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Articles

Conley as a Special Case of *Twombly* and *Iqbal*: Exploring the Intersection of Evidence and Procedure and the Nature of Rules

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I. INTRODUCTION

A pair of Supreme Court cases interpreting the Federal Rules of Civil Procedure pleading requirements has caused quite a storm,¹ and a

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third case has caused a puzzle. *Twombly*² and *Iqbal*³ appear to virtually all observers as rejecting the *Conley*⁴ standard that the “short and plain statement” required of a complainant is satisfied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief,”⁵ and instead requiring enough factual specificity to make the plaintiff’s allegations plausible.⁶ The Court itself seems to agree with the observation that it was rejecting the *Conley* standard.⁷ The puzzle comes from *Erickson v. Pardus*,⁸ in which the Court approved the adequacy of a bare bones pleading with virtually

1. See, e.g., Adam M. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (“Federal pleading standards are in crisis.”). See also Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) [hereinafter Bone, *Pleading Rules*]; Robert G. Bone, *Plausibility Pleading Revisited and Revised: a Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) [hereinafter Bone, *Plausibility Pleading*]; Lonny S. Hoffman, *Burn Up The Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U.L. REV. 1217 (2008); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535 (2009). See generally, Penn Statim, *Reflections on Iqbal: Discerning Its Rule, Grappling with its Implications*, <http://www.pennstatelawreview.org/iqbal-portal/> (2010) (summarizing various legislative responses and scholarly criticism).

2. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) (complaint generally alleging parallel business conduct and conspiracy did not state a plausible claim on which relief could be granted under the Sherman Act).

3. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (finding that civil rights complaint should be dismissed as its specific allegations did not “nudge” claims of discrimination across the line from conceivable to plausible).

4. *Conley v. Gibson*, 355 U.S. 41 (1957).

5. *Id.* at 45-46.

6. See Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis* 25 (Research Symposium on Empirical Studies Of Civil Liability at Northwestern University School of Law, Oct. 10, 2008, available at SSRN: <http://ssrn.com/abstract=1581481>) (noting that as of October 2008, 480 rulings had cited *Twombly* as a revision of the *Conley* standard, although its uses and the conclusions of courts varied enormously). See also Bone, *Pleading Rules*, *supra* note 1, at 903 (suggesting that without adequate protections for defendants, discovery costs may constitute a violation of due process rights); Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C.L. REV. 431, 432 (2008) (suggesting that one of the most pressing issue confronting scholars in the wake of *Twombly* is the question of what, exactly, is plausibility pleading?); Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 121, 124 (2007), available at <https://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.)

7. See *Twombly*, 550 U.S. at 562-63 (“We could go on, but there is no need to pile up further citations to show that *Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard. . . .”). See also *id.* at 577 (Stevens, J. dissenting) (“Today . . . the Court scraps *Conley*’s ‘no set of facts’ language . . . [and] dismisses it as careless composition.”).

8. *Erickson v. Pardus*, 551 U.S. 89 (2007).

no factual specificity that was much closer to the *Conley* than to the *Twombly* standard.⁹

We think there is an answer to this puzzle, although whether it calms the storm or intensifies it remains to be seen. The answer is that *Conley* is not so much wrong as instead a special case of the general domain of pleading requirements, to-wit a case in which knowledge of the relevant facts is reasonably symmetrically distributed over the parties and discovery costs are likely to be both relatively low and symmetrical.¹⁰ These conditions may very well have been a reasonable description of federal litigation at the time the Federal Rules of Civil Procedure (FRCP) were adopted, and thus at the time *Conley* was decided this standard may have been reasonably general.¹¹ However, modern litigation may present other classes of litigation, ones in which each of these three variables takes on different values: knowledge of the events can be asymmetrical, and discovery costs can be both quite high and also asymmetrical.¹² In such cases, applying the *Conley* gloss when its assumptions are false may be socially perverse.¹³ Thus, the solution to the puzzle is that *Twombly* and *Iqbal* are responses to the changed conditions of litigation in certain cases, while *Erickson* applied more or less the *Conley* standard where the prior conditions pertained.¹⁴

9. See *id.* at 93. The decision, puzzlingly, stated that “[The] Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” . . . [W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Id.* (internal citations omitted). *Twombly* was cited for both propositions. *Id.*

10. In *Erickson*, both parties had observational data of treatment, for example. To be clear, costs and information are not necessarily independent variables. In *Conley*, for example, most likely the plaintiffs could easily and cheaply obtain certain initial facts but the cost and difficulty of obtaining information increased as it approached the center of the conspiracy.

11. See, e.g., *infra* Section II.A.

12. See, e.g., *supra* note 1 and articles cited. See also Suzanne Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. (forthcoming 2011). Prof. Sherry’s approach is similar to our own, in many ways, although she grounds her analysis in what appears to be a substantive concept of “doctrine,” rather than in an examination of “rules” which guide decision making.

13. As we will discuss below, our conception of socially optimum outcomes takes into consideration not only the cost of errors in favor of plaintiffs, but also the cost of errors in favor of defendants.

14. Prof. Bone sees this about *Twombly* but not *Erickson*, seeing the later case as one where the essential elements of liability flow naturally from the general allegations of a claim. Bone, *Pleading Rules*, *supra* note 1 at 886 and accompanying footnotes. It is obvious that informational and cost dissymmetry can cut in opposite directions. Conversely, both could favor lowering rather than raising pleading standards. Indeed, there could be any relationship at all between them, which is why, as we explain in the remainder of this article, replacing the *Conley* gloss with another static rule would not likely optimize the interests of the legal system.

Why this explanation, if true, may intensify rather than quiet the storm is because it suggests that the Court's approach to pleading does not respect the important goal of procedure to be trans-substantive, and that now different substantive areas will have different procedural requirements with Rule 8,¹⁵ meaning one thing in one context, and something else in another.

However, we think there is an answer to this, too: the application of Rule 8 already had different results in different contexts as a function of information and cost asymmetries. Nonetheless, the objection deserves careful consideration because it has quite significant jurisprudential implications. It implicitly adopts a conception of a rule as a static entity applicable in an invariant way across its domain. This is the conventional view of what it means to be a rule, and indeed of what the rule of law entails.¹⁶ Its conventionality, however, does not mean it is invariably the correct or optimal conception of a rule. As we elaborate below, rules and their domains may be dynamic. The concern about trans-substantive procedural rules may require something like the *Iqbal/Twombly* gloss. The *Conley* gloss on Rule 8 may have been intended as a universal statement of the Rule's meaning, or it may instead have been the best approximation of the optimal solution of the legal system's interests at the time and under those conditions. But conditions change, and what is optimal under one set of conditions may not be optimal under another. Reaching consistent results in dynamic domains may require a dynamic rule.

There is a third interesting aspect to this line of cases. If Rule 8 does adopt a dynamic conception of rules, an inevitable consequence will be that the distinction between procedure and evidence will be breached. The most obvious implication of this point is that it will not be possible to articulate a formal standard for pleading that can be applied pre-discovery without taking into account substantive evidence. More precisely, these cases make evident what has, in our opinion, always been true, that the wall between evidence and procedure is always breached, and the real question is how much, not whether, the evidence needs to be considered prior to discovery. This explains, in part, the remarkable awkwardness in the Court's attempts to articulate its substitute for the *Conley* standard. It attempted to deny precisely what it was doing in breaching the procedure/evidence boundary, and perhaps it

15. For simplicity, we assume that the cases are interpreting Rule 8, but in fact there is a relationship between Rule 8 and Rule 12 at stake as well.

16. See generally, Antonin Scalia, *Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

also attempted to preserve the appearance of a static rule.¹⁷ Breaching the procedure/evidence divide has a second implication. Contrary to the virtually unanimous critical commentary,¹⁸ the cases will not result in trial judges idiosyncratically deciding on the adequacy of pleadings in light solely of their common sense and experience. This fear neglects the central organizing feature of the evidentiary regime, which is its comparative nature. The parties, through their various efforts, will present courts with structured, not open ended choices.

The fourth interesting point is that, ironically but not surprisingly, the reactions of the commentators have also been consistent in their proposals for responding to these cases.¹⁹ In a short period of time, these cases have generated a robust and insightful literature, but each of the commentators responds with another static rule that has some of the same predictable consequences as the original reading of Rule 8.²⁰ The proposals each try to shoehorn the litigation dynamic into a modified set of necessary and sufficient conditions from which conclusions may be deduced, and in doing so generate a different but equally erratic set of outcomes as those caused by the original *Conley* gloss. This is good evidence that the distinction between a static and dynamic rule is of some importance.²¹

17. Even in *Iqbal*, the Court seemed to be denying what it was doing when it asserted that, in the end, determinations of plausibility will be informed by “the good discretion of the court” rather than by considerations of evidence. As we discuss below, those two are synonymous. See *infra* Section IV. For an insightful analysis of the relationship between procedure and evidence, see Michael Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, BOS. COL. L. REV., (forthcoming), available at <http://ssrn.com/abstract=1585331>.

18. The core of this criticism was first articulated in Justice Stevens’ dissent in *Bell Atlantic v. Twombly*, 550 U.S. 544, 571 (2007) and expanded upon in Justice Souter’s dissent in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1954 (2009). For further exploration of these critiques, see *infra* Section VI.

19. See, *infra* Section VI.

20. See, e.g., Bone, *Pleading Rules*, *supra* note 1, at 878. For further exploration, see *infra* Section VI.

21. We do not discuss the process questions of whether rules should be modified through legislative, rule making, or judicial interpretative processes, not because they are not interesting and important, but simply because what engages us here are the jurisprudential questions. For a discussion of the merits of the changes, see *Whether the Supreme Court has Limited Americans’ Access to Court: Hearing Before the Sen. Committee on the Judiciary*, 111th Cong. 111-530 at 7 (2009) (Prepared Statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice University of Pennsylvania). We do not accept that it is obvious that what the Court has done in *Iqbal/Twombly* is to change the rule. The central point of this paper is that what it means to be a rule is itself an important question that is prior to the question whether a rule has been changed.

We discuss these points in turn and then conclude with some suggestions concerning how to respond to the shift from a static to a dynamic conception of Rule 8.²²

II. CONLEY, TWOMBLY, AND IQBAL AND THE COSTS OF LITIGATION

The history of pleading practice has been characterized by periods of increasingly demanding pleading standards, followed by dramatic liberalizations, which are then followed by periods of increasing complexity.²³ Because pleading standards control access to the courts,²⁴ the degree of rigor with which pleadings are scrutinized has a direct effect on the number of potentially meritorious claims that are rejected and the number of frivolous claims that are allowed to proceed. Strict pleading standards may result in an increase in the number of errors against the plaintiff, while lax pleading standards may result in an increase in the number of errors against the defendant.²⁵ These types of

22. It is important to note that much of what generates the difficulty here, as elsewhere in the litigation process, is the failure of parties to bear the true cost of their behavior, and one solution to many procedural problems would be a true cost bearing regime, which is different from a cost shifting regime. See, e.g., Bruce L. Hay and Kathryn E. Spier, *Settlement of Litigation*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, 442-51 (Peter Newman ed., vol. 3, Macmillan) (1998); James W. Hughes and Edward A. Snyder, *Allocation of Litigation Costs: American and English Rules*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, 51-56 (Peter Newman ed., vol. 1 Macmillan) (1998). If plaintiffs could not externalize costs, for example, defendants would not be coerced into settlements. If defendants could not externalize costs, plaintiffs would not be inhibited from suing, and so on. In fact, cost bearing should occur from beginning to end, including the parties bearing the true cost of their trial activity; when one party puts in evidence, it imposes costs on the other through lawyer's time and the need to respond and so on. However, one of the authors, Prof. Allen, once engaged in the effort to articulate such a scheme and gave it up as hopelessly complex. Who is exactly causing what cost turns out to be extremely complicated and perhaps impossible to model. Of course, even if a scheme could be articulated, adjustments to it would be appropriate for policy reasons.

