

Why Heightened Pleading—Why Now?

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As Professor Ray Campbell stated in his remarks at this symposium,¹ *Ashcroft v. Iqbal*² may be the Supreme Court case that launched a thousand law review articles. Although a statement like that is usually meant to imply that too much ink is being spilled on a subject, in this case the game is worth the candle. Civil pleading rules play a central role in the rule of law in any legal system. Determining who is allowed to invoke the machinery of the civil justice system, and under what circumstance they may do so, lies at the core of how a system of law defines itself. The papers in this symposium outline how *Iqbal* has the potential to change the very purposes of the system of civil justice and give some glimpse into why such a change has come about.

The rules of pleadings are critical to the rule of law in a civil justice system because of what it means to assess a case on the pleadings. Dismissing a case at the pleadings phase of litigation means that the plaintiff will not have access to the mechanisms of discovery to uncover evidence that might support her claims. When a plaintiff's claims fail to identify any legal theory that a system recognizes as allowing recovery, this might seem appropriate. After all, before a case is filed a plaintiff can conduct whatever research lies within her means to identify a legal theory that supports her claims; if she cannot identify one before the lawsuit begins, then it is hard to see why she could identify one

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1. Professor Ray W. Campbell, Remarks at the Pennsylvania State University Law Review Symposium (Mar. 26, 2010).

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

afterwards. But *Iqbal* requires more from a plaintiff. *Iqbal* requires that a plaintiff convince a trial judge that her claims are apt to have factual support—that they are plausible.³ Without the ability to use civil discovery to support her case, a plaintiff might not have the facts she needs to make her claims seem plausible.

All systems of civil pleading must grapple with the issues *Iqbal* raises. They must strike a balance between open access to the courts and the costs of the civil justice system. Allowing plaintiffs to have easy access to the tools of discovery to investigate and demonstrate wrongdoing by defendants is useful in any system, but also expensive. Easy access to the courts allows for the possibility that plaintiffs might file nuisance suits only for settlement value. Plaintiffs might simply be harassing defendants or engaging in fishing expeditions on the mere possibility that a thorough investigation just might uncover some evidence of wrongdoing. Rules of pleading strike the balance.

In striking a balance between access to discovery for plaintiffs and the potential burdens imposed on defendants, a civil justice system does not merely assess costs, it makes a broader social judgment. Requiring that plaintiffs make claims that are factually plausible raises the potential that wrongdoing will go without redress. Under *Iqbal*, cases in which the defendant's documents or witnesses are essential to convincing a trial judge that the case is plausible are apt to be dismissed. Plaintiffs have less ability to uncover wrongdoing after *Iqbal* than before.

In whole categories of cases, plaintiffs might be wholly unable to identify facts that would support their case without first using the tools that discovery makes available. Consider how difficult it is to plead facts in a products liability case in which the plaintiff was injured by a product that exploded or burned, thereby simultaneously injuring the plaintiff and destroying most of the available evidence. Or consider the impediments civil rights plaintiffs face when suing a police department for wrongfully searching their home. Such plaintiffs may know little more than that they are innocent and that the police nevertheless showed up at their doorstep and ransacked their residence. Or consider the difficulty of plaintiffs in employment discrimination suits, confronting what they believe to be a wrongful termination, but knowing only that they were fired with an explanation that seemed inadequate. Without the ability to command the defendant to answer interrogatories, produce documents, and attend depositions, making such a case seem plausible will now

3. *Id.* at 1949 (“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.’”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

depend upon the skill of an attorney in telling the plaintiff's story in a way that convinces a judge that the plaintiff's claims are possible.

Among the many paths to success available to defendants, *Iqbal* thus adds the possibility that their wrongdoing is so outrageous that it seems implausible, at least without evidence buried in the documents. *Iqbal*'s heightened pleading standard thus implicitly embraces a faith either that those who are apt to find themselves to be defendants are generally not engaged in conduct that demands scrutiny, or that mechanisms other than a civil justice process driven by private individuals will keep them in line.

Iqbal's disruption of the balance underlying the civil justice system is the essence of why the case will rightly spawn a blizzard of commentary. Among the issues it raises is the puzzle of why the balance concerning pleadings has to be struck differently now. In this commentary, I outline this puzzle in the first section below. The timing of *Iqbal* is particularly odd considering that the problems that its holding seems intended to address are not new ones. In Part II, I note that the papers in this symposium, along with a few other factors influencing the federal judiciary and the Supreme Court, help answer this puzzle. I conclude that *Iqbal* reflects a new faith in institutions and organizations.

