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Teaching *Twombly* and *Iqbal*: Elements Analysis and the Ghost of Charles Clark

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ABSTRACT

This is an edited version of remarks I gave January 24, 2013, at the *UCLA Law Review* Symposium honoring the contributions of Professor Steve Yeazell to the field of Civil Procedure.

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I would like to thank my colleagues Jennifer Mnookin and Joanna Schwartz, not only for organizing the symposium at which I originally made these remarks, but for their assistance in thinking through the issues I discuss here. And, of course, I offer my felicitations to Steve Yeazell, for all the reason mentioned in the text, and more.

I owe a lot to Steve Yeazell. I am glad that we have the opportunity today to celebrate his enormous scholarly contributions to the field of American Civil Procedure. No one has matched his ability to link the history and theory of modern litigation with a sixth sense for how piecemeal changes in particular rules and practices have fundamentally altered the litigation landscape. And, for someone who did not practice law, his understanding of civil litigation on the ground is remarkably rich; his curiosity about what lawyers do and what dilemmas they face seems unquenchable. Neckwear aside, no mere antiquarian is he.

Since I became his colleague twenty years ago, though, Steve's contribution to the pedagogy of Civil Procedure (to say nothing of his extraordinary colleagueship and service) has had an even more profound influence on me. Steve is deservedly famous here and elsewhere for his extraordinary teaching and the impact he has had on two generations of students. He was not only an early winner of the Rutter Award for Excellence in Teaching at UCLA School of Law (1979), but he is also one of a handful of UCLA Law professors to have won the University's Distinguished Teaching Award (1978–79).

One of the untaxed benefits (to use a phrase I learned from Steve) of teaching procedure at UCLA is the privilege of encountering Steve in the real or virtual hallways and beseeching him for light on the forms of action at common law or the best way to tour the UCLA campus. And using Steve's Civil Procedure casebook for twenty years, with his office but a few steps away, has been like having Vergil down the hall to discuss the *Aeneid*.[1] Accordingly, my observations in this Article concern the teaching of Civil Procedure—in particular, the challenges of teaching the *Twombly* and *Iqbal* cases[2] in the first-year course.

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Twombly and *Iqbal* are still the news of the day as far as pleading in federal court is concerned, and one might think that this would add a refreshing air of

1. In my remarks at the 2013 *UCLA Law Review* Symposium honoring Steve, I actually stated that having Steve down the hall was "like having Homer down the hall to discuss the *Iliad*." Since Steve pointed out, however, that Homer was blind and illiterate (as well as the amalgamation of multiple oral narrators spanning several centuries), I've come to doubt that this is the honorific I originally intended.
2. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

topicality to a first-year procedure course that is predominantly taught from rather yellowed notes. But most professors know that the joys of revisionism are difficult to convey to those who never even knew about the conventional wisdom. Most students intend to practice law in the years to come, not in 2007, 1957, or 1938. Years ago, I would spend as much as half of a class on the move from common-law to code pleading in the Federal Rules of Civil Procedure (FRCP). I have cut it back to something like half of a minute. I believe strongly in the historical method as a key to understanding, but most of my first-year students are more aligned philosophically with Huckleberry Finn, who quickly lost interest in the story of Moses once he discovered he was dead. *Conley v. Gibson* may have passed, but it takes a lot of pulling and hauling to get my students to mourn (or celebrate) that fact.

So *Twombly* and *Iqbal*, and not our sense of their discontinuity with the past, are the order of the day as far as students are concerned. Precisely because *Twombly* and *Iqbal* are still recent, and because it takes so much effort to explain what they say and why they say it, there is a risk that students will treat these two cases as the tail that wags the dog. When presented with a complaint, students are tempted to first ask "Is it plausible that the story the plaintiff is recounting really is a story of [discrimination, conspiracy, fraud]?" More ominously, perhaps, they take seriously the Court's emphasis in these cases on possible alternative explanations for the behavior alleged by the plaintiff.