23. See Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46 (1957) ("I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings"). See also, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998) [hereinafter Marcus, *Puzzling Persistence*] (discussing the periodic revitalization of fact pleading); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Evidence*, 86 COLUM. L. REV. 433 (1986) [hereinafter Marcus, *Revival*] (analyzing the evolution of common law pleading, the Field Code, and the Federal Rules of Civil Procedure).

24. See e.g., Bone, *Pleading Rules*, *supra* note 1 at 876 (discussing *Twombly* in the context of institutional framework which controls access to legal sanctioned transfers of wealth).

25. This presumes that a failure to dismiss an action for failure to state a claim is an error when the plaintiff should, because of the facts, fail to prevail on the merits and vice versa.

errors are commonly called Type I and Type II errors.²⁶ A Type I error occurs when a test returns a false positive,²⁷ and it is this type of error with which the Court was clearly concerned in *Twombly*.²⁸ A Type II error occurs where a test returns a false negative,²⁹ and it is this type of error with which Professor and later Judge Charles Clark, was concerned.³⁰ The distributions and costs of the errors and correct decisions presumably have an effect on primary behavior. The risk of liability is a cost of doing business, and changing that risk will affect the incentives that people have in shaping their primary conduct.³¹

In order to understand the problems facing contemporary courts, it is helpful to contextualize them in the developments in procedure and pleading that have occurred over the last three decades.³² We thus first examine how the original FRCP allocated errors and the cost of errors between plaintiffs and defendants, how this balance changed over the last century, and how the Court and Congress responded.

A. *A Brief History of Pleading*³³

The Federal Rules of Civil Procedure begin with a broad declaration of their scope: “There is one form of action—the civil action.”³⁴ By

26. See generally, JACKSON, *ET. AL.*, *ANALYTICAL METHODS FOR LAWYERS* 473 (2003) (for a concise introduction into statistical analysis and concepts).

27. *Id.* at 511.

28. See *Bell Atlantic v. Twombly*, 550 U.S. 544, 554 (2007) (discussing the process of “hedg[ing] against false inferences”).

29. JACKSON, *supra* note 26, at 511.

30. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 774 (2d Cir. 1944) (“[W]e do not see how the plaintiff may be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.”).

31. Keith N. Hylton, *When Should a Case Be Dismissed? The Economics Of Pleading And Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39 (2009). Prof. Hylton’s economic theory focuses on the relationship between dismissal on the pleadings and summary judgment, but his analysis generalizes to what we examine in the text. Both arguments are straight forward micro-economic arguments about the costs of errors and incentives to obey the law. Prof. Hylton does not deal with the jurisprudential issues critical to the Court’s cases, such what it means to be a rule or the relationship between procedure and evidence. For a similar economic analysis, see Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009).

32. See, e.g., Amendments to Federal Rules of Civil Procedure, 446 U.S. 997 (1980) (Powell, J., dissenting) [hereinafter FRCP Amendments] (“When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that not infrequently [they have been] exploited to the disadvantage of justice. . . . Delay and expense now characterize a large percentage of all civil litigation.”) (internal quotations omitted).

33. This is a very brief history, and as in any such account objectionable on many grounds. For a detailed treatment, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

34. FED. R. CIV. P. 2.

reducing the forms of pleading to one, the rules took a substantial step toward what Clark regarded as the “basic” objective of procedural reform: simplifying the pleading process.³⁵ By streamlining the “procedural formalities” of pleading, the new rules were designed to give greater “significance and effectiveness” to discovery, pre-trial conferences, and motions for summary judgment.³⁶ In Clark’s opinion the game of polishing pleadings was rarely worth the candle, since the dismissal of one complaint due to a dearth of facts would simply result in another round of pleading.³⁷ A far better use for pleadings was to differentiate the claims brought from all others, so as to allow the proper application of *res judicata* and ensure that the claim was heard in the proper forum under the proper mode of adjudication.³⁸ Discovery and summary judgment would allow for the rapid “disclosure of all facts and matters in dispute, followed by prompt and final adjudication wherever that is feasible.”³⁹ The one area where specific pleadings would be required would be in claims related to fraud and mistake where mere

35. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1941). Clark did not achieve everything he wanted through the adoption of the Federal Rules of Civil Procedure; other scholars have gone so far as to suggest that Clark sought to have scrutiny of pleadings eliminated entirely. See also Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L. J. 914, 927 (1976) (discussing Clark’s views on pleadings in his academic writings and judicial opinions).

36. Clark, *supra* note 35, at 456. In addition to a hearing on a motion to dismiss provided by Rule 12(b)(6), the Federal Rules of Civil Procedure also provide for a motion for a more definite statement (which experience suggest is much less frequently used). See FED. R. CIV. P. 12(e). The Rules also allowed for a pre-trial conference before the court where the parties may be required to establish a framework for expediting the disposition of the action, establishing control of the case by the court (or a magistrate judge), discouraging wasteful pre-trial activities, and facilitating settlement. See FED. R. CIV. P. 16. Further, parties are required to disclose certain relevant information and documents in their knowledge or possession at the outset of the litigation and before any discovery request is made and discovery requests may be limited in their scope and number by the court. See FED. R. CIV. P. 26. Other methods of discovery are typically limited by the court’s discretion or explicitly by rule. See, e.g., FED. R. CIV. P. 33 (limiting the number of written interrogatories to 25 absent permission for additional interrogatories by the court). While specific discovery sanctions focus on failures to provide information or appear for a proceeding, see FED. R. CIV. P. 37, discovery requests submitted for improper purposes may result in sanctions under the court’s general powers. See FED. R. CIV. P. 11.

37. See, e.g., Clark, *supra* note 23, at 52.

38. *Id.* For an interesting example of how pleadings serve this function in a contemporary context, see *Barnett v. Obama*, No. SACV 09-0082 DOC, 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009) (dismissing complaint brought by soldier seeking to avoid deploying overseas until “questions” regarding veracity of President Obama’s birthplace could be resolved). See also *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009) (upholding dismissal on grounds that voter’s worries about future impeachment or eligibility to hold office did not create standing to seek declaratory judgment on presidential candidate’s eligibility to run for office).

39. Clark, *supra* note 35, at 456.

allegations could greatly damage a defendant.⁴⁰ Even in these special cases, matters about which a plaintiff simply could not know details, such as malice, intent, knowledge, and conditions of mind, could be “alleged generally.”⁴¹

Since discovery facilitated the process by which disputed issues could be refined and final judgment could be rendered, Clark viewed it not as a problem associated with conclusory allegations, but as a solution to them.⁴² Discussing allegations of conscious parallelism in the antitrust context and their evaluation on a motion to dismiss, Clark suggested that “it is quite apparent that the real objection is not failure to state a claim . . . it is rather the lack of detail which defendant seeks and the court thinks he should have. But this, where really needed, is to be secured directly and simply by pre-trial conference or discovery.”⁴³

The principle that pleadings should not be asked to do the work of discovery or a decision on the merits was reinforced by the Court’s decision in *Conley v. Gibson* that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴⁴ The Court went further to reject the contention that a complaint should “set forth specific facts to support its general allegations,” stating “the decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”⁴⁵ Rather, “all the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁴⁶ Similarly, in reviewing the sufficiency of the factual allegations considered in a complaint, the Court would not test them against its own experience, but presume them to be true.⁴⁷ Where allegations were too ambiguous to allow a coherent response, defendants were to avail themselves of a motion for a more definite statement.⁴⁸ *Conley*, in short, may have accurately reflected the conceptual foundations of the adoption of the Rules.

40. FED. R. CIV. P. 9 (requiring certain matters such as fraud or mistake to be pled with specificity).

41. FED. R. CIV. P. 9(b) (allowing conditions of mind to be pled generally).

42. See Clark, *supra* note 23, at 52.

43. *Id.*

44. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

45. *Id.* at 47.

46. *Id.*

47. See, e.g., *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167, 172 (1967).

48. See *United States v. Employing Plasterers Ass’n of Chicago*, 347 U.S. 186, 189 (1954). In exceptionally broad language, the Court went on to say that where a complaint charged every element of an offense, “summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.” *Id.*

Early challenges to the liberal pleading standards laid out in *Conley* and other decisions from the 1950's often arose in contexts where the risk of errors would be particularly costly to defendants.⁴⁹ In the anti-trust context, defendants argued that the potential for treble damages after trial warranted a "heightened pleading standard" at the motion to dismiss.⁵⁰ Other defendants argued that "jurisdictional facts" must be pled with particularity in order to justify their being brought to court.⁵¹ While defendants made some headway in lower courts establishing heightened pleading standards, particularly where they would have recourse to various immunity doctrines at trial or where the risk of spurious litigation was high,⁵² the Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* brought a halt to this process.⁵³ In *Leatherman*, the Court considered whether a plaintiff in a § 1983 suit could be required to plead facts with particularity where a defendant would have immunity from the suit absent particular circumstances.⁵⁴ The Fifth Circuit, reasoning that immunity from liability would mean little if a government entity could still be forced to engage in time consuming and costly discovery, had required plaintiffs to plead with particularity the facts which would negate this immunity.⁵⁵ The Court, however, came to a different conclusion. In a unanimous opinion, stated that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," that the Federal Rules do impose a particularity requirement in "two specific instances," cases of fraud or mistake, and that according to the maxim "*expressio unius est exclusio alterius*," no other heightened pleading standards could be imposed by judicial decision.⁵⁶ Subsequently, in *Swierkiewicz v. Sorema*, the Court held that a complaint need not allege specific facts sufficient to support a circumstantial prima facie case against a defendant where direct proof

49. See Clark, *supra* note 23, at 48 (discussing example cases).

50. See, e.g., *Hathaway Motors, Inc. v. General Motors Corp.*, 18 F.R.D. 283 (D. Conn. 1955).

51. See, e.g., *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972 (2d Cir. 1944).

52. See, e.g., *Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir. 1989) (stating that § 1983 claims require "claimant to state specific facts, not merely conclusory allegations" to overcome official immunity); *Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (stating that securities fraud claimants must plead facts giving rise to a strong inference of scienter to ward off allegations of fraud in hindsight).

53. *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

54. *Id.* at 166-67.

55. See *Rodriguez*, 871 F.2d at 554.

56. *Leatherman*, 507 U.S. at 168 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

might suffice instead.⁵⁷ Both cases applied a straight forward understanding of Rule 8, with the first rejecting case by case conflation of Rule 8 and Rule 9 and the second rejecting a requirement that a pleader must plead more than would have to be proved.

During this same period, doubts were being raised about the ability of judges to effectively control process costs through pre-trial conferences and managed discovery,⁵⁸ thus calling into question the conceptual foundations of the existing procedural regime. Critics of expansive discovery, like Judge Easterbrook, pointed out that liberal pleading standards, combined with expansive discovery, gave plaintiffs significant leverage over defendants in cases where discovery costs would be disproportionately borne by the latter.⁵⁹ While the Federal Rules of Civil Procedure prohibit the filing of motions for “any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”⁶⁰ and charged courts with trimming back and sanctioning such abusive requests,⁶¹ Easterbrook argued that it was impossible because of informational asymmetries for judges or magistrates to effectively identify these requests.⁶² When the leverage provided by asymmetric discovery costs was combined with the potentially ruinous damages which could flow from a case, even deep-pocketed defendants whose liability was unclear were often “under intense pressure to settle” claims.⁶³

B. *The Conceptual Foundations Reconsidered*

The implications of this history are clear. In a world of symmetrical information and low transaction costs, the *Conley* gloss on the Federal Rules most likely accomplished the goal of facilitating the accurate and efficient resolution of disputes without distorting the underlying substantive law, values that the procedural regime the Federal Rules

57. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508, 511-12 (2002).