I. THE PUZZLING TIMING OF THE HEIGHTENED PLEADING'S ARRIVAL

Among the many puzzles *Iqbal* presents, the question of why the Supreme Court has adopted heightened pleading at this moment stands out. Any change in the approach to pleading likely reflects some evolution of beliefs about the virtues and vices of open access to the courts. Any effort to restrict access to civil discovery likely reflects the belief that allowing individuals to investigate potential wrongdoing among institutions has become too costly. As I discuss in this section, this attitude likely now predominates the thinking of both the Justices on the Supreme Court and many lower court judges, thereby creating an environment in which *Iqbal* makes sense to those who administer the system of civil justice.

The concern that notice pleading represents an inefficient and costly system certainly reflects a change from the attitudes that motivated the adoption of the Federal Rules of Civil Procedure in the 1930's. At that time, notice pleading was heralded as a breathtaking, but welcome reform.⁴ The Federal Rules represented a deliberate effort to lower

4. See B.H. Carey, *In Favor of Uniformity*, 3 F.R.D. 505, 507 (1943) (calling the Federal Rules of Civil Procedure "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law").

barriers to filing lawsuits and pursuing discovery to support a claim.⁵ The Rules originally embraced simplicity in pleading. This was meant to facilitate access to discovery and produce outcomes that better reflected the merits of the claims, rather than the abilities of the advocates to navigate a cumbersome system of pleadings. The reforms that Rules embraced reflected a faith in individualism and professionalism. Attorneys could be trusted to pursue claims that are apt to have merit. The Rules envisioned that litigation that followed the pleadings would consist of the parties engaging in a largely unsupervised investigation of each other.

Although this change was much celebrated when adopted (at least by those who drafted the Rules), times change. By the late 1970's significant discussion of the potential problems with the system emerged.⁶ Concerns about the costs of discovery had grown, especially in large, complex civil cases. Although scholars marked the concern that litigation was too costly for individual plaintiffs,⁷ most of the concern about the cost of litigation was raised by or on behalf of institutional defendants.

Generally speaking, the combination of low pleading standards and costly discovery presents two basic problems for a potential defendant. First, plaintiffs can file suits brought only for the purpose of extracting a nuisance settlement.⁸ Plaintiffs face little cost in doing so, and defendants face being blackmailed into buying their way out of the costs of the discovery process, even if the underlying claim has no merit. Second, even plaintiffs who are not pursuing frivolous claims can still impose enormous costs on defendants. These concerns become particularly acute in cases in which the costs are asymmetric. That is,

5. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 825 (2010) (stating that under the Federal Rules, the "main task [of pleading] was to give fair notice of the pleader's basic contentions to the adversary" and that "[i]t passed most of the screening function from the threshold to later stages of litigation").

6. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1315 (1978) (reviewing evidence on discovery and concluding that the adversary forces that shape civil litigation do not "justify any confidence that the structure of our civil litigation system will provide a fair and efficient framework for conflict resolution").

7. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 120-21 (1974) (arguing that "the broader the delegation to the parties, the greater the advantage conferred on the wealthier").

8. See D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985) (stating that when a plaintiff with a weak case files a claim, the defendant is placed in a position where "the defendant should be willing to pay a positive amount in settlement to the plaintiff with the weak case—despite the defendant's knowledge that were he to defend himself, such a plaintiff would withdraw").

some cases present the potential for discovery to be incredibly expensive to a defendant, but relatively costless to the plaintiff. Class action suits against manufacturers, consumer fraud class actions, litigation brought under the anti-fraud provisions of the federal securities laws, and litigation by prisoners all represent examples of asymmetric litigation in which the plaintiffs face far fewer costs from discovery than the defendants, and hence might have incentives to bring nuisance suits. The twin specters of frivolous litigation and discovery costs tend to run amuck in asymmetric litigation and have haunted the Federal Rules for decades.⁹

But *Iqbal*'s embrace of heightened pleading cannot be attributed solely to concerns about the costs of litigation. The concerns about the supposed litigation explosion, frivolous suits against government officers and corporations, and the boundless costs of discovery are not new—they have been around for decades. Concerns about asymmetric litigation lie at the heart of *Iqbal*, but something in the contemporary environment must have inspired this particular reform.

Whatever inspired heightened pleading at this moment in time, it is not likely a result of accumulated pressures of unrequited desires for reform. Calls to address the costs of litigation have hardly gone unheeded. These concerns produced a series of reforms meant both to deter frivolous litigation practices and reduce the costs of discovery. In 1983, and again in 1993, Rule 11 was altered so as to empower judges to penalize litigants for filing or maintaining frivolous lawsuits or motions.¹⁰ Rule 16 was amended to encourage judges to manage cases actively.¹¹ The discovery rules themselves were amended multiple times to reduce the cost of discovery.¹² Statutory reforms in the 1990's brought heightened pleading requirements to cases thought to create

9. Rhetoric about costly litigation has been around for decades. *See generally, e.g.*, WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Penguin Group 1991).