It is alarming—but completely logical and understandable—how enterprising students can be in hypothesizing such alternative explanations, even speculating that such explanations may be more likely than the one the plaintiff would like us to credit. In employment discrimination hypotheticals, for example, students are apt to verbalize their intuitions that adverse employment decisions, especially in a stagnant economy, are more likely to be explained by lawful business motivations than by intent to discriminate. Causation in toxic torts presents a similar problem; it is not easy to explain to students why a late-appearing illness or injury could not be as readily explained by something besides exposure to the defendant's product.

These altogether reasonable reactions by students are not alarming. But I am alarmed by the effect of this reasoning on their thinking about the Court's strange confidence in *Twombly*, and especially in *Iqbal*, that judges can divine "the way that things usually happen" and can specify with reasonable accuracy the comparative likelihood of alternative explanations for the events plaintiffs recount. I do not have any idea what percentage of fired employees who fall within the protection of employment discrimination laws were fired because of discriminatory intent or how likely it is that an unusual and devastating illness

will have been caused by exposure to a toxic product. Nor have I any idea how often parallel conduct by competitors within a regulated industry bespeaks conspiracy or how often attorneys general and FBI directors are motivated by discriminatory intent when they designate racial and religious minorities for special interest (and, subsequently, extended detention accompanied by harsh treatment). But increasingly, students sense that they must make such calculations to properly analyze a 12(b)(6) motion to dismiss for failure to state a claim, and they have Supreme Court precedent to back them up.

If nothing else, however, the plausibility note struck by *Twombly* and *Iqbal* has caused me to look more closely and critically at the assumptions underlying my teaching of pleading and Rule 12(b)(6) prior to those decisions. I now realize how much of a formalist I really am. In fact, I have a public confession to make: Behind the closed doors of my Civil Procedure classroom, I frequently, and quite comfortably, use the phrase "cause of action." Regardless of the procedural point for which I have assigned a case, the first question I tend to ask is, "What is the cause of action in this case?" More importantly, in my syllabus, under the heading "Pleading," I have a section entitled "The Elements of a Cause of Action," and I spend considerable time and energy discussing how the allegations of a complaint might or might not be legally sufficient and thus withstand a motion to dismiss under Rule 12(b)(6).

This observation is in the nature of a confession, but not an avoidance, because, after all, in 1938 the drafters of the FRCP did away with the phrase "cause of action," seemingly vindicating the legal realist contention that the phrase did more harm than good. I suspect that my practice of focusing on the elements of a cause of action would probably not have met with the approval of the FRCP's chief drafter, Charles Clark.

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Scholars commonly suppose that the pleading regime that was put in place by the FRCP in 1938, given its ultimate expression in *Conley v. Gibson*, and upended in *Twombly* was that of notice pleading. However accurate that supposition may be—some judges and scholars have asserted that the FRCP is *not* a system of notice pleading—its significance depends on what is meant by the phrase "notice pleading." I had always interpreted the phrase as a rough proxy for the following statement: "You do not have to provide a lot of detail in your factual allegations; so long as the defendant understands what set of events you are referencing, lack of specifics is not a basis for dismissing the complaint. At least up to a point, being conclusory in one's allegations is tolerated." The Forms that

appear after the Federal Rules arguably dramatize this fact by providing examples of sufficient complaints that are rather brief and general.[3]

But that particular understanding of the phrase "notice pleading" did not alter the requirement that the complaint's allegations satisfy the elements of a recognized cause of action. The conceptual basis for assessing the legal sufficiency of a complaint that had prevailed prior to the FRCP's adoption remained in place: The complaint's allegations must be assessed in light of governing substantive law to ensure that they address the elements of some recognized claim. Consequently, prior to *Twombly*, I always focused on two basic concepts when teaching my students the fundamentals of pleading, the complaint, and the legal sufficiency thereof.