58. See, e.g. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989). See also FRCP Amendments, *supra* note 32, at 1000, n.1 (Powell, J dissenting).

59. Easterbrook, *supra* note 58, at 636. See generally William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971) (discussing problem of *in terrorem* value of claims and coerced settlement); Donald Wittman, *Dispute Resolution, Bargaining and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988) (cataloguing commentary on Landes' original proposal).

60. Fed. R. Civ. P. 11(b)(1).

61. See FED. R. CIV. P. 11(c) & 26(g).

62. See Easterbrook, *supra* note 58, at 638.

63. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also, *Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007) (“the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings”).

replaced did not adequately secure. If the original assumptions about litigation are true, procedural wrangling is largely a dead weight social cost, serving no good purpose. Increasing the cost of resolving disputes, unnecessary procedural wrangling makes the underlying substantive right less valuable, which can distort substantive law. This is where the procedural regime begins to intersect the evidentiary regime. It is plausible that the standard of proof in civil cases of a preponderance of the evidence as a general matter optimizes social value,⁶⁴ but, under certain simplifying assumptions, it can only do so if the cases brought to trial are not a skewed or distorted sample of the underlying disputes that people have.⁶⁵

However, in a world rife with informational and economic asymmetry, the application of an interpretation of a rule constructed for a different context could ultimately have just the opposite effect of being socially perverse. If the procedural regime creates distortions in the cases that are brought to trial, there may be no good reason to believe that the preponderance standard is optimal. Prior to the Federal Rules being adopted, perhaps procedural costs systematically disfavored plaintiffs.⁶⁶ If the status of plaintiff and defendant are not random (e.g. more pedestrians than car drivers deserve to recover for accidents, and thus more pedestrians sue car drivers than vice versa), then the effect of the procedural regime, coupled with applying the standard evidentiary

64. On certain assumptions, the preponderance of the evidence standard minimizes expected errors, which, in turn, might reduce actual errors. David H. Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiable Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487 (1982). The preponderance standard may also cause most cases to be settled where the facts are relatively clear. Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). That in turn may optimize socially useful activity. There are numerous complexities here. See, e.g., Ronald J. Allen, *The Error of Expected Loss Minimization*, 2 LAW, PROBABILITY & RISK 1 (2003); Ronald J. Allen, *Clarifying the Burden of Persuasion and Bayesian Decision Rules: A Response to Professor Kaye*, 4 INT'L. J. OF EVIDENCE AND PROOF 246-259 (2000); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493 (1966).

65. More precisely, the question is the effect of litigated cases on primary behavior. We simplify this question in the text, but it should be noted that the policy should be to encourage the litigation of those cases which will optimize primary behavior. That may involve the simplified assumptions of the text, but it may not. For example, a skewed set of cases at trial may result in optimizing the much larger set of non-litigated cases. For an excellent discussion of the effect of burdens of proof on primary activity, see Chris William Sanchirico, *A Primary-Activity Approach to Proof Burden*, 37 J. LEGAL STUD. 273 (2008) (distinguishing between litigation as a search for truth and litigation as a means to regulate behavior).

66. See Marcus, *Puzzling Persistence*, *supra* note 23 at 1753 (discussing rise and fall of fact pleading prior to Federal Rules).

rules, could be to undermine the substantive law.⁶⁷ In the car example, car drivers would not be adequately internalizing the costs of their behavior if too many at-fault drivers escape liability because of litigation costs of plaintiffs. The adoption of the Federal Rules may very well have rectified this in part by clearing away some procedural impediments to accurate adjudication that favored defendants.

Note another aspect of the assumptions underlying the adoption of the Rules: if information is evenly dispersed and cheap to obtain, the procedural regime can largely ignore the evidence and proceed on the assumption that judges should make no fact-based decisions which would terminate trial prior to the discovery process. In such a world, it is perfectly plausible to adopt the *Conley* gloss that cases can only be dismissed on the pleadings if there is no possible state of affairs consistent with liability. This directly serves the important goal of ensuring that a complaint properly frames the legal question and allows for the application of *res judicata*, which, in a costless regime, may be the primary purpose of pleading.⁶⁸

Now, fast forward to the present. As foreshadowed by Judge Easterbook's concerns, culminating in *Iqbal* and *Twombly*, there has been a growing belief (whether empirically accurate or not) that the assumptions about knowledge and cost are not true in some set of cases.⁶⁹ Knowledge may not be symmetrically distributed, and discovery costs may be large relative to the value of claims, and also asymmetrically distributed. Applying the *Conley* gloss in that subset of cases may not further the underlying purpose of accurate and efficient adjudication, and may undermine the original achievements of the Rules

67. Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FL. L. REV. 1 (2010) (argues that pleading imposes costs and due process constrains the costs that can be imposed on individuals). The problem is that the almost limitless ability of legislatures to impose costs and determine distributions of errors in civil cases is virtually unquestioned. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Nonetheless, the argument has the one similarity to ours of emphasizing the differing costs that different pleading regimes impose and suggesting that the cases may be responding to that notion. Perhaps the author is correct that the conventional understanding should be rethought.

68. See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (stating that a complaint contains sufficient specificity when it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456-57 (1941) (suggesting proper role of pleadings was to channel claims to the proper adjudicative body and to allow the application of *res judicata*).

69. Indeed, by the time of *Twombly*, the Court felt it was "self-evident" that the "problem" of discovery abuse could not be resolved by judicial management and it identified a string of its own precedents in which additional information was demanded from plaintiffs in order to clear the motion to dismiss. See *Bell Atlantic v. Twombly*, 550 U.S. 544, 559-60 (2007).

by misallocating errors and correct outcomes. That, in turn, will undermine the substantive law.

In some cases, perhaps the positions of plaintiff and defendant have been inverted from what was believed to be the pre-Rules situation, which in turn may justify more intense scrutiny of these complaints. Whereas the pre-Rules procedural regime favored defendants, and thus subsidized socially wasteful activity, now, in some set of cases, perhaps it favors plaintiffs with the opposite effect. In such cases, defendants will be deterred from productive activities, not by the law, but by litigation costs that increase the *in terrorum* value of even meritless suits that put pressure on a defendant to settle⁷⁰ and burden otherwise lawful conduct.⁷¹ Potential defendants will engage in litigation avoidance tactics that are likely to be socially wasteful, and they will settle to avoid litigation costs rather than risk liability on the merits.⁷² This increases the cost of conduct, which is not itself actionable, but which might appear indistinguishable from that which is actionable, if a complaint is drawn with a high degree of generality.⁷³

Of course, the reverse might also be true. Mandating even the *Conley* standard might insulate too many defendants from liability, and

70. *Twombly*, 550 U.S. at 558 (“[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding with antitrust discovery can be expensive.”) (citation omitted).

71. Bone, *Pleading Rules*, *supra* note 1, at 903 (suggesting that without adequate protections for defendants, discovery costs may constitute a violation of due process rights).

72. See *Twombly*, 550 U.S. at 556 (“[The] potential expense [of discovery] is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the . . . United States, in an action against America’s largest telecommunications firms . . . for unspecified . . . instances of antitrust violations that allegedly occurred over a period of seven years.”); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (“Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’”). *Twombly*, 550 U.S. at 559, (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

73. See *Twombly*, 550 U.S. at 554 (“The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”) (citation omitted). While it may be easy to dismiss this concern where defendants are large corporations with deep pockets and highly competent legal representations, one need only consider the lot of a college student served with papers from the RIAA to appreciate how this settlement pressure effects large and small alike. See Electronic Frontier Foundation, RIAA v. the Students: An FAQ for “Pre-Lawsuit” Letter Targets, *available at* http://w2.eff.org/IP/P2P/RIAA_v_ThePeople/college_faq.php (discussing RIAA offers of pre-litigation settlement).

in such cases applying the general approach the Court has now fashioned should result in even less scrutiny of complaints than *Conley* mandates. Interestingly, that is already the case. Complaints relying on *res ipsa loquitur* involve situations where the plaintiff does not know what happened and thus cannot possibly in good faith assert a set of facts consistent with liability, yet such complaints survive the pleading stage.⁷⁴ Alternatively, such cases may involve, *a priori*, quite plausible stories of liability, justifying proceeding to the next stage of the litigation process.⁷⁵ In a critical fashion, the *res ipsa* cases anticipate our general point about the significance of a dynamic rule, and thus may be precursors to *Iqbal* and *Twombly*, which can be seen not as revolutionary, but as applying the very same dynamic conception that long ago recalibrated the relationship between the parties in *res ipsa* cases in order to optimize the objectives of the legal system. Moreover, this remains true whether such cases are understood as manipulating pleadings, relying on presumptions, or burden shifts, for the consequences are precisely the same: A set of cases that would have not survived the pleading stage, if the rules are treated as static, is permitted to survive.

Can *Iqbal* and *Twombly* bear this weight? We now turn to them.

C. *History Repeats Itself, Maybe*

Bell Atlantic v. Twombly brought these matters to a head.⁷⁶ The case considered whether a Sherman Act § 1 complaint could survive a

74. Erickson is, as Prof. Bone has noted, a prime example of this, since liability turns on facts and mental states which are outside of the plaintiff's knowledge. See Bone, *Pleading Rules*, *supra* note 1 at 886 and accompanying footnotes.

75. The case of the plaintiff injured by a barrel which fell from a hoist found in *Byrne v. Boadle* provides a classic of example of this. *Byrne v. Boadle*, (1863), 159 Eng. Rep. 299 (Court of Exchequer). Without discovery a pedestrian injured by a runaway barrel could only allege that he had been injured, that he had been injured by the barrel, and that the barrel had been in the sole control of the warehouse owner. As Baron Pollock explained in his opinion, to require the plaintiff to establish the particular nature of the duty breached and the particular acts which led to the breach would be pointless as these would almost invariably be the acts and duties of the defendant.

76. There were related statutory developments that are analytically identical to the present problem, but, being statutory amendments, do not raise the same interpretive problem. In response to concerns about the "abusive practices" discussed in the text, Congress acted to pass bills like the Private Securities Litigation Reform Act (PSLRA). See H.R. REP. NO. 104-369, at 31 (1995) (CONF. REP.) ("The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits."), which required plaintiffs to plead "particular" facts which gave rise to a "strong inference" of a defendant's fraudulent intent when alleging securities fraud. 15 U.S.C. § 78u-4(b)(2). While this measure offered some protection to apparently law-abiding companies that might otherwise be burdened with the cost of defending against

motion to dismiss where it alleged parallel conduct, but failed to present some “factual context suggesting agreement” in violation of the act.⁷⁷ The Court concluded that, in order survive a motion to dismiss, a § 1 claim must state “enough factual matter (taken as true) to suggest that an agreement was made.”⁷⁸ The Court cautioned that this requirement did not “impose a probability requirement at the pleading stage” or demand “detailed factual allegations,” but it did require “more than labels and conclusions [] and a formulaic recitation of the elements of a cause of action.”⁷⁹ According to the Court, the test was not whether it was possible that the plaintiff deserved recovery, but rather, was it plausible.⁸⁰ The plausibility inquiry “simply calls for enough fact to

such litigation, *see* Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81 (2006), it also raised a new question: how was a court to test the strength of inferences in a complaint where all allegations of fact were presumed to be true?

