those #*X!!! Lawyers*, TIME, April 10, 1978, at 58-59. Again borrowing from equity, there has been a decrease on the importance of oral testimony in open court and of the trial itself, with profound influence on the quality and meaning of dispute resolution, and on the nature of trial advocacy. See Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860 (July 1980); Stanley, *President's Page*, 62 A.B.A. J. 1375, 1375 (1976); *infra* text accompanying notes 445-48.

⁸² See *infra* text accompanying notes 110-21, 214-15, 381-82.

ther a combined common law and equity system or the nineteenth century procedural code system.⁸³ The norms and attitudes borrowed from equity define our current legal landscape: expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power.

Before discussing how the shift to an equity-type jurisprudence came about, it is important to issue four warnings. First, I am not arguing that before the Federal Rules there had been no movement toward equity. To the contrary, the Field Code of 1848 took some steps in that direction, and there were subsequent experiments in liberalized pleading, joinder and discovery.⁸⁴ What I *am* saying is that the Federal Rules were revolutionary in their approach and impact because they borrowed so much from equity and rejected so many of the restraining and narrowing features of historic common law procedure. It was the synergistic effect of consistently and repeatedly choosing the most wide-open solutions that was so critical for the evolution to what exists today.

Second, I am not saying that the Federal Rules are solely responsible for shaping the contours of modern civil litigation. Factors such as citizen awareness of rights, size and scope of government, and individual and societal expectations for the good and protected life should also be considered.⁸⁵ Causes and effects here, as with other historical questions, are virtually impossible to disentangle. So far as I can determine, the Federal Rules and the Enabling Act are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country's social-economic-political structure. It cannot be denied, however, that the Federal Rules facilitated other factors that pushed in the same expansive, unbounded direction.⁸⁶

Third, to criticize a system in which equity procedure has swallowed the law is not to criticize historic equity or those attributes of modern practice that utilize equity procedure. This is not an attack on

⁸³ See Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE, *supra* note 6, at 171, 186 ("The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments.").

⁸⁴ See G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18 (1932); *infra* text accompanying notes 132-38.

⁸⁵ One should also consider the growth in legislation and regulation, transactions and their complexity, photocopying and data processing, nontangible property, and the size of law firms. See *supra* text accompanying note 18.

⁸⁶ See *infra* notes 355-58 and accompanying text (describing the impact of the New Deal on the development of the Federal Rules).

those aspects of *Brown v. Board of Education*⁸⁷ or other structural cases that attempt to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian. I *do* criticize, however, the availability of equity practice for all cases, the failure to integrate substance and process, and the failure to define, categorize, and make rules after new rights are created. In other words, I question the view of equity as the dominant or sole mode instead of as a companion to a more defined system.

Fourth, I am not suggesting that we should return to common law pleading or to the Field Code. Nonetheless, there are aspects of common law thought, pre-Federal Rules procedure, and legal formalism that may continue to make sense and should inform our debate about appropriate American civil procedure.⁸⁸

TRADITIONAL EQUITY AND CONTEMPORARY
PROCEDURE

(WASH. L. REV. J., Vol. 78)
2003

Thomas O. Main

III. THE PROCEDURAL MERGER OF LAW AND EQUITY

Beginning in the middle of the nineteenth century, a reform effort to simplify legal procedure originated in the State of New York.²¹¹ The reformers were frustrated with the practical and theoretical complexities of parallel systems of law and equity.²¹⁴ Enticed by the rhetoric of uniformity,²¹² these reformers sought to unify law and equity into a single system of codes.²¹³ Such codes offered a simple set of uniform rules better suited for the practical task of procedure to efficiently process the more important issues of substantive law.²¹⁷ One commentator described the technicalities of common law pleading as "needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence."²¹⁹ The reform effort was successful, as Section 62 of the new New York Code of Civil Procedure declared for New York state courts:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished: and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.²¹⁸

The Field Code abolished the common law forms and merged law and equity in a greatly simplified procedure.²²⁰ Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity.²²¹ Accepting Blackstone's view that substance and procedure were conceptually distinct,²²² the Field Code took the additional step of recognizing the divisibility in fact of substance and procedure: "The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."²²³

The merged procedure of the codes borrowed heavily from equity practice.²²⁴ Much like the old bills in equity, the Field Code provided that the pleadings should state the facts;²²⁵ thus the codes, like equity, de-emphasized the importance of framing an issue.²²⁶ The Code adopted for all actions numerous equity practices and processes, including latitude in the joinder of claims and parties.²²⁷ Further, echoing King James I's

resolution of the dispute between Bacon and Coke three centuries prior.²²⁸ any conflict between the substantive doctrines of law and equity was to be resolved in favor of equity.²²⁹

The innovative codes proved popular elsewhere and were adopted in most states. The system inaugurated by the New York Code of 1848 was adopted promptly by Missouri and Massachusetts in 1849 and 1850, respectively.²³⁰ In 1851, California adopted a version of the Field Code, and prior to the outbreak of the Civil War, Iowa, Minnesota, Indiana, Ohio, the Washington Territory, Nebraska, Wisconsin and Kansas likewise enacted similar procedural codes.²³¹ Within twenty-five years, procedural codes had been adopted in a majority of the states and territories.²³² Additionally, the Field Code had at least some influence in all states, as all states departed somewhat from the common law system of pleading in response to the proliferation of the codes.²³³ For example, some of the states that did not model the codes nevertheless modified their pleading rules by statutes, allowing the assertion of equitable defenses in actions at law.²³⁴

Nevertheless, the reform effort that was remarkably successful in the state courts initially drew only skepticism from the federal courts. Although law and equity were administered on different "sides" of the same federal courts,²³⁵ a commitment to the formal separation of law and equity was venerated and, arguably, constitutionally grounded. Justice Grier emphasized the significance of the separation in an 1858 opinion of the Court:

This [dual] system, matured by the wisdom of ages, founded upon principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invest new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things: it is absolutely inseparable from the correct administration of justice in common law courts.²³⁶

Bolstered by constitutional references to systems of law and of equity,²³⁷ commentators long sustained the argument that "the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States."²³⁸

However, the resolve for separate systems weakened as popular confusion and dissent mushroomed. A primary source of the confusion and dissent was federal procedure, which, both prior and subsequent to state adoption of the procedural codes, followed state procedure in law

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cases and a uniform federal procedure in equity cases.²³⁹ Thus, there was a uniform simplified procedure in equity for the federal courts throughout the country. Yet in law cases the various federal courts were applying the procedure of the corresponding state court.