First, and most importantly, I focused on establishing the inferential link between the complaint's allegations and the elements of a cause of action. This link is the indispensable core to understanding the legal sufficiency of a complaint.

Second, as a type of add-on principle to this idea of legal sufficiency, I emphasized to students that the FRCP did not require specificity, and that the obsessive distinction between "facts" and "conclusions" nourished by the code pleading system was of minimal importance—although it was possible, even prior to *Twombly*, to be so abstract and general in one's complaint as to be impermissibly conclusory. That is, allegations that the Court in *Twombly* called "[t]hreadbare recitals of the elements of a cause of action"[4] might, as a matter of formal logic, connect inferentially with the elements of the cause of action—indeed, by definition they would have to—yet still be insufficient because they are excessively conclusory. I had always taken this idea to be the meaning of the phrase "notice pleading" when distinguishing the FRCP from what had come before: So long as the complaint gives the defendant bona fide notice concerning what the dispute is about, rare indeed will be the complaint that fails for being excessively conclusory in its allegations.

But, as Professor Emily Sherwin has shown, Charles Clark and others had a rather more radical idea in mind when they argued for an end to the Code's pleading regime.[5] In Professor Sherwin's words, "Clark believed that a plaintiff with a compelling story should be able to bring it before a judge and ask for

3. *See, e.g.*, FED. R. CIV. P. Form 10 (Complaint to Recover a Sum Certain); FED. R. CIV. P. Form 11 (Complaint for Negligence).
4. *Iqbal*, 556 U.S. at 678.
5. It should be noted that Clark did not, apparently, favor the term "notice pleading." Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 85 n.63 (2008).

justice."[6] In Clark's vision, the failure to conform to the elements of a recognized cause of action should not necessarily be a basis for dismissal of a complaint. That is, the emphasis should instead be on facts that might ultimately produce a judicial remedy, and not on preexisting substantive law within which the allegations must fit.[7] In fact, Professor Sherwin states:

> [Clark's] definition of a "cause of action" was, in a sense, no definition. A cause of action was whatever set of factual allegations gave notice to the defendant of the genesis of the plaintiff's claim and allowed the presiding judge to organize a fair hearing of the case. The same standard, without the potentially misleading term "cause of action," was incorporated into the Federal Rules.[8]

If this is indeed the idea lying behind Rule 8(a)(2), then I am not doing a very good job of teaching pleading in federal court (though that may be true regardless). It is disconcerting to realize how wedded I am, at least in teaching Civil Procedure, to the very ideas that Clark and other realists rejected—that substantive law preexists the complaint and that a complaint should establish an adequate link between its allegations and the elements of a recognized cause of action. It has, though, put me in the uncomfortable position of saying to students, "Here is a concept that is indispensable, the very *sine qua non*, for understanding the legal sufficiency of a complaint. Plus, it does not really matter very much." That is because, prior to *Twombly*, the requirement that the complaint make allegations that satisfied the elements of a recognized cause of action did not, on the whole, impose heavy burdens on plaintiffs.

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6. *Id.* at 84.
7. Clark's opinion in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), suggests something of what he had in mind. Admittedly, in *Dioguardi*, Clark did not deny altogether the relevance of preexisting substantive law. *Id.* at 775 ("It appears to be well settled that the collector may be held personally for a default or for negligence in the performance of his duties."). However, Clark's eagerness to read into the plaintiff's allegations the necessary components of a legal claim suggests his disposition to find sufficient the plaintiff's firm belief that he had been treated unjustly.
8. Sherwin, *supra* note 5, at 84 (footnote omitted). It is interesting to note that Clark's preferred emphasis in pleading rules on enabling courts to adjudicate cases on a case-by-case basis resembles the approach taken by Brainerd Currie (also influenced by Realism) to the methodology of choice of law. Both Clark and Currie doubted the efficacy of using preexisting substantive rules to determine outcomes in particular cases: Currie criticized the "imperative" quality of jurisdiction-selecting rules of choice of law in the same way that Clark criticized theories of the "cause of action" that cabined the discretion of judges in individual cases. *See, e.g.*, Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1006–08 (1958) (disparaging traditional jurisdiction-selecting choice-of-law rules as embodying a formalist, absolutist spirit at odds with the more policy-oriented approach of twentieth-century American law).