It was this “strong inference” language which the PSLRA incorporated into statute and which was at issue in the *Tellabs* case. The Court concluded that to survive a motion to dismiss under the PSLRA, a plaintiff must allege facts from which “a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at 324. In conducting this inquiry, a court should “accept all factual allegations in the complaint as true,” it must consider the “complaint in its entirety” along with “other sources courts ordinarily examine” when making such rulings, and in determining whether the allegations give rise to a “strong inference of scienter,” the court should take into account “plausible opposing inferences.” *Id.* at 322-23.

Critical to the Court’s adoption of a comparative test was its belief that “the strength of an inference cannot be decided in a vacuum.” *Id.* at 323. Finding the inquiry “inherently comparative,” it reasoned that to determine whether a plaintiff had created a strong inference “a court must consider plausible nonculpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.” *Id.* at 323-24. While an inference need not be “irrefutable,” it must be more than merely “reasonable,” it must be “cogent,” and “at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at 324. The plaintiff, after all, should not be required to plead more than he must prove at trial. *Id.* Interestingly, in concurrences that took issue with the characterization of a “strong inference” as one which was “at least as compelling” as alternatives, Justices Scalia and Alito argued not that the term “strong” did not imply a comparison, but that the statute called for the plaintiff’s inference to be the “strongest.” *Id.* at 329-30, 333 (Scalia, J., concurring), 333-34 (Alito, J., concurring). Further, Justice Alito would only have given consideration to facts “alleged with particularity” when considering whether the “allegations of scienter” were sufficient. *Id.* at 333.

There are obvious analytical similarities between these developments and the interpretations of Rule 8. We put them aside only because the Court is addressing different statutes and rules. However, plainly our analysis easily extends to these developments as well, including our analysis that the Court’s use of terms and concepts is not terribly felicitous. One difficulty here is that the task the Court is engaged in—the regulation of inference—is exceedingly difficult for anyone, let alone those not expert in it, as the members of the Supreme Court are not. We discuss some of this further in Sec. IV, *infra*.

77. *Twombly*, 550 U.S. at 550.

78. *Id.* at 556.

79. *Id.* at 555-56.

80. *See id.* at 570.

raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”⁸¹

Against a background of substantive law that would not have allowed the plaintiff’s claim to survive a motion for summary judgment or directed verdict based only on proof of parallel conduct,⁸² the Court explained that “an allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.”⁸³ In the antitrust context, the Court had already “hedged against false inference from identical behavior . . . at a number of points in the trial sequence.”⁸⁴

As the Court said, “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.”⁸⁵ In light of the “common lament” that judicial oversight of the discovery process was ineffective, only by engaging in an inquiry into the plausibility of a complaint could a court “hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.”⁸⁶ The fatal flaw in the plaintiff’s complaint was not that they had failed to allege agreement, but that they had failed to include other allegations to render it plausible.⁸⁷

While *Twombly* appeared to impose a heightened pleading standard for antitrust cases, the Court distinguished its decision from that in *Swierkiewicz*, where the Court explicitly rejected a “heightened pleading standard” that required a plaintiff to plead a prima facie circumstantial case when he might establish his case by direct evidence at trial.⁸⁸ Reiterating that “we do not require heightened fact pleading of specifics” in § 1 cases, the Court in *Twombly* explained that it was only requiring the plaintiffs to state “a claim to relief that is plausible on its face.”⁸⁹ In the process of reaching this conclusion, the Court also devoted several paragraphs to excoriating Justice Black’s opinion in *Conley* as poorly grounded in the Federal Rules and “as an incomplete, negative gloss on an accepted pleading standard” which dealt more with the manner in

81. *Id.* at 556.

82. *See id.* at 553-54 (citing *Theatre Enterp., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954)).

83. *Twombly*, 550 U.S. at 557.

84. *Id.*

85. *Id.*

86. *Id.* at 559.

87. *See id.* at 570.

88. *Id.* at 569 (citing *Swierkiewicz*, 534 U.S. at 515).

89. *Id.* at 570.

which a complaint could be supported by discovery than its initial sufficiency.⁹⁰

In *Ashcroft v. Iqbal* the Court was again confronted with the problem of costly discovery, here measured in terms of the time and attention of senior government officials, and broad allegations in a complaint.⁹¹ The plaintiff in *Iqbal* was a Pakistani national arrested in the wake of the September 11th attacks and confined in harsh conditions at a federal facility in Brooklyn, New York.⁹² In a *Bivens* suit he named both his jailers and former FBI head Robert Mueller and former Attorney General Richard Ashcroft as defendants.⁹³ He alleged that the abuse he suffered at the hands of federal employees was delivered pursuant to a policy implemented from the highest levels of government.⁹⁴ The district court refused to grant a motion to dismiss claims against Mueller and Ashcroft, and the Second Circuit, applying what it termed *Twombly's* "flexible plausibility standard," determined that the allegations against the two officials did not arise in a context where legal conclusions required factual "amplification."⁹⁵

The Court reversed. In order to prevail against Ashcroft and Mueller, *Iqbal* would be required to establish that both implemented the policy by which he was detained and that both acted with the specific intent of violating his rights or those of others similarly situated.⁹⁶ Such intent, the Court concluded, could not be alleged in a "conclusory" fashion.⁹⁷ Clarifying the nature of the "plausibility" inquiry proposed by *Twombly*, the Court explained that two "working principles" had underpinned its holding.⁹⁸ The first principle is "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."⁹⁹ Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss."¹⁰⁰ Determining whether a complaint states a "plausible claim for relief" is a "context specific task that requires the reviewing court to draw on its judicial experience and common sense,"¹⁰¹ but where the "well pleaded

90. *Id.* at 560-64.

91. *See* *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (discussing "heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government").

92. *See id.* at 1943.

93. *Id.* at 1943-45.

94. *Id.*

95. *Id.* at 1944-45.

96. *Id.*

97. *Id.* at 1951.

98. *Id.* at 1949.

99. *Id.* at 1950.

100. *Id.*

101. *Id.*

facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not ‘shown’ that the pleader is entitled to relief.”¹⁰² In considering the plausibility of a complaint, the first step is “identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth” and then identifying a second set of pleadings that “are well-pleaded factual allegations” which the court should assume to be true.¹⁰³ The court should then consider this second class of allegations and “determine whether they plausibly give rise to an entitlement to relief.”¹⁰⁴

Applying this “two pronged” approach, the Court determined that the plaintiff had not “nudged” his claim “across the line from conceivable to plausible.”¹⁰⁵ The Court first identified allegations as mere “formulaic recitation of elements” of a claim¹⁰⁶ that the two officials “knew of, condoned, and willfully and maliciously agreed to subject [plaintiff] to harsh conditions “as a matter of policy solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest” and his allegations that Ashcroft that “the principle architect” of the policy and that Mueller was “instrumental” in adopting it.¹⁰⁷ Considering the “factual” allegations concerning specific details of the policy, which pertained both to his arrest and his confinement, the Court concluded that in the wake of the September 11th attacks, both his arrest and his confinement were more likely the result of legitimate government interests than a “purposeful discrimination.”¹⁰⁸ In concluding its opinion, the Court rejected Iqbal’s arguments that *Twombly* should be confined to the antitrust context, that application of the plausibility standard should be tempered by the ability of the court to “cabin” discovery in a way that preserved “petitioner’s defense of qualified immunity,” or that Rule 9 allowed him to allege “discriminatory intent generally.”¹⁰⁹ Illuminating this last point, the Court explained that while Rule 9(b) allowed malice, intent, knowledge and other conditions of a person’s mind to be alleged generally, “‘generally’ is a relative term” and while it carved an exception into the heightened standards of Rule 9, it had no bearing on the dictates of Rule 8.¹¹⁰

102. *Id.* at 1950 (citing FED. R. CIV. P. 8(a)(2)).

103. *Iqbal*, 129 S. Ct. at 1950

104. *Id.*

105. *Id.* at 1951.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1953.

110. *Id.* at 1954.

We will return below to a scrutiny of the legal tests articulated by the Court, but it is obvious from these two cases that one possible inference to draw is that the Court was transmuting Rule 8 from the formality of *Conley* into a requirement of substantive engagement with evidentiary matters at an earlier time in the process.¹¹¹ That understanding, though, is hard to reconcile with *Erickson v. Pardus*.¹¹² *Erickson* involved a § 1983 action by a prisoner alleging substantial harm caused by the prison authorities who failed to treat his medical condition.¹¹³ The lower courts had dismissed the complaint on the grounds that the complaint contained only conclusory allegations. In a *per curiam* opinion issued within weeks of *Twombly*, the Court reversed, concluding that, in this case, the allegations were sufficient, even though there was no allegation that plaintiff's condition suffered as a result of his treatment rather than simply from the disease itself.¹¹⁴

These cases simply cannot be reconciled on an understanding of Rule 8 as articulating a defined standard applicable to a static environment. It is quite obvious that *Twombly* and *Iqbal* impose more difficult to meet pleading standards than *Erickson*. However, these cases can be reconciled on an understanding of Rule 8 as applying a dynamic standard in a dynamic environment. *Twombly* and *Iqbal* involved cases where the original assumptions which motivated *Conley's* interpretation of the Rules quite possibly were false. If so, applying the static conception of Rule 8 would have been inconsistent with ultimate objectives of the pertinent substantive law and would have resulted in over-deterrence of productive activity—economic activity in the one case and governmental activity in the other. In contrast, *Erickson* looks like a car accident case—knowledge was probably symmetrically distributed and relatively cheap to come-by, and thus the prior understanding of Rule 8 was satisfactory.¹¹⁵

If our explanation is correct, when the original assumptions hold, something like the *Conley* gloss is appropriate; when they do not, a more searching inquiry into pleadings is permitted, and maybe mandatory. It is easy to state how this should work (but, as we discuss below, perhaps

111. This is apparently the conclusion drawn by Sherry, *supra* note 12, at 29-31.

112. *Erickson v. Pardus*, 551 U.S. 89 (2007).

113. *Id.*

114. *Id.* at 90-94.

115. While the underlying issues in *Erickson* and *Iqbal* are superficially similar, the cases differ on critical variables. *Erickson* was fully aware of the actions underlying his complaint (although obviously not the intent behind them); there was no risk to national security, nor any intrusion into highest levels of government. See *Erickson*, 551 U.S. at 90-92 (discussing contents of pleadings). By contrast, *Iqbal's* case against senior officials rested almost entirely on conjecture. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1943-45 (2009) (summarizing pleadings).

much more difficult to implement). The law (substantive, procedural, and evidentiary) is concerned with policies, accuracy, and cost. The law pursues certain substantive outcomes; but for it to do so it must be able to make reasonably accurate decisions on facts; cost is a variable that can affect both substantive outcomes and accuracy. At the highest level of generality, these cases can be understood as adopting a sliding scale—a dynamic rule—to implement Rule 8 depending upon parameters of the case before the court. If the objectives of the law are optimized by applying the *Conley* gloss, then it is to be applied; and if they are not, it is not. When the gloss is not applied, the test by which pleadings are to be judged is whether permitting cases of that sort to go forward with the kind of pleading before the court will subvert the substantive law as a result of either cost or informational asymmetries. The level of specificity and cogency needed to survive a motion to dismiss is the level that will further the objectives of the substantive law, generally conceived, and thus the level that will result in the proper balance being maintained between the parties. This maintains rather than subverts the incentive structure of the law.¹¹⁶

It is important to see that we are not simply suggesting the replacement of one static rule with another. The relationship between information, cost and correct outcomes could be literally anything—that is one of the implications of the domain of this rule being organic. Thus, the central problem is optimizing a set of variables rather than deducing outcomes from a predetermined set of necessary and sufficient conditions contained in a static rule.¹¹⁷

116. In his highly informative testimony before Congress, Prof. Burbank objects in part to the recent cases because of their modification of the *Conley* standard. See generally Burbank, *supra* note 21. This objection may be well taken, but it cannot end the debate. It equates one interpretation with the meaning of the rule. Another way to understand an interpretation is that it provides the meaning of the rule in context, and that when the context changes so do the implications of the rule. Both are “rule-like,” and it is simply a logical error to assert as true that a subsequent interpretation of a rule thought to be at odds with the first “changes” the rule’s meaning. If the rule is dynamic, both interpretations can be correct. Even if one is not, the question is which interpretation is correct, not which was first. This is akin to the common error in legal scholarship of criticizing one case by reference to another, whereas either could be “right” or “wrong.” In any event, the analysis provided here does not claim one is right or wrong but is trying to explain how both could be right and develop the implications of that point.