Federal equity practice was a model of simplicity and uniformity. Somewhat paradoxically, federal procedure in equity cases was actually a product of a certain hostility toward equity among the early colonists.²⁴⁰ Conformity to state practice seems to have been demanded, but it became necessary to follow the English equity procedure because a number of the states adopted no equity procedure to which conformity could be had.²⁴¹ The first set of Federal Equity Rules, promulgated by the Supreme Court in 1822, contained thirty-three very concise rules of practice and procedure.²⁴² A few of the rules were mandatory,²⁴³ but most generously accorded federal judges with broad discretionary authority.²⁴⁴ Moreover, after the extension of the doctrine of *Swift v. Tyson*,²⁴⁵ to equity cases in 1851, the federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.²⁴⁶ The Federal Equity Rules proved quite durable and were

substantially revised only twice in the succeeding century—in 1842 and in 1912.²⁴⁷ The latter revision was a comprehensive reform that modeled many of the provisions of the Field Code, especially those dealing with the joinder of parties.²⁴⁸

Meanwhile, the procedure in law cases was controlled by congressional legislation requiring the federal courts to follow state procedure "as near as may be."²⁴⁹ The Conformity Act was unpopular and true conformity seemed largely unobtainable.²⁵⁰ Noting the success of equity procedure,²⁵¹ the American Bar Association blamed legislative control of federal practice for the problem and proposed that the power to promulgate federal rules of procedure for law cases be turned over to the United States Supreme Court.²⁵² After years of debate and struggle,²⁵³ Congress passed a bill providing:

[T]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law,²⁵⁴

The legislation further provided that "[t]he court may at any time unite the general rules prescribed by it for cases in equity with more in actions at law as to secure one form of civil action and procedure for both . . ."²⁵⁵ However, the Court did not rush to the task; an advisory

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committee was appointed the following year.²⁵⁶ Two years thereafter, a set of uniform rules was promulgated, eliminating the distinction between procedures for cases in equity and in law.²⁵⁷ "Under the new rules the hideous Conformity Act [wa]s relegated to the limbo of 'old unhappy, far off things.'"²⁵⁸ In his address to the American Law Institute Chief Justice Hughes stated the objective of the new rules:

It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.²⁵⁹

Carrying the torch lit by Blackstone 150 years earlier, the reformers argued that procedure had a tendency to be obtrusive, and that it should be restricted to its proper and subordinate role.²⁶⁰ The Chief Justice transmitted the Rules to Congress over the dissent of Justice Brandeis, and in 1938 the new uniform Federal Rules of Civil Procedure went into effect.²⁶¹

The philosophy and procedures of equity heavily influenced the tenor of the new Federal Rules.²⁶² One general and generous sentence

applicable to all types of cases established a fluid standard of pleading.²⁶³ Parties could plead alternative theories.²⁶⁴ Plaintiffs were able to pursue novel theories of relief.²⁶⁵ Related and unrelated claims could be joined in a single action.²⁶⁶ Judges could hear the counterclaims and cross-claims of parties already joined in the filed action.²⁶⁷ As in equity, there were numerous specialized devices through which judges could allow the lawsuit to expand further in order to develop a more efficient litigation unit—e.g., impleaders,²⁶⁸ interpleaders,²⁶⁹ interventions,²⁷⁰ and class

actions.²⁷¹ Complementing the new pleading regime were new liberal rules of discovery,²⁷² and judges were vested with the authority to "manage" the case through pretrial conferences²⁷³ and special masters.²⁷⁴

The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.²⁷⁵ Indeed, Rule 1 articulated this

very purpose: "[The Federal Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."²⁷ Commenting generally on the philosophy and durability of discretionary rules, Professor Carrington mellifluously recites: "Tight will tear. Wide will wear."²⁸

Like the Field Code, the reforms were directed exclusively to the procedural problem: the 1934 enabling legislation provided that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."²⁹ The Supreme Court later confirmed that "[t]he Rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished."³⁰ The fundamental substantive characteristics that distinguished the regimes of law and equity remained intact.³¹ Again, in the event of any substantive conflict between law and equity, the latter was to prevail.³²

Many states, in turn, modeled the federal rules for their state court procedures. In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.³³ Decades later, Professor John Oakley detailed "the pervasive influence of the Federal Rules on at least some part of every state's civil procedure."³⁴

The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law

Lumen N. Mulligan
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UCLA L. REV. V. 59 (2012)

The rulemaking era began when Congress empowered the Court to promulgate the Rules of Civil Procedure in 1934 with the passage of the Rules Enabling Act.⁴¹ Although the 1934 Act did not specify the use of committees, in 1935 the Court appointed a fourteen-person Advisory Committee—which did not adhere to the notice-and-comment procedures currently required of the Advisory Committee⁴²—to do the research and drafting work for the creation of the original Federal Rules of Civil Procedure.⁴³ Under this first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, if satisfied, reported the promulgated Rules to Congress,⁴⁴ which could overrule any of the rules by exercising the legislative veto built into the 1934 Act during the specified “report-and-wait period.”⁴⁵ Although the Court often deferred to the Advisory Committee’s proposals during this early period,⁴⁶ it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.⁴⁷ At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely.⁴⁸

The rulemaking process became more reticulated in 1958 when Congress created the Judicial Conference of the United States, which took over the direct supervision of the Advisory Committee from the Court.⁴⁹ This new structure resulted in decreased input into the rulemaking process by the Justices.⁵⁰ Indeed, during this period, the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court’s role in rulemaking as one of being a “mere conduit” for the work of others.⁵¹

By the late 1970s, observers of the rulemaking process, including Chief Justice Burger,⁵² leveled charges at every step in the process. They argued that Congress’s review of the Rules was flawed.⁵³ They similarly argued that the Court was not an appropriate entity to promulgate Rules.⁵⁴ Commentators chastised the committee structure as acting beyond the bounds of the Rules Enabling Act⁵⁵ and for being unrepresentative and closed to public input.⁵⁶ The judiciary sought to correct many of these faults without new legislation by commissioning a Federal Judicial Center study, which, upon completion, suggested several amendments to the rulemaking process.⁵⁷

These changes, however, did not satisfy Congress, which passed significant rulemaking reforms in 1988.⁵⁸ While retaining the Judicial Conference’s role in the rulemaking process, the 1988 Act codified the role of the rulemaking committees for the first time. It mandated the existence of the Standing Committee on Rules of Practice and Procedure, which the Judicial Conference had previously established at its discretion, and charged the Standing Committee with reviewing the proposals of other duly appointed committees and making recommendations to the Judicial Conference.⁵⁹ The 1988 Act also formalized the Judicial Conference’s practice of deploying area-specific advisory committees.⁶⁰ Hence, the Court can only promulgate Rules that have been vetted by the area-specific advisory committees, the Standing Committee, and the Judicial Conference.