The pre-*Twombly* tolerance for general or globalized allegations that was demonstrated in *Swierkiewicz v. Sorema N.A.*[9] and embodied in Rule 8(a)(2) made it a trivial matter in most cases to proffer the necessary allegations. After *Swierkiewicz*, in which the Court upheld the legal sufficiency of an employment discrimination complaint that made concededly conclusory allegations of discrimination,[10] it was hard to ask students to believe that they must sweat heavily over their ability to make allegations from which the factfinder could reasonably infer that the elements of a recognized claim were satisfied. If the formulaic allegations of discriminatory intent in *Swierkiewicz* were sufficient to avoid dismissal, then even Rule 11 does not prevent an enterprising lawyer from making the necessary allegations, except in cases where the facts are so unpromising that it would be objectively unreasonable for the lawyer to do so.[11]

Nevertheless, I do not see any way around at least beginning students' exposure to Rule 12(b)(6) with a discussion of the elements of a cause of action and some stylized examples of how a complaint can fail. I do not know how one can otherwise understand the command of Rule 8 that a complaint make "a short and plain statement of the claim showing that the pleader is entitled to relief."[12] Thus, to give an example, I itemize the elements of a cause of action for assault, including the requirement that the defendant's actions placed the plaintiff in fear. If the complaint makes allegations from which the inference of such fear would be absurd—say, if the single concrete allegation is that "the defendant said, 'Excuse me, do you have the time?'"—then I suggest to students that the allegations have failed to satisfy an essential element of the assault claim. Thus, the complaint would be subject to demurrer or dismissal. Then, of course, the disclaimers can begin: Making the necessary allegations may not be too difficult in most cases because the allegations can be made in general terms. You can just allege, "The encounter made me fear for my physical safety." But I do think you have to march up the hill even if only to march down it again.

9. 534 U.S. 506 (2002).
10. *Id.* at 514–15.
11. *Mitchell v. Archibald & Kendall, Inc* provides an example of bad facts that limit what a lawyer can do in a complaint. 573 F.2d 429 (7th Cir. 1978). A delivery-truck driver parked across the street from the recipient's driveway because other vehicles parked in the driveway made it inaccessible. *Id.* at 431. The plaintiff driver was attacked in his truck while waiting to make the delivery. *Id.* Under Illinois tort law, the plaintiff was without a remedy because all potentially applicable duties devolving upon the recipient required the plaintiff to have been on the recipient's property at the time of the attack, which he had not been. *Id.* at 433. The plaintiff's attorney made heroic efforts to argue that the question of whether having been parked across the street could give rise to a reasonable inference that the plaintiff had been on the defendant's property, but to no avail. *See id.*
12. FED. R. CIV. P. 8(a)(2).

What, then, have the decisions in *Twombly* and *Iqbal* done to this pedagogical schema? Despite Justice Souter's protestation that *Twombly* did not establish a heightened particularity requirement,[13] it is impossible to square *Iqbal*'s freewheeling disqualification of conclusory allegations with the spirit of toleration evinced in *Swierkiewicz*. I can no longer tell students, "It does not matter if you can't come up with lots of specifics in your complaint; you can always make pretty conclusory allegations, as in *Swierkiewicz*." Moreover, a renewed emphasis must now be placed on establishing an inferential link between allegations and elements. It must be plausible, for example, to infer that there has been a conspiracy from allegations of parallel conduct by each competitor within a regulated industry. Perhaps the more formalist, elements-based approach to pleading is being restored to its former majesty.