117. *But see, e.g.,* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, Illinois Public Law Research Paper No. 09-16 (October 2009), available at SSRN: <http://ssrn.com/abstract=1494683>. We don’t think the Court’s recent decisions have simply made the motion to dismiss into summary judgment; rather, the Court has recognized that whenever it is clear that permitting a case to go forward is socially perverse, it ought not to go forward, whatever one calls the process for doing so.

There are (at least) two difficulties looming. The first is that some will object that our “explanation” deprives Rule 8 of its rule-like nature, leaving nothing but a discretionary admonition. The second is that it acknowledges the piercing of the barrier between evidence and procedure. We discuss these two points in turn.

III. THE NATURE OF RULES, DISCRETION, AND DYNAMIC SYSTEMS

There are many debates over the nature of rules. The simplest and most intuitive concept of a rule is a set of necessary and sufficient conditions which may be applied straightforwardly to their domain so as to allow deductions to be drawn.¹¹⁸ This is the concept of rule at play in games, often in raising children, and predominantly in discussions of “rule of law.”¹¹⁹ The process of generalizing and applying the generalization at the heart of the concept is probably hardwired in human brains as it obviously has survival benefits for creatures with limited intellectual resources encountering a nearly infinite set of threats.¹²⁰ If one’s child wanders to the river and gets eaten by a crocodile, one’s DNA is likely to die out quickly unless one internalizes some general lessons about crocodiles and rivers. There are, however, other kinds of rules and other kinds of reasoning. Another concept of a rule is a set of defeasible conditions.¹²¹ If the river is one’s only source of protein, denying one’s children access to it will just as surely lead to one’s DNA dying out, and thus survival depends on something other than the straight forward deduction from the rule about children, rivers, and crocodiles.¹²²

The simple concept of a rule is an example of monotonic logic, and defeasible argumentation is an example of nonmonotonic logic.¹²³ Although not normally put in such terms, many of the modern jurisprudential arguments over rules are arguments over the virtues and

118. On rules, see GIDON GOTTLIEB, *THE LOGIC OF CHOICE* (1968); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1999); FRED SCHAUER, *PLAYING BY THE RULES* (1992); LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* (2001), Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Fred Schauer & Larry Alexander, *Law’s Limited Domain Confronts Morality’s Universal Empire*, WM. & MARY L. REV. (forthcoming).

119. See Scalia, *supra* note 16, at 1175-78.

120. For an interesting discussion of rule based decision making in a psychological context, see David Shanks & Richard Darby, *Feature and Rule Based Generalizations in Human Associative Learning*, 24 J. EXP. PSYCH. 405, 412-414 (1998).

121. See, e.g., LOGICAL MODELS OF LEGAL ARGUMENTATION (Henry Prakken & Giovanni Sartor eds., 1997).

122. See DOUGLAS N. WALTON, *ABDUCTIVE REASONING* (2004).

123. Under a monotonic system of logic, an original premise remains true, regardless of the manner in which it is extended by additional axiom. Under a non-monotonic system, there is no first premise. For additional discussion, see LOGICAL MODELS OF LEGAL ARGUMENTATION, *supra* note 121, at 122.

vices of these different forms of logic, such as the over- and under-breadth of rules, rules v. their underlying purposes, rules v. standards, and so on. Perhaps even less noticed in the current jurisprudential debates is that the driving force behind these arguments is complexity.¹²⁴ Monotonic logics work better as their assumptions more accurately capture the relevant universe of reasons and facts, and thus they work better in simplified environments such as games. Nonmonotonic logics work better as the environment becomes more complex, such as in the efforts to model natural reasoning processes. Thus, much of the debate over rules and whatever the alternative might be is largely an implicit discussion about the complexity of the relevant domain and one's tolerance for mistakes of different kinds.¹²⁵

From the perspective we are developing, the standard problems with rules are that there are too many variables, or the variables can take too many values, to be computationally tractable, and that all the relevant variables, or some values they may take, were not anticipated in advance. In either case (computational intractability or failure of imagination), algorithmic approaches that conceptualize rules as static face the standard critiques given in the debate over rules that focuses on their indeterminate nature. The critics of *Iqbal/Twombly*, working comfortably within this tradition, claim that the Court has unnecessarily and inappropriately introduced indeterminateness into Rule 8 by changing the meaning of the rule through an unjustified interpretation that changed how certain cases will come out going forward.¹²⁶

The Court's interpretation will indeed affect outcomes, but whether that is because the Court changed the meaning of Rule 8 is a different question. The most interesting aspect of the Supreme Court's cases is that they highlight the difference between static and dynamic rules and conditions, and the affect of that difference on the meaning of a rule. Although the normal legal/jurisprudential approaches to rules is that they have the definite, hypothetico-deductive form as suggested above, nothing in the nature of a rule says whether that form is to be applied to pre-existing facts, as is normally implicit in the rule debates, or instead as

124. Indeed, there is virtually no discussion within the jurisprudential literature of this type of complexity of which we are aware.

125. Another aspect of the debate, one championed by Fred Schauer in particular, focuses on authority. Who gets to decide what kinds of mistakes are made? As he points out, requiring that rules be followed preserves the authority of the rule maker over that of the person implementing the rule. *See, e.g.,* SCHAUER, *supra* note 118, at 112.

126. The first instance of such a criticism came in the dissent to the decision itself. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 572 (2007) (Stevens, J., dissenting) (lamenting the fact that Court had not forced defendants to explain their conduct through sworn depositions and discovery in favor of resolving the matter using economic arguments).

directions about outcomes, as exemplified by the regulation of physical forces.

Here is a simple example of the difference. Consider the “rule”: “At the end of the day hose down the boat to clean it.” The water pressure from the hose will matter to such a rule. One could further elaborate the rule in such a form as “turn the spigot two full revolutions to start the water flow and then hose it down,” or one could say “turn the spigot until the water pressure from the hose is adequate to loosen the material on the side of the boat but not so strong as to adversely affect the paint job.” The point is that both the precise water pressure from a hose and the pressure needed to do the job will depend on other variables than turning the spigot, such as temperature, water pressure in the system, water usage in the area, the nature of the stuff stuck to the side of the board, and so on. Many physical forces are like this. For example, homeostasis in organisms is achieved through dynamic equilibria of many interacting systems that almost surely could not be reduced to a computable algorithm.¹²⁷

There is a rule here to be applied—clean the boat—the objective of which is quite clear, yet how to accomplish that objective is quite complicated and depends on the optimizing of a large number of continuous variables. Apply this to Rule 8. One way to understand the phrase “a short and plain statement of the claim showing that the pleader is entitled to relief” is as articulating a specific standard of definiteness and detail. It is the Court’s implicit rejection of that approach which is causing the storm over its rulings.¹²⁸ However, another way to understand the phrase is as a direction to maintain the equilibria of the system. As the system changes, so, too, must its regulators to keep it functioning normally. In this particular case, as developments change the relative balance between plaintiffs and defendants, the system responds to reestablish the equilibrium.¹²⁹

127. Cognition itself may be better described in dynamical than computational terms. See, e.g., Tim Van Gelder, *What Might Cognition Be, if Not Computational?*, 92 J. PHIL. 345 (1995).

128. See *infra* Section VI.

129. As we say, this perspective intersects but is quite different from the conventional jurisprudential argument over rules and standards. See, e.g., Frederick Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911 (1997). “Clean the boat” is a standard, but it is precise, canonical and dispositive, which of course would, paradoxically, make it a rule in the traditional discourse over rules. As suggested in the text, we think the traditional debate over rules has missed the most important aspect of the problem it purports to be addressing (differing levels of specificity and so on), which is complexity. By missing complexity, it also misses what we are emphasizing in this article, which is the value of considering contexts, and thus rules, as dynamic. Although Prof. Schauer does not address the problem of rules from the perspective in the text, he,

The objections to the Court's cases thus presuppose the nature of a rule to be of the static rather than dynamic variety. It seems to us that, while understandable, this presupposition is not *a priori* obviously correct. The law has many dynamic rules, such as do not act in restraint of trade, do not behave negligently, drive at a safe speed and so on. In the procedural context, the summary judgment rule, FRCP 56, is best understood as a dynamic rule, as well. Whether there is a genuine issue of material fact depends on knowledge about the world and a comparison of the parties' cases, and not just on the documents attached to the motion.¹³⁰ The issue, thus, is whether in the context of pleading a static or a dynamic conception is better justified, and it is certainly plausible that a dynamic conception is sensible. Without adjusting to the changing conditions of the modern legal landscape, the procedural system can subvert the substantive law, whereas viewing the rules as dynamic regulators can help achieve substantive objectives. The law is often an "ass" precisely because of its rigidity, and that rigidity in turn often comes precisely from assuming that the only form of a rule is a static one.

It should also be obvious that applying a static conception of Rule 8 may result in radically different consequences in different areas of the law. Thus, applying a static conception of the rule does not necessarily manifest rule-like behavior, a point the critics of *Iqbal* and *Twombly* have neglected. Their insistence that "rules" can only be thought of as deductive commodities ironically can subvert the very rule-like behavior that motivates their conception of what rules entail. Plainly, individuals are benefited or hurt as a by-product of the real world setting of the particular litigation that can be in tension with the intended consequences of substantive policy choices. The "static" conception of the rule can result in a dynamic that does not generate uniform or consistent outcomes. The dynamic conception of Rule 8, by contrast, has the potential to generate considerably more uniform outcomes, and to that extent may behave in a considerably more rule-like fashion generating trans-substantive effects, even if not trans-substantive, in a sense, in application. Thus, as we say, this tension between the static and the dynamic generates quite interesting questions about what it means to be a rule, and the conventional conception of what constitutes a rule that is

too, thinks the distinction between rules and standards is problematic, although obviously for quite different reasons.

130. See generally Pardo, *supra* note 17, for a detailed analysis of the similarities, from the evidentiary perspective, of various procedural devices.

now dominating the discourse about this problem may lead to suboptimal results.¹³¹

There is a problem, however, and that is whether the courts can behave effectively as regulators. The risk is that encouraging them to do so will result in idiosyncratic judgments that will introduce needless unequal treatment into the litigation process, which in turn may both subvert the underlying substantive objectives and undermine the authority of the judicial system. The fear comes from the Court's recognition that the "plausibility" of the factual allegations in some cases must be judged by the common sense and experience of the trial judges, which seems to the Court's critics as an open-ended invitation for judicial bias to determine outcomes.¹³² Indeed, the critics' position seems to entail that the static conception requires no substantive engagement with the facts, whereas the dynamic conception does, but at a time prior to discovery where the facts are not well known, which is the precise space opened up for judicial bias to be determinative.¹³³ The critics might have a point were it true that the static conception of Rule 8 requires no engagement with the facts, and thus none with the evidence. One cannot judge whether there is any possible set of facts upon which liability might be premised without engaging with the facts and thus with the evidence.¹³⁴ This is another place where the procedural system again runs into the evidentiary system, to which we now turn. As shall see, this raises deep questions about the meaning of "fact," and "evidence," but they are deep questions which must be addressed to understand the full implications of what we are examining.