The 1988 Act also increased representation and public participation in the rulemaking process. The Act mandates that the various advisory committees include practitioners, trial judges, and appellate judges.⁶¹ Congress also mandated greater transparency and public input. The Act thus requires the Judicial Conference to publish its procedures for amending⁶² and adoption of rules.⁶³ It further re-

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quires that the Advisory and Standing Committees conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available.⁶⁵ Additionally, the 1988 Act codified the longstanding practice of the Advisory Committee to attach official drafters' notes to Rule proposals.⁶⁶ Finally, the 1988 Act increased the length of the report-and-wait period to Congress. The period now stands at a minimum of seven months.⁶⁷

Thus, the current rulemaking process comprises seven steps.⁶⁸ First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.⁶⁹ These suggestions are forwarded to the appropriate Advisory Committee's reporter⁷⁰ (a law professor assigned to each advisory committee to set the agenda and do the initial drafting of rule revisions and explanatory notes⁷¹), who makes an initial recommendation for action to the Advisory Committee. Second, to go forward with a Rules revision, the Advisory Committee must submit the proposed revision and explanatory note, and any dissenting views, to the Standing Committee in order to obtain permission to advance to the publication and comment period.⁷² Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.⁷³ At the conclusion of the notice-and-comment period, the Advisory Committee's reporter summarizes the results of the public input and presents them to the Advisory Committee.⁷⁴ If the Advisory Committee finds that no substantial changes to the revision are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.⁷⁵ If the Advisory Committee makes substantial changes to the proposed revision, it must go through another public notice-and-comment period.⁷⁶ Fourth, the Standing Committee reviews the proposed revision.⁷⁷ If it makes substantial changes to the proposed revision, the Standing Committee returns the proposed revision to the Advisory Committee.⁷⁸ If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.⁷⁹ Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.⁸⁰ Sixth, the Court takes the proposed revisions under advisement from September to May 1 of the following year, at which time it must transmit to Congress those Rules it seeks to promulgate.⁸¹ Seventh, under the current law, Congress's report-and-wait period runs another seven months from May 1 to December 1, at which time unaltered revisions to the Rules become law.⁸²

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SUPREME COURT OF THE UNITED STATES

No. 00-1853

AKOS SWIERKIEWICZ, PETITIONER v.
SOREMA N. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[February 25, 2002]

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.¹ In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a

¹ Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 153, 154 (1993).

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French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, Francois M. Chaval, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulos, a 32-year-old who, like Mr. Chaval, is a French national. About a year later, Mr. Chaval stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulos as CUO. Petitioner claims that Mr. Papadopoulos had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chaval . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chaval to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chaval outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chaval fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. §621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the Southern District of New York dismissed petitioner's

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complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.*, at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802. See, e.g., *Tarshis v. Riese Organization*, 211 F.3d 80, 35-36, 38 (CA2 2000); *Austin v. Ford Models, Inc.*, 149 F.3d 148, 152-153 (CA2 1998). The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U.S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases,² and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. See 5 Fed. Appx., at 64-66. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1)

²The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in order to survive a motion to dismiss. See, e.g., *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (CA10 2000); *Bennett v. Schmidt*, 153 F.3d 515, 518 (CA7 1998); *King v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson v. Calambus*, 194 F.3d 737, 751 (CA8 1999).

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membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas*, 411 U. S., at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253-254, n. 6 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U. S., at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine*, *supra*, at 252-253 ("In [*McDonnell Douglas*] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U. S., at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict[] the role of the pleadings." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974) ("When a

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federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); see also *McDonnell Douglas, supra*, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (CA8 1993)

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("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.*, at 47-48; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.³ This Court, however, has declined to

³ In all averments of fraud or mistake, the circumstances constitut-

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extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*" 507 U.S., at 188. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U.S.C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).⁴

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before respond-

ing fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

⁴These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

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ing. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley, supra*, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.*, at 24-28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra*, at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34-40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman, supra*, at 168. Furthermore, Rule 8(a) establishes a

Cite as: 534 U. S. ____ (2002)

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pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U. S., at 236.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

PARTIES

2. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive, Yardley, Pennsylvania 19067.
3. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.
4. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.
5. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.
7. By notice dated May 3, 1999 and which he received on May 5, 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.
8. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

FACTUAL ALLEGATIONS

9. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.
10. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946.
11. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national:-
12. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.
13. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U.S., a reinsurance company, as Senior Vice President for Research and Special Risks.
14. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").
15. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.
16. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulos, who was 32 years old at the time (and 16 years younger than plaintiff).

17. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

18. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulo as SOREMA's CUO.

19. Mr. Papadopoulo was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulo had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

20. At the time Mr. Papadopoulo assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department - clearly implying that plaintiff was too old for the job.

21. In light of Mr. Papadopoulo's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulo, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr. Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

22. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

23. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

24. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

25. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

26. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

27. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

28. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

29. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

30. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

Mr. Swierkiewicz refused to resign his employment with SOREMA.

As a result, he was fired by Mr. Chavel, effective that very day (April 29, 1997).

31. SOREMA had no valid basis to fire Mr. Swierkiewicz.

32. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

33. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to, the following individuals: Jay Kubinak, Thilo Harda, Douglas Zale, Nigel Harley and Marcus Corbally.

34. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability insurance and the insurance he had for accidental death and dismemberment.

35. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

36. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

37. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 40 of the Complaint as if they were set forth in full.

38. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

39. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 42 of the Complaint as if they were set forth in full.

40. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

(a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;

(b) Front pay and benefits to the extent reinstatement is not feasible;

- (c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII;
- (d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII;
- (e) Liquidated damages in an amount equal to twice Mr. Swierkewicz's back pay losses as authorized by the ADEA;
- (f) An award of reasonable counsel fees and costs to compensate Mr. Swierkewicz for having to prosecute this action against SOREMA; and
- (g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

RAYNES, MCCARTY, BINDER, ROSS & MUNDY

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Dated: August 3, 1999

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20540, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 07-1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL,
ET AL., PETITIONERS v. JAVAID IQBAL ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May 18, 2009]

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a

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claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1, 11-12* (Apr. 2003) (hereinafter *OIG Report*), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=D&bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and

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a 184-member subset of that group was deemed to be "of high interest" to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112-113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 490 F.3d 143, 147-148 (CA2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 143. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 143. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Rivers v. Six Unknown Fed. Narcotics Agents*, 408 U.S. 988 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who

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were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶¶10-11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.*, ¶113, App. to Pet. for Cert. 176a; subjected him to sexual strip and body-cavity searches when he posed no safety risk to himself or others, *id.*, ¶¶143-145, App. to Pet. for Cert. 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.*, ¶154, App. to Pet. for Cert. 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." *Id.*, ¶47, at 164a. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his]

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religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation." *Id.*, ¶11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 186a–187a (relying on *Conley v. Gibson*, 355 U.S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly's* applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F.3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established consti-

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tutional law. *Id.*, at 174.

Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise . . . between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity." *Id.*, at 178. We granted certiorari, 554 U. S. ____ (2008), and now reverse.

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III

In *Twombly*, *supra*, at 553–554, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability “to any new context or new category of defendants.” 534 U.S., at 68. See also *Wilkie*, 551 U.S., at 549–560. That reluctance might well have disposed of respondent’s First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v. Lucas*, 462 U.S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent’s First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the “federal analog to suits brought against state officials” under Rev. Stat. §1979, 42 U.S.C. §1983.” *Hartman*, 547 U.S., at 254, n. 2. Cf. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for

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the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 (“[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*”). See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978) (finding no vicarious liability for a municipal “person” under 42 U.S.C. §1983); see also *Dunlap v. Munroe*, 7 Cranch 242, 269 (1812) (a federal official’s liability “will only result from his own neglect in not properly superintending the discharge” of his subordinates’ duties); *Robertson v. Sichel*, 127 U.S. 607, 615–616 (1888) (“A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties”). Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–541 (1993) (First Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Personnel Administrator of Mass. v. Fasney*, 442 U.S. 256, 279 (1979). It instead involves a decisionmaker’s undertaking a course of action “because of,” not merely “in spite of,” [the action’s] adverse effects upon an identifiable group.” *Ibid.* It follows that, to state a claim based on a violation of a

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clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." *Iqbal* Brief 45–46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a §1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, the pleading standard Rule 8 announces does

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not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555 (citing *Papasan v. Allain*, 478 U. S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U. S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 556 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a com-

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plaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F. 8d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[ed]”—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U. S. C. §1. Recognizing that §1 enjoins only anti-competitive conduct “effected by a contract, combination, or conspiracy,” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 776 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants “ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another.” 550 U.S., at 551 (internal quotation marks omitted). The complaint also alleged that the defendants’ “parallel course of conduct . . . to prevent competition” and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

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The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "legal conclusion" and, as such, was not entitled to the assumption of truth. *Id.*, at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed further. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.*, at 565–566. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.*, at 567. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.*, at 570.

B

Under *Twombly's* construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 173a–174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *id.*, ¶10, at 157a, and that

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Mueller was "instrumental" in adopting and executing it, *id.*, ¶11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U.S., at 555, namely, that petitioners adopted a policy "because of, not merely in spite of, its adverse effects upon an identifiable group." *Feeney*, 442 U.S., at 278. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly*, *supra*, 550 U.S., at 554-555. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "contract, combination or conspiracy to prevent competitive entry," *id.*, at 561, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." Complaint ¶47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 168a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

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The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, *Twombly*, *supra*, at 567, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible “policy of holding post-September-11th detainees” in the ADMAX SHU once they were categorized as “of high interest.” Complaint ¶69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as “of high interest” because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before

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us, may have labeled him a person of "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "cleared" by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudge[]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U.S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondet superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state

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of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

□

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. Iqbal Brief 87-88. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U. S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U. S., at 555-556, and n. 3.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." Iqbal Brief 27. We have held,

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discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor distracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, calined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 172a-173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[in]alice, intent, knowledge, and other conditions of a person's mind

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[to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. Wright & A. Miller, *Federal Practice and Procedure* §1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)'. And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

In re GUARDIANSHIP OF Richard
PESCINSKI, Incompetent.

Janice Pescinski LAUSIER, Appellant,

v.

Richard PESCINSKI, Respondent.

No. 668.

Supreme Court of Wisconsin.

March 4, 1975.

WILKIE, Chief Justice.

Does a county court have the power to order an operation to be performed to remove a kidney of an incompetent ward, under guardianship of the person, and transfer it to a sister where the dire need of the transfer is established but where no consent has been given by the incompetent or his guardian *ad litem*, nor has any benefit to the ward been shown?

That is the issue presented on appeal here. The trial court held that it did not have that power and we agree. The appellant, Janice Pescinski Lausier, on her own petition, was appointed guardian of the person of her brother, the respondent, Richard Pescinski. In 1958, Richard was declared incompetent and was committed to Winnebago State Hospital. He has been a committed mental patient since that date, classified as a schizophrenic, chronic, catatonic type.

On January 31, 1974, Janice Pescinski Lausier petitioned for permission to Dr. H. M. Kauffman to conduct tests to determine whether Richard Pescinski was a suitable donor for a kidney transplant for the benefit of his sister, Elaine Jeske. Elaine had both kidneys surgically removed in 1970 because she was suffering from kidney failure diagnosed as chronic glomerulonephritis. In order to sustain her life, she was put on a dialysis machine, which functions as an artificial kidney. Because of the deterioration of Elaine, the petition contended that a kidney transplant was needed. Subsequent tests were completed establishing that Richard was a suitable donor, and a hearing was then held on the subject of whether

permission should be granted to perform the transplant. The guardian *ad litem* would not give consent to the transplant and the county court held that it did not have the power to give consent for the operation.

At the time of the hearing Elaine was thirty-eight and her brother Richard was thirty-nine. Evidence was produced at the hearing that the other members of the Pescinski family had been ruled out as possible donors on the basis of either age or health. The father, aged seventy, and the mother, aged sixty-seven, were eliminated as possible donors by Dr. Kauffman because, as a matter of principle, he would not perform the operation on a donor over sixty. A similar rationale was applied by Dr. Kauffman as to all of the six minor children of Elaine, the doctor concluding that he "would not personally use their kidneys" as a matter of his "own moral conviction." Mrs. Jeske's sister, Mrs. Lausier, was excluded as a donor because she has diabetes. Another brother, Ralph Pescinski, testified that he was forty-three years old, had been married twenty years and had ten children, nine of whom remained at home. He is a dairy farmer and did not care to be a donor because there would be nobody to take over his farm and he felt he had a duty to his family to refuse. He further testified that he had a stomach disorder which required a special diet and had a rupture on his left side. He had been to see Dr. Capati at the Neillsville Clinic, who told him he should not get involved and that his family should come first.