And yet there is some irony in the inquiry enjoined upon federal courts by the decisions in *Twombly* and *Iqbal*. At one level, of course, the decisions seem atavistic, at war with an ethos that had long informed federal procedural law. Scholars have criticized *Twombly* and *Iqbal* for, among other things, abandoning the reformist spirit of Rule 8. Robert Bone, for example, has suggested that *Iqbal*'s freewheeling exclusion of so-called conclusory allegations reinscribes code pleading's proscription on pleading legal conclusions.[14] Charles Clark would presumably have been appalled. In one unusual respect, however, the two new cases actually resemble the more radical version of Clark's attempt to reform the pleading rules in the 1920s and 1930s. Plausibility, as explicated in *Twombly* and *Iqbal*, seems to shift the examination of a complaint's legal sufficiency from the formalist, elements-based approach to more of a Rorschach test: Does this narrative sound plausible, given my experience of the world? *Iqbal* in particular pushes judges dangerously far in the direction of eyeballing a complaint and asking, "Is it really likely that it happened the way the plaintiff would like us to think that it did?"

Obviously, we should not push this unexpected similarity between the *Twombly/Iqbal* framework and Clark's vision too far. The intent and effect of Clark's approach were to enable more complaints to survive a motion to dismiss, while *Twombly* and *Iqbal* do precisely the opposite. In a sense, *Twombly* and *Iqbal* (unlike Clark's position) rigorously retain the formal requirement that a complaint state the elements of a cause of action while adding a less formal assessment of narrative plausibility to the picture. There is an interesting

13. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).

14. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 859 (2010). Professor Bone, incidentally, finds the decision in *Twombly* to be far better justified than that in *Iqbal*. *Id.* at 851, 859.

reflection here of the move that has occurred in the last twenty-five years in scholarship concerning the psychological determinants of jury decisionmaking, where, as Ron Allen and others have pointed out, cognitive theories based on narrative structure have largely replaced the emphasis on formal, elements-based reasoning.[15]

Is it realistic to suppose that federal district court judges will, in the wake of *Twombly* and *Iqbal*, begin to evaluate the sufficiency of complaints based on not-wholly-conscious assessments of narrative plausibility, in the same manner that juries (on the best explanation account) reason their way to findings of fact?[16] Not really. Judges and lawyers are trained to apply formal structures of reasoning to problems like the legal sufficiency of a complaint, even if those structures are in tension with more natural modes of cognition. There is little risk that federal judges will forget *en masse* that a complaint must state the elements of a recognized cause of action, simply convert Rule 12(b)(6) motions into summary judgment motions, or dismiss complaints for no better reason than that "it doesn't sound right."

But while teaching first-year students, I think that care is required lest the distinctive conceptual core of Rule 12(b)(6), the "so what" defense, be lost or diluted. This may sound a bit patronizing or insulting to the intelligence of my remarkably able Civil Procedure students. But these are the conceptual points that procedure professors have been at pains to reinforce for as long as American law schools have existed. To use a figure of Walter Wheeler Cook's from a different context, the tendency to confuse questions of fact and questions of law "has all the tenacity of original sin and must constantly be guarded against."[17] The problem is amplified by the fact that the meaning of *Twombly* and *Iqbal*—assuming any of us feels confident that we've succeeded in isolating and trapping it—is so confusing and takes so much time and effort to explain. My five-hour course covers pleading, discovery, pretrial litigation (including summary judgment), trial, appeal, personal and subject matter jurisdiction, *res judicata*, and

15. Nearly twenty years ago, Allen spoke of "the contemporary shift of focus from the elemental structure of liability to holistic perspectives, from deciding the truth or falsity of particular elements to deciding the relative plausibility of opposing stories." Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 604–05 (1994). The conceptual connection between Allen's contrast of elements with the plausibility of stories, and the problems raised by *Twombly* and *Iqbal*, seems obvious. *See* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223 (2008).