131. It perhaps should be noted that our discussion here about what it means to be "trans-substantive" has a certain analytical similarity to the arguments over the nature of equality to the effect that equality is empty without an articulation of the variable to be equalized. For the classic debate within the law, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), and Steven Burton, *Comment on the "Empty Ideas": Logical Positivist Analysis of Equality and Rules*, 91 YALE L.J. 1136 (1982). Similarly, a rule can be applied "trans-substantively" in many different ways with many different outcomes. Why is applying the *Conley* gloss in every case trans-substantive, in other words, rather than attempting to further the values of the litigation system in every case?

132. See, e.g., Burbank, *supra* note 1, at 535.

133. See *Bell Atlantic v. Twombly*, 550 U.S. at 571 (Stevens, J. dissenting) (complaining that 'judicial opinion' regarding facts was being used to measure the legal sufficiency of the complaint). See also, Burbank, *supra* note 1, at 535.

134. Prof. Burbank, an esteemed expert on civil procedure, testified before Congress that Rule 8 was intended to be limited to testing the formal contours of a complaint. See Burbank, *supra* note 21, at 11. This does not appear to be an accurate description of how the courts proceed, however. See, e.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

IV. PROCEDURE AND EVIDENCE

The central problem we have identified is that continuing to apply a rule constructed on one set of assumptions when those assumptions have changed may lead to unintended consequences. In the pleading context, this problem cannot be solved formally. It requires knowledge of the litigated case. Maybe antitrust cases do pose too large a risk for defendants, but how does one know that, and how does one know if the case before the court is an exception? Maybe allowing cases involving high governmental officials to proceed to discovery would create perverse disincentives, but again, how does one know? The assumption that evidence can be ignored does not hold in some set of cases, but this produces the apparent anomaly that in those cases motions on pleadings involve substantive, not just formal, engagement with the case being litigated prior to discovery. It also instantiates the deepest conceptual problem of the evidentiary regime, which is that, because evidence is highly contingent, to know anything one must know everything.¹³⁵ This seems to produce the paradox that to decide cases on the pleadings requires that they be decided on the merits, and that in turn requires having all the information about the particular case. Because motions on the sufficiency of Rule 8 are made pre-discovery, we return once again to the critics' concern that the Court's interpretation of Rule 8 opens up a large space for judicial bias. What other possible basis could there be, the argument goes. The courts will not be able to decide on the facts because they will have no evidence before them; therefore, decision can only be based on bias, whim, or caprice. By contrast, the implicit argument goes, deciding whether there is any set of facts upon which liability may rest requires no engagement with the facts, and thus opens little space for bias.

It is important to see why the critics' implicit belief that the *Conley* gloss on Rule 8 ruled out engagement with the "facts" and "evidence" is wrong, unless, as noted above, Rule 8 simply permits a formal, logical analysis of the sufficiency of the allegations of the elements of causes of action. If the *Conley* gloss allows something in addition to that, the additional something must have some connection to the facts. The belief to the contrary rests upon the view that, pre-discovery, there is no evidence to consider, and therefore there are no factual findings to make.¹³⁶ This makes deep mistakes about both "evidence" and "facts."

135. See, e.g., Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 *Nw. U.L. Rev.* 604, 616-30 (1994).

136. See, e.g., *Twombly*, 550 U.S. at 574-75 (Stevens, J. dissenting) (discussing historic rejection of concept of "facts" during the analysis of pleadings under the early Federal Rules).

First, it equates “evidence” with information formally transmitted from one person to another, such as producing in discovery or adducing at trial.¹³⁷ This is, to be sure, a quite conventional view of what “evidence” means. It is also highly misleading. “Evidence” is not packets of information. Those packets of information are completely meaningless unless analyzed by a human bringing to bear a vast conceptual apparatus including such things as the meaning of language, rules of logic, expectations and beliefs about the real world, and so on. “Evidence” is thus not things produced at discovery or trial but the consequence of an interaction between those things and all the cognitive capacities of a person.¹³⁸ The barest bones complaint *a la Conley* involves factual allegations about the world that are understood and then appraised by reference to someone’s conceptual and cognitive apparatus. For example, a complaint about a car crash tells the judge that someone is asserting two cars came into contact resulting in damage the liability for which is now being contested. Such “factual” allegations trigger a multitude of responses about how likely such things are in the real world, whether the disincentives to bringing suit increase their probability or plausibility, whether the possibility of the case being meritorious justifies further expense, and so on. The point, in other words, is that even a *Conley* complaint requires the court to consider its factual allegations from the perspective of the judge’s background and experience. A judge who says that there is no possible set of facts upon which God may be sued for damages, or President Obama enjoined from exercising the powers of the Presidency, is engaging in a factual inquiry analytically identical to that required by *Iqbal* and *Twombly*.

The difference is only that the same background and experience necessary to make sense of whatever the parties produce may tell us that some sets of cases differ from others. In some cases, bare bones allegations may further the objectives of the legal system and in others they will not. To be sure, how any particular judge will reach decisions

137. See, e.g., *Whether the Supreme Court Has Limited Americans’ Access to Court: Hearing Before the Sen. Committee on the Judiciary*, 111th Cong. 111-530 at 317 (2009) (letter of Tobias Wolff):

The pleading stage of a lawsuit is entirely different. There is no evidence at the pleading stage—only a sketch of what the plaintiff will later prove. Under a notice pleading system, the plaintiff is neither required nor expected to include any evidence with her complaint, and a skeptical court cannot dismiss the complaint “even if it appears that a recovery is very remote and unlikely.” (citations omitted).

This is the conventional view, but it is erroneous. While there may not be “evidence” at the pleading stage, there is a daunting amount of information, including, for example, whether a plaintiff is willing to bring a lawsuit, whether a defendant is willing to settle, and so on.

138. For a discussion, see Allen, *supra* note 135, at 605.

will be determined in part by that judge's background and experience, but that is true whether operating under the *Conley* or the revised Rule 8 gloss. In both cases, judges will be engaging in identical intellectual exercises. There may be a difference in degree between the two, but there is no difference in kind. In both cases, judges will be considering the "evidence" that can be gleaned from the pleadings, judged through the lens of their life experiences.

But, if judges have greater authority to stop cases from proceeding, won't that change the way things are operating now? The answer is yes, of course, but whether that is beneficial or lamentable depends on how things are operating now, which is the point we were at pains to make in Section III and will not repeat here. We will summarize it, though, by noting that one cannot criticize the Court simply for not following a rule; one must engage with the consequences of differing meanings of the rule. If in some set of cases the legal system now creates perverse incentives in part because of an interpretation of the pleading rules, it has perverse consequences to maintain that interpretation.¹³⁹

Still, as power to dismiss cases on the pleadings increases, the critics fear a commensurate increase in the significance of the judge's background and experience and decrease in the significance of what should be paramount, which are the facts of the case.¹⁴⁰ In essence, the concern is the cognitive capacity of individual trial judges to get it "right." This concern rests in turn on the image of the solitary judge pondering in chambers what to do, where the judge's own background, knowledge, experience, and predilections will critically determine the outcome. These factors surely will influence the outcome, but the image of the solitary decision maker neglects the role of the parties. The litigation process is largely comparative with the parties advancing their contrasting claims, adducing evidence (both before and at trial), and arguing for outcomes.¹⁴¹ And—critically—deciding how much to invest in any particular procedural stop along the way. It is hard to imagine anyone more informed about the risks and costs of error, the ease of investigation, and the policies at stake than the parties; and they can, and do, present such matters at all stages of the proceedings, including the motion to dismiss.

139. The potential impact of *Iqbal* and *Twombly* on the value of intellectual property rights provides an interesting example of this effect. See, e.g., Benjamin W. Cheesbro, *A Pirate's Treasure?: Heightened Pleading Standards for Copyright Infringement Complaints After Bell Atlantic Corp. v. Twombly*, 16 J. INTELL. PROP. L. 241, 251 (2009).

140. See, e.g., *supra* note 131 and accompanying citations.

141. See Allen, *supra* note 135 at 606-612; see also, Allen & Pardo, *infra* note 157, at 1797-1800.

Rather than a solitary judge having to make wise choices, at the pleading stage, as at trial, a decision will be made largely over the cases as presented by the parties, and thus the concern about idiosyncratic decision making should instead be a concern about the competence of the parties. If they are reasonably competent, the litigation process provides an effective means to educate the judiciary about just the kinds of variables that motivated the Supreme Court in *Twombly* and *Iqbal* and interestingly over time to do so in a finely tuned way that could approximate or perhaps even exceed the capacity of the rule making or legislative process.¹⁴² One would predict some idiosyncratic outcomes—mistakes are difficult to avoid in any complex system—but the question of the overall operation of these two regulatory regimes is at a minimum open. Parties may now have an extra burden to showing why they are within the *Conley* gloss, or even if within the *Iqbal/Twombly* gloss that nonetheless the case should proceed, but they also have the opportunity to meet that burden by producing more “evidence” in their pleadings. If parties fear a “biased” reaction to a bare bones pleading, they can provide considerably more than they otherwise would. Again, this can only be rationally criticized on the ground that empirically it leads to perverse results. It cannot rationally be criticized on the ground that the intellectual task is somehow different under *Iqbal/Twombly*.

To be sure, a party cannot provide pre-discovery the evidence that it can only get through discovery, but that does not mean that it should be able to impose those costs if the best understanding of the world, all things considered, is that doing so is likely enough to be perverse rather than socially useful. That does not necessarily mean that such cases can never be brought. It may mean that in some sets of cases plaintiffs will have to establish that the entire set should be allowed to proceed. This, again, is nothing new to the system. Similarly, plaintiffs in some sets of cases may need to creatively explain how costs can be controlled in such a fashion so as to reduce the perverse effect and that doing so is likely enough to produce useful information of liability that it makes sense to proceed to the next round of litigation.¹⁴³ And there are other means of

142. The relative virtues and vices of the common law is a perennial topic. See, e.g., Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21 (2007). The question of whether judicial or legislative supervision of pleading is preferable is explored in a dialogue between Mark Herrmann, James M. Beck, and Stephen B. Burbank. *Plausible Denial: Should Congress Overrule Twombly and Iqbal*, PENNumbra (2010), <http://www.pennumbra.com/debates/debate.php?did=24>.

143. This is the solution to the analytical problem of the contingency of evidence. Within the field of evidence, the analogue is conditional relevancy. See FED. R. EVID. 104 (“[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. . .”).

limiting the idiosyncratic rules of trials judges.¹⁴⁴ It is critical to remember, though, that plaintiffs impose costs on defendants and in many cases wrongfully. It is thus not sufficient to point out that some rule, or rule change, may hurt plaintiffs; the question is whether the rule as interpreted and applied optimizes the values of the legal system.¹⁴⁵

In sum, it is not obvious that *Iqbal/Twombly* changed the intellectual task of the trial judge qualitatively rather than simply recognizing that the intellectual task may vary quantitatively with the case before the court.¹⁴⁶ This would simply make evident that the parties and trial court must invest those resources that are adequate to suggest, plausibly, that allowing a case to proceed is not socially perverse in the sense we have identified.¹⁴⁷ In any event, we would predict that in most cases there will be no change from the present understanding of Rule 8, as most cases probably are quite similar to the original assumptions of the rules.¹⁴⁸ Nonetheless, some cases may appear more like *Iqbal* than *Erickson*, and in those cases a dynamic conception of Rule 8 will be applied.