The testimony showed that Richard was suffering from schizophrenia—catatonic type, and that while he was in contact with his environment there was marked indifference in his behavior. Dr. Hoffman, the medical director at the Good Samaritan Home, West Bend, Wisconsin, testified that in layman's terms Richard's mental disease

was a flight from reality. He estimated Richard's mental capacity to be age twelve. No evidence in the record indicates that Richard consented to the transplant. Absent that consent, there is no question that the trial court's conclusion that it had no power to approve the operation must be sustained.

2014 WL 51290
S.D. Texas,
Houston Division.

Perry COLEMAN, Plaintiff,
v.
JOHN MOORE SERVICES, INC., Defendant.

Jan. 7, 2014.

MEMORANDUM AND OPINION

LEE H. ROSENTHAL, District Judge.

*1 The plaintiff, Perry Coleman, sued his former employer, John Moore Services LP, alleging violations of the Fair Labor Standards Act for failure to pay overtime for hours worked in excess of 40 hours in a workweek. John Moore has moved to dismiss Coleman's amended complaint for failure to state an FLSA violation or FLSA employer status under Federal Rule of Civil Procedure 12(b)(6) and Rule 8(a)'s pleading standards.

Based on the pleadings; the motion, response, and reply; and the applicable law, this court finds that the complaint's allegations are inadequate and grants the motion to dismiss, without prejudice and with leave to amend.

I. The Allegations in the Amended Complaint

Coleman's amended complaint is terse. His FLSA allegations in his amended complaint are as follows:

6. The Plaintiff worked for Defendant from on or about January 2008 to on or about May 2012 as an electrician.
7. During one or more weeks of Plaintiff's employment with Defendant, Plaintiff worked in excess of forty (40) hours (overtime hours).
8. During one or more weeks of Plaintiff's employment with Defendant wherein Plaintiff worked overtime hours, Defendant failed to pay Plaintiff one and one-half times his regular rate of pay for each overtime hour worked.
9. The acts described in the preceding paragraph violate the Fair Labor Standards Act, which prohibits the denial of overtime compensation for hours worked in excess of forty (40) per workweek. Defendant willfully violated Plaintiff's rights under the FLSA.

Coleman seeks actual and compensatory damages. He also seeks liquidated damages for a willful FLSA violation.

John Moore moves to dismiss under Rule 12(b)(6) based on recent case law applying *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) to similar bare-bones FLSA allegations. John Moore argues that Coleman's allegations that he worked in excess of 40 hours per week without being paid overtime are insufficient because they "merely parrots" the FLSA's text without supporting the overtime allegations with sufficient facts.

*2 In response, Coleman argues that the case law before and after *Twombly* and *Iqbal* support the sufficiency of his FLSA-violation allegations. He does not address the challenge to the coverage allegations: Coleman argues that the additional details can be obtained through discovery. John Moore replies by pointing out that some of the cases Coleman relies on are from 2009 and the more recent cases denying motions to dismiss had considerably more detailed pleadings than Coleman's complaint.

II. Analysis

On a Rule 12(b)(6) motion, a court must take the facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. The court will not dismiss any claims unless the plaintiff has failed to plead sufficient facts to state a claim to relief that is facially plausible, *Bell Atl. Corp.*, 550 U.S. at 570, that is, one that contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged," *Iqbal*, 556 U.S. at 678. The plaintiff must allege facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

A. The Allegation of an FLSA Violation

The FLSA states that for "employees engaged in interstate commerce ... no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed," 29 U.S.C. § 207(a)(1). To show a violation of the FLSA's overtime requirements, a plaintiff must allege (1) that he was employed by the defendant; (2) that his work involved interstate activity; and (3) that he performed work for which he was undercompensated. John Moore argues that Coleman's complaint fails to allege his claims or coverage with sufficient factual specificity. John Moore relies on two recent circuit cases, *DeJesus v. HF Management Services, LLC*, 726 F.3d 85 (2d Cir.2013) and *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir.2012).

In *DeJesus*, the Second Circuit agreed with the district court that the plaintiff failed to allege sufficient facts supporting allegations that she worked overtime without proper compensation. *DeJesus* "alleged only that in "some or all weeks" she worked more than "forty hours" a week without being paid '1.5' times her rate of compensation." *DeJesus*, 726 F.3d at 89. Those allegations were "no more than [a] rephrasing [of] the FLSA's formulation specifically set forth in section 207(a)(1)." *Id.* Because the "complaint [merely] tracked the statutory language of the FLSA, lifting its numbers and rehashing its formulation, but alleging no particular facts" her complaint was properly dismissed. *Id.* Plaintiff merely "repeated the language of the [FLSA]," without "estim[at]ing her hours in any or all weeks or provid[ing] any other factual context or content," *Id.*

*3 Although plaintiffs are not required to provide an approximation of uncompensated overtime hours to survive a motion to dismiss FLSA overtime claims, the Second Circuit required the plaintiff to at least "allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours," and noting that an approximation of hours "may help draw a plaintiff's claim closer to plausibility," but was clear that such an approximation was not required.

Before the Second Circuit's analysis in *DeJesus*, district courts in the Second Circuit allowed threadbare paraphrasing of the FLSA's statutory requirements to survive a motion to dismiss. *DeJesus* approved a district court's decision to require some factual content or context beyond the elements of the statute. Cases decided in district courts in the Second Circuit after *DeJesus* have applied this requirement.

*4 Here, by contrast, Coleman's complaint has no allegations that provide any factual context that form the basis for his claimed FLSA violation. The complaint merely alleges that "[during] one or more weeks of Plaintiff's employment, Plaintiff worked in excess of forty (40) hours" and that during "one or more weeks ... Defendant failed to pay Plaintiff" the overtime rate. For the same reasons as the Second Circuit in *DeJesus*, this court finds that more is required of a plaintiff than an "all purpose pleading template" with allegations providing no factual context and no way for the court to determine that the plaintiff has stated a claim as opposed to repeating the statutory elements of the cause of action. The *DeJesus* court was careful to note that it was not requiring a plaintiff to plead a specific number of hours worked; "mathematical precision" was not the standard. But the court did not find it unfair or burdensome to require some factual allegations. "[I]t is employees' memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place. Our standard requires that plaintiffs draw on those resources in providing complaints with sufficiently developed factual allegations ." *DeJesus*, 726 F.3d at 88-91. Similarly, Coleman should be able to use his memory to flesh out the complaint with a factual context, before discovery has taken place.