10. *See* FED. R. CIV. P. 11 advisory committee's note on 1983 amendments ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.").

11. *See* FED. R. CIV. P. 16 advisory committee's note on 1983 amendments ("[T]here is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases . . .").

12. *See* FED. R. CIV. P. 26 advisory committee's note on 1993 amendments (noting that the "major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information").

asymmetric litigation strategies, including Prisoner's rights cases¹³ and claims under Federal securities laws.¹⁴

The concerns about the costs of litigation and the presence of nuisance suits are thus an entrenched part of the rhetoric of civil justice reform. But this history only deepens the puzzle. Why has the long backlash against notice pleading finally gotten enough traction to inspire a wholesale retreat from the concept after all this time? And why have past notice pleading and discovery reforms suddenly been deemed to be inadequate?

II. CLUES TO *IQBAL*'S TIMING

The other issues raised by *Iqbal* provide some clues as to the answer to the question of why the Court has suddenly chosen to embrace heightened pleading. In addition to the heightened pleading requirement, Professor Brown's and Professor Pfander's contributions to this symposium note that the case also extends the collateral order rule, thereby facilitating greater intervention by the appellate courts into factual matters normally assessed by the trial courts.¹⁵ The case effectively extends the willingness the court expressed in *Scott v. Harris*¹⁶ to engage in fact-finding on appeal. Professor Kinports' paper in this symposium notes that *Iqbal*'s pronouncements on the doctrine of supervisory immunity also provide a greater shield to officers of the federal government from judicial scrutiny.¹⁷ Combined with its creation of a heightened pleading standard, the Court overall seems to bristle at the notion of subjecting high officers to even the most indirect supervision that would accompany discovery. As Professor Romero notes, the case thus provides greater deference to governmental actors.¹⁸

An assessment of the various parts of *Iqbal*'s holding thus reveals a unifying theme: reluctance to allow individuals to use access to the courts (and discovery) as a means of scrutinizing institutional actors. *Iqbal*'s recent predecessors, *Scott v. Harris* and *Bell Atlantic v.*

13. Such cases typically involved the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

14. Such cases typically involved the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

15. James Pfander, *Iqbal*, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN ST. L. REV. 1387 (2010); Mark R. Brown, *Qualified Immunity and Interlocutory Fact Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010).

16. *Scott v. Harris*, 550 U.S. 372 (2007).

17. Kit Kinports, *Iqbal and Supervisory Immunity*, 114 PENN ST. L. REV. 1291 (2010).

18. Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and (a Lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010).

Twombly,¹⁹ similarly embrace deference to institutional actors. *Iqbal*'s holding itself benefits agencies of the federal government most directly, extending the kind of deference *Scott v. Harris* provided to local law enforcement.²⁰ And *Twombly* reduced the ability of individuals to use notice pleading of the antitrust laws to investigate the possibility of corporate misconduct in the marketplace.²¹ The holdings reflect a faith that actors in the large institutional settings of the federal government and corporate structures are worthy of some measure of trust. A Court that believes that these institutions will largely operate in a forthright, honest fashion will be more apt to think of these private lawsuits as frivolous and unnecessary. Notice pleading ensures private individuals will have the means to investigate potential wrongdoing within these institutions. It provides, as Professor Welsh notes in this volume, an opportunity for individuals to have a place at the negotiating table.²² Heightened pleading renders such investigations more difficult to undertake and places these efforts more squarely under the control of the judiciary—particularly the appellate courts. If institutional actors and judges are thought to be generally worthy of trust, then private investigations that arise through civil discovery are apt to be unnecessary.

This theme of heightened deference to institutional actors provides one possible answer to the question of why the court feels that the time has come for heightened pleading. The concerns about costly discovery or nuisance suits might not be the primary motivation for the new pleading standard; those concerns have been around for decades and have inspired other reforms. It is not that the landscape of civil litigation has changed so much as the perspective of the members of the judiciary has changed. Under this understanding of the case, *Iqbal* arose from a new belief in the importance of deference to institutional actors, rather than form a new understanding of the costs of discovery.

Other aspects of *Iqbal* also support the thesis that great faith in institutional actors motivated the the Court's holding *Iqbal*'s holding

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

20. *See* Kinports, *supra* note 17, at 1291.

21. *See Twombly*, 550 U.S. at 572 (Stevens, J., dissenting) (noting that the majority opinion does not require “knowledgeable executives . . . to respond to these allegations by way of sworn depositions or other limited discovery . . . [but instead], permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot”).