16. In recent years, several studies of jury decisionmaking have argued that a process called "reasoning to the best explanation," a more holistic and *gestalt*-like process than that of applying the formal elements and proof tests specified by legal doctrine, best explains the jury decisional process. *See, e.g.*, Pardo & Allen, *supra* note 15.

17. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933).

sometimes joinder of parties and the *Erie* problem. Thus there is only so much time for the niceties of pleading. The energy required to make sense of *Twombly* and *Iqbal* is out of all proportion to these cases' importance relative to the conceptual core of Rule 12(b)(6). It is all I can do to ensure that the latter issue is not swamped by forays into the dialectics of "plausibility."

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The challenges of teaching *Twombly* and *Iqbal* in the first-year procedure course open onto a larger pedagogical field; they raise questions about how professors teaching a wide variety of procedural topics should balance the conceptual and the practical. Perhaps because my own modest practice experience involved almost no civil litigation—and because, as a Yale Law School graduate, I had to teach myself civil procedure virtually from the ground up before my first offering of the course—I have tended to emphasize the conceptual in my teaching. I conceive of my procedure class partly as an introduction to legal process, and this leads me to focus heavily on questions of concept and structure that, if not unique to American civil litigation, are treated by it in distinctive ways: the distinction between fact and law, the importance of standards of review, the tension between the adversary system and the duties that lawyers owe the system of adjudication, and the complex interplay between questions of procedure and questions of substance. But I am constantly nagged by the predictable sequence in which I first explain the theory and then advise that lawyers and judges don't necessarily think about the problems that way.

Thus, for example, I teach the topic of summary judgment in federal courts according to a rather rigid blueprint. First, I posit that courts first ask whether the moving party has sufficiently supported her summary judgment motion (being careful to distinguish situations in which the defendant is the moving party from those in which the plaintiff is). If there is sufficient support, we then turn to whether the nonmoving party has met his burden. I insist, scrupulously if not tediously, on linking the inquiry to the standard of proof that the court would instruct the factfinder to apply at trial.

This framework seems to me completely logical and conceptually chaste. Sometimes, though, I have the opportunity to ask former students who have clerked for a federal judge whether what I taught them is reflected in the way their judges treated summary judgment motions. Invariably the answer is, "Sure . . . sort of . . . not really." I'm never 100 percent certain as to how and why the judge's approach is different from the one I teach, but I do get the impression that what is at work is a more "holistic" approach (to use Professor Ron Allen's word)

than my rather formal model would predict. I could give numerous other examples in which practice departs from theory.

And such is the case for *Twombly*, *Iqbal*, and Rules 8(a)(2) and 12(b)(6). Prior to 2007, one could well have asked: Given that the Federal Rules are so hospitable to rather conclusory allegations (as per *Swierkiewicz* and other cases), is satisfying the elements of a cause of action as big a deal as I am making it out to be? Why bother haranguing students about whether allegations of one's age and of one's firing are alone sufficient to support an inference of age discrimination, when it's so easy just to add an allegation stating, "Plaintiff was fired because of his age"? After *Twombly* and *Iqbal*, one might ask whether it is worth heroic efforts to reconcile those cases with the more formal and traditional ideas concerning the elements of a cause of action[18]—or whether the disposition of a 12(b)(6) motion will come to be partly a matter of whether the individual federal district court judge finds, based on her worldly experience and common sense, that "it just doesn't seem plausible." For myself, I will cleave to my formalist proclivities and relentlessly march my students up and down the hill. It's why I get paid the big bucks.

18. For all the criticism that has been legitimately directed at the *Iqbal* decision, the general framework that the decision sets out (as opposed to its application in the particular case) is at least coherent and formally consistent with traditional principles: (1) Impermissibly conclusory allegations do not count; (2) the remaining allegations must support a plausible inference that each of the elements has been satisfied.