John Moore points out that while Coleman cites cases denying motions to dismiss FLSA claims, the complaints in those cases provided facts that fairly put the defendant on notice of the basis of the claims but in [those cases] the plaintiff's allegations indicated that her overtime claim was based on alleged misclassification as an independent contractor. Accordingly, the motion to dismiss the FLSA violation claim is granted, without prejudice and with leave to amend the complaint to provide a factual context, consistent with this opinion.

B. The Allegation of FLSA Coverage

John Moore contends that the complaint does not allege facts but rather merely recites the statutory elements of FLSA coverage. Coleman does not respond to this argument. His amended complaint alleges the following:

At all times pertinent to this complaint, Defendant John Moore, LP was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce, and his work was essential to Defendant's business.

*5 To survive a motion to dismiss, a complaint must allege facts that show coverage under the FLSA. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir.1992). "Commerce," under the FLSA, "means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

The court agrees that the complaint does not sufficiently allege facts demonstrating individual or enterprise coverage. Rather than pleading specific facts that establish individual or enterprise coverage, Coleman recites the statutory elements of FLSA coverage or asserts generalized facts that do not relate to the coverage issue.

Because Coleman has failed to allege facts that, if taken as true, establish coverage under the FLSA, John Moore's Rule 12(b)(6) motion to dismiss is granted, without prejudice and with leave to amend to provide a sufficient factual basis consistent with this opinion.

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2014 WL 4722706
N.D. Texas,
Dallas Division.

Kurtiss KIDWELL, Plaintiff,
v.
DIGITAL INTELLIGENCE SYSTEMS, LLC, d/b/a Disys, Defendant.

Signed Sept. 22, 2014.

MEMORANDUM OPINION AND ORDER

JANE J. BOYLE, District Judge.

*1 Before the Court is the Motion to Dismiss for Failure to State a Claim or, in the Alternative, Motion for a More Definite Statement, filed by Defendant Digital Intelligence Systems, LLC, d/b/a DISYS on March 17, 2014. After considering the Motion and the related briefings, the Court GRANTS Defendant's Motion to Dismiss but permits Plaintiff leave to amend his complaint to include allegations sufficient to inform Defendant of the parties' coverage under the FLSA. Accordingly, the Court DENIES Defendant's Motion for a More Definite Statement as moot.

I.
BACKGROUND

This is an action for unpaid overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq.* Plaintiff Kurtiss Kidwell ("Kidwell") alleges that he was employed by Defendant Digital Intelligence Systems, LLC d/b/a DISYS ("DISYS") as a national accounts recruiter from November 2012 through April 2013. Kidwell claims that during "one or more weeks" of his employment he worked in excess of forty hours but was not paid overtime. *Id.* Accordingly, he filed suit in this Court on October 8, 2013. Several months later, on February 3, 2014, Kidwell filed his First Amended Complaint, seeking actual and compensatory damages, liquidated damages, as well as attorneys' fees and costs. On March 17, 2014, DISYS filed its present Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement.

II.
LEGAL STANDARD

A. Rule 12(b)(6) Motion to Dismiss

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 12(b)(6) authorizes the court to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* When well-pleaded facts fail to achieve this plausibility standard, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks and alterations omitted).

B. Rule 12(e) Motion for a More Definite Statement

*2 Rule 12(e) allows a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed" when it is "so vague or ambiguous that the party cannot reasonably prepare a response." Fed.R.Civ.P. 12(e). "When a party moves for a more definite statement, a court must determine whether the complaint is such that a party cannot reasonably be required to frame a responsive pleading." *Ash Grove Tex., L.P. v. City of Dallas*, No. 3:08-CV-2114-O, 2009 WL 3270821, at *7 (N.D.Tex. Oct.9, 2009). "[M]otions for a more definite statement are generally disfavored," and district courts have

"significant discretion" when considering them. *Id.* (internal citations and quotations omitted).

III. ANALYSIS

DISYS seeks dismissal, or alternatively, a more definite statement, because Kidwell "failed to plead facts ... sufficient to support his claims for individual relief" under the FLSA. Specifically, DISYS argues Kidwell does not offer sufficient facts regarding DISYS's employer status, the alleged overtime violations, and coverage under the FLSA.

A. *The Allegations of Employer Status under the FLSA*

The Court first considers DISYS's argument that Kidwell has failed to plead sufficient facts to demonstrate that an employer-employee relationship existed between them. DISYS contends that Kidwell's allegations fail to satisfy the "economic reality" test set out by the Fifth Circuit and do not provide facts establishing DISYS's employer status.

In order "[t]o be bound by the requirements of the Fair Labor Standards Act, one must be an 'employer.'" *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir.1984) (citing 29 U.S.C. §§ 206-07). Under the FLSA, the term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir.1991) (quoting 29 U.S.C. § 203(d)). The Supreme Court has determined that the FLSA's definition of "employer" is to be interpreted expansively. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973). Thus, "[t]he term employer includes individuals with managerial responsibilities and 'substantial control over the terms and conditions of the [employee's] work.'" *Lee*, 937 F.2d at 226 (quoting *Falk*, 414 U.S. at 195).

*3 The Fifth Circuit uses the "economic reality" test to evaluate whether an individual or entity possesses such operational control with respect to the employment relationship. *Gray v. Powers*, 673 F.3d 352, 354, 357 (5th Cir.2012). In applying this test, the court considers whether the alleged employer: "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 355 (citations omitted). "While each element need not be present in every case," the individual must have control over at least certain aspects of the employment relationship. *Id.* at 357 ("While the Fifth Circuit 'has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship,' it does not follow that someone who does not control any aspect of the employment relationship is an employer.").

While Kidwell's Amended Complaint does not provide details describing how DISYS oversaw his work, the Court concludes that the allegations are sufficient to support a reasonable inference of operational control by DISYS and an employer-employee relationship between the parties. Kidwell alleges he "worked for Defendant from November 2012 through April 2013 as a national accounts recruiter"; "his work was essential to Defendant's business"; and "[d]uring ... Plaintiff's employment with Defendant ... Defendant failed to pay Plaintiff." At the very least, Kidwell has asserted that he was employed by DISYS, DISYS was in control of his method of payment, and DISYS failed to pay him. *See Hoffman v. Cemex, Inc.*, No. H-09-3144, 2009 WL 4825224, at *3 (S.D.Tex. Dec.8, 2009) (finding that similarly simple allegations in an FLSA complaint were "all factual allegation[s]—not legal conclusions—and, if proven, they give rise to a plausible claim for relief"). Kidwell's allegations, taken as true, are sufficient to qualify DISYS as an employer under the FLSA, and therefore state a claim against it.

Accordingly, the Court finds that Kidwell has alleged sufficient facts to demonstrate that an employer-employee relationship existed between him and DISYS.