22. Nancy A. Welsh, *I Could Have Been A Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149 (2010) (noting that the *Iqbal* holding will have the effect of “effectively undermining such institutions’ motivation to negotiate, mediate—or even communicate and listen to—[individual] claimants”).

arises from the events of 9/11 and echoes past deference on national security matters in times of crisis. As Professor Wadhia's paper in this symposium notes, *Iqbal* echoes past deference on national security matters in times of crisis, even to the point of sacrificing civil rights.²³ Of course, *Scott v Harris* and *Twombly* have no such connections, but the holdings in these cases are less capacious than *Iqbal*. It seems a remarkable coincidence that the one case that clearly establishes heightened pleading in the Federal Courts was brought by a Guantanamo Bay detainee against the Attorney General who was a leader of the Bush Administration's response to 9/11. The circumstances of the case make it abundantly clear that a system of notice pleading would allow even an accused terrorist to launch a largely unsupervised investigation of the nation's terrorism policies. Threatening events like terrorism and war engender trust in domestic institutions—a trust which apparently can easily spread beyond the context of a single case.

Furthermore, the federal judiciary is increasingly staffed with former institutional actors—largely prosecutors.²⁴ The clearest pathway to a federal judgeship is by working as a U.S. Attorney or in corporate practice. Lawyers whose practice focuses on individual plaintiffs are rarely considered for new federal judgeships. The judiciary has thus become an entity that is staffed with individuals who have some faith in the institutions of government, having spent much of their time working for the government. And private practice for many judges has consisted of big firm, corporate work. Although one can only speculate about the influence that these trends will have, this career path likely undermines the belief that privately implemented civil litigation against institutional actors is not an essential component of the rule of law. Even if they opposed the Bush Administration's approach to addressing terrorism, such actors are unlikely to believe that private litigation by Guantanamo detainees is the most effective means of changing policies. More likely, institutional actors prefer institutional reforms.

Another new aspect of the judiciary is the extent to which judges, especially the Supreme Court justices, are exposed to alternative legal systems. This includes the Continental System, as documented by Professor Maxeiner's paper.²⁵ Assertions that alternative civil justice

23. Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010).

24. See generally Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (discussing the demographics and ideological perspective of judges).

25. James Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, A Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257 (2010).

systems, especially the continental (and especially the German), have advantages are almost as old as calls for reforming the cost of discovery.²⁶ But there is an enormous difference between reading about a different system and hearing it described firsthand by a peer jurist from that system. The Supreme Court justices might also increasingly be influenced by exposure to the judge-controlled civil litigation procedures in other countries, as the justices frequently meet with their international counterparts.²⁷ Numerous international conferences put the U.S. justices in the same room as their counterparts in systems that have never embraced notice pleading. The U.S. justices have surely observed that their international counterparts preside over perfectly lawful, well-developed legal systems that demand more than notice pleading from their plaintiffs in civil systems.

Finally, it must also be noted that notice pleading might well have been largely a dying concept even before *Iqbal*. Reforms to the discovery rules encourage plaintiffs to plead facts so as to facilitate disclosure under Rule 26. The ubiquity of judicial conferences under Rule 16 also encourages plaintiffs to draft complaints that tell their story, so that the when they meet with a judge or magistrate judge, that judge can easily understand their side of the story. And the willingness of courts to contemplate motions for summary judgment early in a lawsuit's history means that a plaintiff might have to rely on facts pled in the pleading to continue conducting discovery. These factors have been conspiring against the concept of simple notice pleading for decades. To judges who are used to seeing lengthy, fact-laden complaints, *Iqbal* might seem a small change.

Taken together, the circumstances that gave rise to the *Iqbal* decision can be understood as a confluence of events. Judges who themselves spent most of their careers in loyal and honest service to institutions might feel little need to allow open-ended investigations of these institutions by private actors, absent some overt evidence of wrongdoing. An increasingly global perspective on the role of courts and judges helps this view along, as the system of notice pleading and generally unsupervised discovery is highly unusual. The events of 9/11 and a discomfort with scrutinizing the institutions that are charged with defending against terror attacks complete the picture. Requiring that plaintiffs make out plausible claims before proceeding on to discovery suddenly feels like an idea whose time has come.

26. See generally, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

27. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 96-99 (Princeton University Press 2004) (documenting the increasing tendency of high-court judges to meet face-to-face at international conferences).

III. CONCLUSION

Iqbal is a product of its time. It arose in an environment in which notice pleading may be long past its expiration date, having been chipped away by numerous reforms. It is the work of a highly confident Court—indeed, as Professor Gildin’s paper notes, one that might have reached beyond the scope of the issues argued.²⁸ The opinion expresses confidence in the courts in general and in institutional actors. Only the passage of time and experience with the new system of pleading will tell us whether this confidence is warranted.

28. Gary S. Gildin, *The Supreme Court’s Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333 (2010).