V. WHAT THE COURT SAID

The Court did not use our terminology to decide its cases, but it certainly hinted strongly at adopting our conceptual apparatus. The central problem in *Twombly*, thought the Court, was that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases. . . . Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to

144. Appellate oversight and legislative change (with its attendant legislative investigation) are always available to make adjustments. See generally *supra* note 76 and accompanying discussion of PSLRA. See also, 28 U.S.C. § 1915(e)(2)(B)(ii) (empowering sua sponte dismissal of in forma pauperis suits brought by prisoners which are deemed by a court to be lacking legal or factual support).

145. One response to the Court’s cases has been to propose controlled discovery. See, e.g., Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 1 (2010). This is isomorphic to our proposed understanding of Rule 8. It recognizes the dynamic nature of the system and proposes a rule based authorization to do what the Court has construed Rule 8 to require. Whether an explicit authorizing of formal discovery compared to the incentive to engage in other kinds of information gathering is more or less optimizing is an empirical question. The important point to see, though, is that such proposals implicitly embrace the analysis we have provided here.

146. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (“[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense”).

147. See generally Pardo, *supra* note 17. One option is to require an explanation as how discovery will reveal adequate evidence.

148. For obvious reasons, there will be a lot of cases now dealing with *Iqbal* and *Twombly*. Lots of citations do not equate with substantial substantive change. As many people have said, though, making predictions is difficult, especially about the future.

avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence.’”¹⁴⁹ In *Iqbal*, the Court emphasized that “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.”¹⁵⁰ One way to accomplish such objectives is to require the trial courts to engage with the substantive merits of the case at the pleading stage, but that, as we have said, requires the trial court to engage at an early stage with the evidence. The problem is substantive, having to do with the parameters of the litigation actually before the court, and thus no formal, *a priori* test that ignores the evidence can achieve the desired outcome. In what to us is the most remarkable aspect of these cases, though, the Court was at pains to deny it was requiring an engagement with the evidence at the very same time that it was doing precisely that.¹⁵¹ It was at pains to deny it, we suspect, both because that is not what courts supposedly do at the motion to dismiss stage and because it would acknowledge the sliding scale aspect of what the Court has actually done, leading to the concerns previously noted about what it might mean for Rule 8 to be a rule.¹⁵² Whatever the motivation, it is the inconsistency between the Court’s objectives (deal with the substantive problems, but don’t deal with evidence) that generated the awkward standards that emerged from the opinions.

There is an additional cause of this awkwardness. The Court in these cases is attempting to regulate the inferential process. That is extraordinarily difficult to do for just the reason these cases make evident—it requires constructing *a priori* rules that must anticipate infinite variations on the evidence that might be produced, and that is an impossible task.¹⁵³ “Regulating inference” is a tough enough problem when trying a case, where the parties pick and choose what issues to present,¹⁵⁴ and it is close to an impossible problem when writing *a priori* inferential rules.

149. *Bell Atlantic v. Twombly*, 550 U.S. 544, 558 (2007).

150. *Id.* at 559.

151. *Id.* at 554.

152. *Id.* at 584-85 (Stevens, J., dissenting).

153. Ronald J. Allen, *Artificial Intelligence and the Evidentiary Process: The Challenges of Formalism and Computation*, 9 ART. INTELL. & LAW 99 (2001).

154. The evidentiary regime accommodates this reality through liberal admission rules and conditional relevance, that permits rulings on evidentiary matters to be delayed until more evidence is received. *See, e.g.*, FED. R. EVID. 104. In addition, the parties are largely ambiguity discards rather than generators at trial. Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion In Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893 (2003).

To attempt to avoid the obvious implication that the Court's approach will require substantive engagement with the evidence, the *Twombly* and *Iqbal* opinions focused on three different variables. None of them provides the slightest support for the proposition that motions to dismiss are to be decided without reference to the evidence in the case. First, the Court distinguished between assertions of sufficient factual matters to show possible entitlement of a verdict on the one hand, and "conclusory allegations," "legal conclusions," "bare," "threadbare" and "naked" assertions,¹⁵⁵ and "formulaic recitation of the elements"¹⁵⁶ on the other. The analytical problem here is that there is no distinction between "conclusory assertions" and anything else. Everything in a pleading will be "conclusory," just as everything will involve the facts of the case, as we demonstrated in the previous section. The difference between the plaintiff listing the elements of a cause of action and asserting the defendant violated them, and listing in exquisite detail what the evidence supposedly will show is not a qualitative difference in the "conclusory" nature of the pleading but a quantitative difference in the level of specificity and the amount of detail. Rather obviously, when a pleading asserts, for example, that "Defendant ran the red light," it is "conclusory." It is summarizing and expressing in shortened form what the pleader expects will happen at trial, to-wit that a witness will get on the stand and so testify. But, that is also precisely the way in which a pleading that asserts "negligence" is conclusory. The only variable is the level of specificity. To some extent, the Court may have been suffering here under the myth that there is a difference between questions of fact and questions of law, but there is not.¹⁵⁷ With that prop removed, this edifice obviously falls.¹⁵⁸

We think this point is obvious, and will not belabor it. We simply note that perhaps the best demonstration of its correctness is the Court's own use of the spurious distinction. In *Twombly* the Court thought that the allegation of a conspiracy was a "legal conclusion" and not, apparently, a fact¹⁵⁹ but that is simply impossible to understand. Asserting a conspiracy plainly asserts a state of affairs in the world independent of the law, and this remains true even if the existence of a conspiracy is an element of the substantive law. In any event, the

155. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951, 1955 (2009).

156. *Id.* at 1955.

157. See Ronald J. Allen & Michael Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. REV. 1769, 1769-1807 (2008).

158. For an insightful analysis of the Court's curious reliance in the cases on the law-fact distinction, see Elizabeth G. Thornburg, *Law, Facts, and Power*, 114 PENN STATIM 1 (2010), http://pennstatelawreview.org/114/114_Penn_Statim1.pdf.

159. See *Bell Atlantic v. Twombly*, 550 U.S. 544, 564 (2007).

complaint went further and asserted agreements not to compete, among other “facts.”¹⁶⁰ In *Iqbal*, a remarkable litany of what any rational person would deem “facts” were found to be unacceptable conclusions, such as Ashcroft being the “principal architect” of an invidiously discriminatory policy, that Mueller “was instrumental in adopting and executing it,” and that this was done on account of the plaintiff’s religion, race, and/or national origin.¹⁶¹ These are factual assertions distinguishable in no interesting qualitative way from an allegation like “the defendant ran the red light” or that “the defendant drove negligently.” One can require greater or lesser evidentiary specificity in pleading, but one cannot accurately capture the distinction with a rule about conclusory pleadings. The static nature of such a rule obviously conflicts with the dynamic nature of the phenomenon. This, of course, is precisely our point. One can read Rule 8 to permit trial courts to insist on great specificity in pleading when doing so advances the interests of the legal system; the rule-like nature of the rule can be its direction about the effects of regulation rather than a formal, *a priori*, test.

The second analytical tool that the Court employed to maintain the pretense that it was not addressing the evidence was to distinguish between evidence and “context.”¹⁶² This distinction tries to mine the myth that we elaborated in the previous section that there is a useful analytical difference between “evidence” and the background knowledge and experience brought to bear in appraising it. As we showed, there is no such useful distinction. Evidence does not announce its own implications; it can only be appraised from some perspective.¹⁶³ To say, as the Court did in both cases, that part of the problem was that no, or an inadequate, “context” for the facts alleged was provided is simply to say that not enough factual specificity was provided to satisfy the Court. Consider again the case of negligence, and assume the plaintiff testifies that the defendant’s car ran the red light. Does that establish the fact or fail to because of the plaintiff’s obvious potential bias? Whatever one thinks, is it because of the evidence or the “context”? Obviously, it is both. One’s prior beliefs are employed to make evidence meaningful, and thus it is supremely unhelpful to make the distinction that the Court did.

160. *Id.*

161. *Iqbal*, 129 S.Ct. at 1951. See also, Thornburg, *supra* note 158 (discussing the extent to which inquiry undertaken by the Court in *Iqbal* conflicts with the traditional deference shown by appellate courts for findings of fact made by lower courts).

162. See, e.g., *Twombly*, 550 U.S. at 563; *Iqbal*, 129 S. Ct. at 1950, 1954, 1969.

163. See, Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the “Naked Statistical Evidence” Debate, the Meaning of “Evidence,” and the Requirement of Proof Beyond Reasonable Doubt*, 65 TUL. L. REV. 1093 (1991).

Consider *Twombly* in this regard. The Court's assertion that an allegation of parallel conduct does not make "plausible" (we shall return to that word immediately below) a conspiracy can be understood as a statement about the implications of the evidence, standing alone as it were, or as a statement about the set of beliefs that allows one rationally to appraise it. One can say such an allegation is "insufficient" to justify some inference, or one can say that the failure to contextualize it leads to its insufficiency. One can say either because they are identical for the purposes at hand. The Court's repeated efforts in these cases to suggest that certain allegations were insufficiently contextualized is simply equivalent to saying that they were insufficient, period. The invocation of "context" adds literally nothing.

Now we get to the heart of the matter. The Court concluded that the factual allegations were insufficient, which sounds like a factual judgment about their probability, which it is, but again the Court denied this.¹⁶⁴ According to the Court, pleadings are not to be tested by some version of probabilism, but instead by whether their allegations set forth a "plausible" basis for recovery.¹⁶⁵ Again, this is simply an insupportable distinction.

"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," says the *Iqbal* court.¹⁶⁶ One immediately sees a problem: "more than a sheer possibility" obviously means something more likely than a very remote or logical possibility, but the language of "more likely" creates precisely a "probability requirement." There has to be something more probable than a "sheer possibility." Assume the contrary. Suppose the probability of some proposition is 0.0. Could that proposition, which is literally impossible, be nonetheless plausible? Obviously not. The logical contradiction is evident and the conclusion obvious that "plausibility" incorporates a "probability requirement."

To be sure, "plausibility" and "probability" are not coterminous, and have a somewhat subtle relationship to each other. "Probability" usually refers to some version of conventional probability theory where propositions are arrayed on a number line ranging from 0.0 to 1.0. The number can refer to a relative frequency, a propensity, a logical probability, or a belief state under highly specified conditions.¹⁶⁷ In such cases, the numbers are computable and give rise to one of the powerful

164. *Twombly*, 550 U.S. at 556.

165. *Id.* ("a well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable").

166. *Iqbal*, 129 S.Ct. at 1949.

167. See, e.g., DONALD GILLIES, *PHILOSOPHICAL THEORIES OF PROBABILITY* (2000); LEONARD J. SAVAGE, *THE FOUNDATIONS OF STATISTICS* (1954).

tools of modern science. “Plausibility” by contrast is involved with a different form of reasoning known as inference to the best explanation.¹⁶⁸

Inference to the best explanation arose as an alternative explanation or tool of rationality which solves many of the serious problems with the application of probability theory in many contexts.¹⁶⁹ As its name suggests, the central concept of inference to the best explanation involves determining which of the possible explanations of events is “best,” where “best” means some complex mix of coherence, consistency, coverage, consilience, efficiency and so on. The intellectual task involves comparing and contrasting the various explanations to determine which is best in terms of the various variables. The best explanation is certainly likely to be the most probable, and here plausibility and probability meet, but the driving force is not probability; instead, conclusions of the “most probable” are governed by explanatory factors. In the law, inference to the best explanation is a considerably better explanation of juridical proof than probabilism.¹⁷⁰ The parties offer comparative accounts of what happened, and the fact finders choose over them, or construct their version of the best explanation in light of what the parties offer. The rules of evidence facilitate this, as well.¹⁷¹

Strikingly, except for the obviously erroneous assertion that probabilism plays no part in plausibility, the Court applied the concept of plausibility in a straight forward inference to the best explanation fashion. Indeed, *Twombly* is a paradigmatic case of inference to the best explanation. As the Court said, “here we have an obvious alternative explanation”¹⁷² to the charge of conspiracy, which was parallel behavior. The pleadings gave no reason to favor conspiracy nor sufficient ground to believe that discovery would yield facts favoring conspiracy over parallelism.¹⁷³ The plaintiffs’ failing was in not providing facts directly of a conspiracy, demonstrating that the context of this suit was one where conspiracy was more likely than parallel conduct (note here the point about there being no difference between “evidence” and its context comes into play), or giving some reason to believe that discovery at an acceptable cost would yield such information.¹⁷⁴ In short, the Court just

168. Ronald J. Allen & Michael Pardo, *Juridical Proof and the Best Explanation*, 27 J. L. & PHIL. 223, 223-43 (2008).

169. See generally PETER ACHINSTEIN, *THE NATURE OF EXPLANATION* (1985); PETER LIPTON, *INFERENCE TO THE BEST EXPLANATION* (2nd ed., 2004).