B. *The Allegations of FLSA Overtime Violations*

*4 The Court next considers DISYS's argument that Kidwell has failed to satisfy the pleading requirements for the alleged FLSA overtime violations because he offers no factual context for his claims and "must at least allege an estimate of the number of hours worked without adequate compensation." In response, Kidwell insists that he pled sufficient facts to put DISYS on notice that it is being sued for overtime wage violations.

Allegations of a complaint must be sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "Moreover, it cannot be the case that a plaintiff must plead specific instances of unpaid overtime before being allowed to proceed to discovery to access the employer's records." *Solis v. Time Warner Cable San Antonio, L.P.*, No.

Taking Kidwell's factual allegations regarding the overtime violations as true, the Court finds that Kidwell has pled "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.² In his pleadings, Kidwell has specified the name of the employee asserting the statutory violation, the employee's job title while working for DISYS, and the six-month time period during which he allegedly worked over forty hours without being paid time-and-a-half. Doc. 5, Pl.'s Am. Comp. 1-2 (noting that "Plaintiff worked for Defendant from November 2012 through April 2013"). Kidwell's complaint presents similar allegations regarding overtime pay and is therefore sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

C. The Allegations of FLSA Coverage

*5 The Court turns to the issue of the parties' coverage under the FLSA, examining both Kidwell's individual coverage and DISYS's enterprise coverage. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir.1992) (citing 29 U.S.C. § 207(a)(1)). "Either individual or enterprise coverage is enough to invoke FLSA protection." *Id.* (emphasis omitted). Because coverage is an element of an FLSA claim, a plaintiff must allege facts that show coverage under the FLSA in order to survive a motion to dismiss.

Kidwell alleges both individual and enterprise coverage. Doc. 5, Pl.'s Am. Comp. 1-2. In addition to stating that he worked for DISYS as a national accounts recruiter, the relevant portion of the Amended Complaint states:

[a]t all times pertinent to this complaint, DIGITAL INTELLIGENCE SYSTEMS, LLC d/b/a DISYS, LLC, was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce and his work was essential to Defendant's business.

Id. DISYS argues Kidwell's allegations supporting the overtime claim are insufficient because the Amended Complaint does not allege any specific facts regarding interstate commercial activity, but merely recites the statutory elements of FLSA coverage.

1. Individual Coverage

The Court first addresses the issue of Kidwell's individual coverage under the FLSA. To demonstrate that individual coverage exists, Kidwell must allege facts that give rise to a reasonable inference that he was engaged in commerce or in the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a); *Morrow*, 2011 WL 5599051, at *3. The test to determine whether an employee is "engaged in commerce" inquires "whether the work is so directly and vitally related to the functioning or an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it rather than an isolated activity." *Williams v. Henagan*, 595 F.3d 610, 621 (5th Cir.2010).

*6 Even though Kidwell's Amended Complaint indicates "national accounts recruiter" as his job title, Kidwell has failed to plead specific facts that establish individual coverage. Despite the presence of the term "national" in his job title, Kidwell offers neither a description of the nature of his work nor a clarification as to how such work engaged him in interstate commerce. *See Foreman v. Foodtronix, LLC*, No. 3:14-CV-0656-BF, 2014 WL 2039055, at *2 (N.D.Tex. May 16, 2014) (finding that plaintiff's allegation that he worked as a "technical support agent" and his assertion that his employer engaged in interstate commerce did not demonstrate that plaintiff's work engaged him in interstate commerce); *Morrow*, 2011 WL 5599051, at *3 (holding that plaintiff's allegation that he provided electrician services to defendants' clients sufficiently described his work but did not demonstrate "how that work engage[d] him in interstate commerce"). Kidwell recites the elements of coverage as articulated in the FLSA, but he fails to relate them to the specifics of his work responsibilities. Thus, the Court concludes that the Amended Complaint fails to allege sufficient facts to establish individual coverage.

2. Enterprise Coverage

Lastly, the Court examines the issue of enterprise coverage under the FLSA. To satisfy the pleading requirement, Kidwell must allege facts that give rise to at least a reasonable inference that DISYS is an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). An "enterprise that engages in commerce or in the production of goods for commerce" is an enterprise that:

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated) [.]

*7 29 U.S.C. § 203(s)(1)(A).

To demonstrate the existence of coverage under the FLSA, Kidwell alleges that "[a]t all times pertinent to [the Complaint], [Defendant] was an enterprise engaged in interstate commerce" and "regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by ... 29 U.S.C. § 203(r) and § 203(s)."

Kidwell does not otherwise allege that any other of DISYS's employees engaged in interstate commerce or handled, sold, or worked on goods or materials that have been moved in or produced for commerce. 29 U.S.C. § 203(s)(1)(A)(i). Rather, Kidwell solely alleges that DISYS was "engaged in interstate commerce." Doc. 5, Pl.'s Am. Comp. 1. These allegations provide no factual context for Kidwell's claims and are merely "formulaic recitations" of the elements of an FLSA cause of action. *Twombly*, 550 U.S. at 555 (citations omitted). Therefore, the Court finds that Kidwell has not articulated grounds from which individual or enterprise coverage under the FLSA can be discerned.

In sum, because Kidwell has failed to plead sufficient facts that, if taken as true, would establish coverage under the FLSA, he has failed to state a claim upon which relief can be granted. Accordingly, DISYS's Motion to Dismiss is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, DISYS's Motion to Dismiss is hereby **GRANTED**. Normally, courts will afford a plaintiff the opportunity to overcome pleading deficiencies, unless it appears that the defects are incurable. Since this Order is the Court's first review of Kidwell's allegations, the Court concludes that Kidwell should be given the opportunity to overcome the deficiencies in its pleadings.

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2013 WL 2189952
S.D. Texas,
Victoria Division.

Jose O GUZMAN, Plaintiff,
v.
HACIENDA RECORDS AND RECORDING STUDIO, INC., et al, Defendants.

May 20, 2013.

MEMORANDUM AND ORDER

GREGG COSTA, District Judge.

*1 This is a copyright infringement case involving two Tejano songs. Plaintiff José O. Guzman alleges that Defendants copied the "original lyrics and music" in his song, "Triste Aventurera," by producing, selling, and distributing records containing a substantially similar, yet differently named song, "Cartas de Amor." Docket Entry No. 1 ¶¶ 13, 16. Defendants now seek dismissal pursuant to Rule 12(b)(6), or alternatively a more definite statement pursuant to Rule 12(e), on the ground that Guzman failed to plead the infringement allegations with sufficient specificity. Having reviewed the parties' briefs and the applicable case law, the Court DENIES Defendants' motion.

The crux of Defendant's motion is whether Guzman's Complaint meets the pleading standard set forth by the Federal Rules of Civil Procedure. Rule 8(a)(2) requires that a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), a claim for relief must be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556).

Defendants argue that Guzman's Complaint fails to meet this standard, because it does not identify the exact elements of "Triste Aventurera" that "Cartas de Amor" copied. But by identifying the two works at issue and alleging that Defendants copied the original lyrics and music in his copyrighted work, Guzman pleaded a claim that was plausible on its face. *Kelly v. L.L. Cool J.*, 145 F.R.D. 32 (S.D.N.Y.1992), is informative. In that case, the court rejected arguments nearly identical to Defendants' when evaluating a complaint alleging that L.L. Cool J. copied parts of plaintiff's song "Jingling Baby" in his 1991 hit "Mama Said Knock You Out":

Broad, sweeping allegations of infringement do not comply with Rule 8. Plaintiff's complaint however, narrows the infringing act to the publishing and distribution of two songs, "Mama Said Knock You Out" and "Jingling Baby" in 1991, which is sufficiently specific for the purpose of Rule 8. Defendant argues that it is not possible to determine from the complaint the nature of the claimed infringement. However, such a level of specificity is not required in a complaint.

Id. at 36 n. 3 (citations omitted).

Though *Kelly* was decided before the Supreme Court clarified the federal pleading standard in *Twombly* and *Iqbal*, under those decisions "the height of the pleading requirement is relative to circumstances." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir.2009) (Posner, J.); *see also Kadmos v. Stevens*, 706 F.3d 843, 844 (7th Cir.2013) (noting that "some [claims] require more explanation than others to establish their plausibility" (citations omitted)); *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir.2010) ("*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)."). Complex claims, like those in *Twombly* and *Iqbal*, require more specificity than simple ones, such as *Kelly's* and *Guzman's*. This makes sense given that *Twombly* and *Iqbal* are "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir.2010). To the extent *Twombly* and *Iqbal* are animated by concerns that vague allegations will lead to broad, "fishing expedition" discovery, that concern is not present here because the complaint provides notice of an allegation

limited to the copying of a three-minute song. The complaint cabins discovery to discrete items, such as the sales data relating to the allegedly infringing song, the creation and production of the allegedly infringing and infringed songs, and not much else.

*2 Defendants have cited no post-*Iqbal* cases imposing a higher pleading requirement in the copyright context than the *Kelly* court did. After Guzman filed his response to Defendants' motion, the Court held a telephone conference in which defense counsel represented that, in a recent case in this District involving Beyoncé, the court required plaintiffs to identify the constituent elements copied in an allegedly infringed song in order to meet the federal pleading standards. The Court allowed Defendants to file a supplemental brief containing the Beyoncé case and any similar cases, but Defendants' brief only cited *Armour v. Knowles*, No. 4:05-cv-2407 (S.D.Tex.), in which the plaintiff voluntarily amended her complaint against Beyoncé. Docket Entry No. 25 at 5. Contrary to Defendants' position, "even post-*Twombly*, Rule 8 requires only the pleading of the basic elements of an infringement claim, albeit allegations that rise above the speculative level. There is no heightened pleading requirement for copyright-infringement claims." 6 *Patry on Copyright* § 19:3 (2013); see also *Schneider v. Pearson Educ., Inc.*, No. 12 Civ. 6392(JFO), 2013 WL 1386968, at *3 (S.D.N.Y. Apr.5, 2013) (ruling that plaintiff's infringement allegations, "though not brimming with details, are specific enough to meet the requirements of Rule 12(b)(6) and Rule 8" and citing cases).

In sum, Guzman has adequately stated a claim for copyright infringement. He has pleaded sufficient content to establish the elements of a copyright claim—namely, ownership of a valid copyright and copying of constituent elements of his original work. See *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 367 (5th Cir.2004) (stating elements of copyright infringement claim), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). The Complaint provides sufficient notice to allow Defendants to defend against the claim and to limit discovery. Accordingly, Defendants' Motion to Dismiss and in the Alternative, Motion for More Definite Statement (Docket Entry No. 20) is DENIED.

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Practice Problem for Notice Pleading - Problem #1

Essay Question #1 (from Fall 2009 exam)
(total - 33 1/3 points)

Adel Guirguis brought suit in federal district court against his former employer, Movers Specialty Services, Inc. ("Movers"), alleging violations of Title VII of the Civil Rights Act of 1964. Guirguis, who is of Arab descent and a native of Egypt, contends that Movers terminated his employment on the basis of his national origin.

Paragraphs 7 through 9 of the complaint, which read as follows, contain the entirety of Guirguis's factual averments:

7. Plaintiff began working for the defendant in 2000 in the accounting department. Plaintiff was employed by the defendant from that day until February 14, 2006, when he was terminated by the defendant in violation of his civil rights.
8. Plaintiff is foreign born, is an Arab, having been born in Egypt on June 20, 1947.
9. On February 14, 2006, plaintiff was terminated by the defendant in violation of his rights due to his national origin, having been born in Egypt.

Movers sought dismissal, charging that his complaint failed to state a claim upon which relief could be granted. How should the trial court rule?

Practice Problem For Notice Pleading- Problem # 2

From Fall 2012 Exam

Question 2 (worth 40% of grade). Your answer should not exceed 1500 words.

Plaintiff brings a complaint in federal district court. She alleges the following:

1. On June 8 2010, Plaintiff was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was operated by Defendant Dollar General.
2. Plaintiff fell due to the negligence of Defendant and its employees who failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn Plaintiff of the wet floor. Defendant, through its employees, breached its duty to warn Plaintiff of the dangerous wet floor.
3. As a direct result of Defendant's employee's negligence, acting in the scope of their employment, Plaintiff was severely and permanently injured. She has incurred medical and hospital bills and suffered great pain. Also, her ability to earn an income has been hindered.
4. Plaintiff seeks a judgment in the amount of \$300,000 against Defendant Dollar General.

Defendant moves to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In its motion, Defendant argues that the complaint lacks any allegation of how the liquid came to be on the floor and that it does not allege that Defendant knew or should have known about the liquid in advance of the plaintiff's alleged fall.

Under Virginia law, store owners owe their customers the duty to exercise ordinary care as their invitees upon their premises. Ordinary care is not met as to an owner who knew or should have known of a dangerous condition on the premises and failed to exercise due care to warn others of the dangerous condition or remove it within a reasonable time. However, a landowner is under no duty to a person reasonably expected to be on the premises to warn against an open and obvious condition on the premises.

How should the court rule?