170. See Allen & Pardo, *supra* note 157, at 265-68.

171. Allen, *supra* note 135, at 630-640; Ronald J. Allen, *Nature of Juridical Proof*, 13 CARD. L. REV. 373, 413-420 (1991).

172. *Bell Atlantic v. Twombly*, 550 U.S. 544, 567 (2007).

173. See *id.* at 557.

174. It is, of course, debatable as to whether the allegations of the Plaintiff in *Twombly* showed that conspiracy was or was not the more likely explanation for the

wanted the plaintiffs to plead “more.” Had the plaintiffs done so, one could say that got them past the line separating “possibility from plausibility” or that they had provided “enough factual matter . . . to suggest that an agreement was made,”¹⁷⁵ but that simply means that the added material changes the relative plausibility of the two propositions. That in turn means the relative probability of the two propositions has been adjusted as well, and that, quite contrary to what the Court said, the Court imposed a “probability requirement” at the pleading stage. We would say that, in fact, it refined it, as one has always existed. While the “no set of facts” language of *Conley* has been read to preclude an inquiry into probability, showing that “no set of facts exists” is the equivalent of demonstrating that the probability of liability is exactly 0.0. Put another way, to prevail on a motion to dismiss under *Conley*, the moving party must prove a probability of non-liability of 1.0, which is exactly what it would be if a plaintiff had failed to allege some essential element of a claim or the law specifically barred relief on allegations in the complaint.

Iqbal does exactly the same thing as *Twombly*. Immediately after reiterating that probabilism plays no role in pleadings, the Court launches into an extensive and detailed discussion of the various explanations for what happened and why intentional discrimination is not the most plausible one.¹⁷⁶ It sums up its conclusion that the pleadings “are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race” but nonetheless inadequate by explaining that “given more likely explanations, they do not plausibly establish this purpose.”¹⁷⁷ Rather obviously, one cannot at the same time rationally dispense with a “probability requirement” to determine “plausibility” yet conclude that something is not “plausible” because there are other “more likely explanations.” No sense can be given of “more likely” except “more probable.”¹⁷⁸

Defendant’s behavior, but this goes to the application of the Court’s new standard in a particular context, not the nature of the standard itself.

175. *Twombly*, 550 U.S. at 556, 570.

176. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009).

177. *See id.*

178. The Court did the same thing in *Tellabs*. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321, 329 & 333 (2007). In construing the term “strong inference” in *Tellabs*, eight of nine justices were in agreement that inferences could only be tested against other inferences. *Id.* *See also, supra* note 76 and accompanying text. The Court is correct about this, and has put its collective finger on a deep issue concerning the nature of juridical proof. *See, e.g.*, Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. L. REV. 604 (1994).

VI. THE COMMENTATORS AND RULES

The pleading cases have generated an enormous body of scholarly commentary from very erudite scholars of civil procedure.¹⁷⁹ They have analyzed the cases from multiple interesting perspectives, but each of them responds to the cases with a more or less static rule that largely recapitulates the awkwardness of the Court's discussion of the meaning of FRCP 8.¹⁸⁰ We give a few examples from a set of articles remarkable (to us at any rate) for their insight that nonetheless operate from the unspoken assumption that a rule must be static.

Prof. Bone, writing before *Iqbal* was decided, argues that *Twombly* “requires no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type.”¹⁸¹ The *Twombly* complaint was deficient because the “correct baseline is competitive behavior under the particular conditions of the telecommunications market, and there is nothing necessarily odd about what the defendants are doing.”¹⁸² Moreover, “By a ‘baseline,’ I mean the normal state of affairs for the situations of the same general type as those described in the complaint. The probability of wrongdoing for baseline conduct is not necessarily zero, but it should be small for otherwise the conduct in question would not be part of a socially acceptable baseline.”¹⁸³

Prof. Bone's analysis is piercing and extremely clarifying, but his understanding of the case substitutes one static rule for another. First, identifying the baseline as innocent conduct appears completely arbitrary.¹⁸⁴ The case before the court will be a member of innumerable reference classes,¹⁸⁵ some of which will be composed of largely innocent members but some of which will not. For example, why not use the set of litigated cases as the baseline, for which presumably the probability of liability would be much higher and which seems more likely to be predictive of the substance of the case? But, if the baseline is higher and one needs significant departure from it, the pleading standards become

179. See generally *supra* note 1 and cited articles.

180. See *supra* note 6 and cited articles.

181. Bone, *Pleading Rules*, *supra* note 1, at 878.

182. *Id.* at 858.

183. *Id.* at 885.

184. As Adam Smith wrote in 1776, “[p]eople of the same trade seldom meet together . . . but the conversation ends in a conspiracy against the public.” ADAM SMITH, *THE WEALTH OF NATIONS* 152 (1776). While a presumption of innocence or non-liability may make sense when allocating burdens of proof, few would seriously contend that this is done to represent the objective likelihood of a particular party's guilt of innocence.

185. See Ronald J. Allen & Michael S. Pardo, *The Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 109 (2007).

more difficult as the probability of liability goes up, which seems peculiar. Using a baseline of cases where the plaintiff ultimately prevailed on the merits would be similarly problematic because this would effectively immunize well concealed conspiracies from suit. Second, merely requiring that “allegations that differ in some significant way from what usually occurs and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct” leads to widely varying results, which is a good marker of a static rule in a dynamic environment.¹⁸⁶ If, for example, the probability of wrongdoing in the “baseline” is .01, but the probability of wrongdoing given the allegations is .1, there has been a tenfold increase in the probability of wrongdoing, but it still remains extraordinarily low. If a .1 probability is nonetheless adequate to proceed, why is it not adequate if the baseline probability is .11 and the allegations suggest a .1 probability? What difference does the direction of the movement make?

When Prof. Bone then applies this understanding to *Erickson*, it appears he has to make adjustments to it. He asserts the baseline is “that plaintiffs would receive treatment for serious illness,” but the non-culpable baseline would seem to be that prisoners would receive the treatment that they need and not be substantially harmed by the choices of prison officials.¹⁸⁷ In *Erickson*, remember, the complaint failed to allege that the plaintiff would be harmed as a result of the actions of prison officials, and thus the pleadings do not describe a state of affairs inconsistent with the proper baseline. Thus, *Erickson* is not consistent with this understanding. Alternatively, by adjusting the baseline, which itself is not constructed by reference to very confining *a priori* rules, any result at all could be justified.

Prof. Bone then turns to his own suggestions for what should be done, and the analysis is again piercing and insightful, and is a fascinating exploration of the normative issues that might arise.¹⁸⁸ Still, he ends up suggesting another static rule—in particular that the concern of pleadings should be the identification of meritless suits, however that

186. Bone, *Pleading Rules*, *supra* note 1, at 878.

187. *Id.* at 886 n.68.

188. *Id.* He does struggle with what “fairness” might mean in some context, such as having difficulty explaining what is wrong about “forcing a defendant to shoulder the burden of litigation without giving the defendant any reason why he should.” *Id.* at 900. We think this is quite simple to explain. Rights are completely reciprocal. The defendant has the same right not to be harmed by the plaintiff as the plaintiff has not to be harmed by the defendant. Imposing costs to defend meritless suits is a harm. The probability of that harm goes up as the reasons justifying plaintiff’s actions go down. Thinking of things probabilistically solves this problem. It is also an example of how many of the problems in this general area are driven by the failure of the parties to bear the true cost of their behavior.

is defined, in light of the complex normative analysis he provides.¹⁸⁹ Focusing on meritless suits has all the advantages and disadvantages of a static rule, and recapitulates the problems that the Court might have been struggling with on our understanding of what it did. Screening more or fewer meritless suits can have any effect at all on the full range of social values to be optimized. It could encourage too much or too little of otherwise useful behavior. *Iqbal*, decided after Prof. Bone wrote his article, may be a clearer case of this than *Twombly*, where allowing suits by disaffected people against high governmental officials could bring governmental processes to a halt.

As discussed above, understanding Rule 8 dynamically eliminates these artificialities. The parties can assert what they want, what baselines (reference classes) are appropriate, suggest why social interests are or are not optimized by permitting the case to proceed, and the judge can decide who has the more plausible case.

Prof. Spencer has provided another informative analysis that, like Prof. Bone, emphasizes the relationship between morality and utility optimization.¹⁹⁰ Again, though, his conclusion as to what is now demanded of pleading reduces to a static, and thus awkward, rule. He summarizes his conclusion that “it appears that legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation. . . .”¹⁹¹ However, if “allegations of objective facts present a scenario that, if true, is neutral with respect to wrongdoing by the defendant [the pleading] . . . fails to state a claim,” and “the addition of speculative suppositions to suggest wrongdoing will not overcome” the presumption of propriety.¹⁹²

Prof. Spencer’s rule, like Prof. Bone’s, is static in the sense that we mean it, and not surprisingly has some of the same difficulties as a result, such as the problem of the reference class. *A priori*, any set of allegations will be within numerous reference classes, some of which may be neutral with respect to the probability of liability and some of which may not be. Prof. Spencer tends to focus on a very general reference class of all the activity encompassed within the set of allegations, but no good reason is given to focus on that class. It would seem to make more sense from both a moral and a utility maximization perspective to focus on the set of litigated cases, or the set of cases in

189. *Id.* at 898. He also argues that whatever is done should be done by rule makers rather than through a common law process. *Id.* To reiterate, we do not address the process issues.

190. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26 (2009).

191. *Id.* at 14.

192. *Id.* at 16.

which there were similar pleadings. There are, after all, disincentives to plaintiffs to bring suits, and those disincentives plausibly weed out weak cases. As we explained above, however, this approach brings with it its own set of problems.

Other somewhat surprising consequences obtain as well. Prof. Spencer requires that allegations not be “neutral,” but that appears to mean that it is more likely than not that there is liability.¹⁹³ That imposes at the pleading stage the standard of persuasion of the typical trial. How that can be done efficiently pre-discovery is unclear. What can be done, as we described above, is make contingent decisions to proceed to the next stage of litigation.

Last, the distinction between “objective facts” and “speculative suppositions” seems to capture the distinction between direct and circumstantial evidence. The distinction between these two is more difficult to identify than is commonly believed.¹⁹⁴ The old distinction (direct evidence is evidence that, if believed, establishes a material proposition) was designed to sort out the more from the less reliable, but it has become clear that it is not a terribly effective rule. Eyewitness testimony is typically direct evidence and DNA typically is circumstantial evidence, but in many cases the DNA evidence is much more probative than the eyewitness. Prof. Spencer gives the example of a pleading of racial discrimination and suggests that there is a difference between pleading that a person was fired after being told “you are too black” and one that simply alleged racial discrimination.¹⁹⁵ Both seem to us to assert “objective facts,” the only difference being the inferential process that each instantiates. The inferential chain may be longer in the latter case, but as the DNA example shows, that does not mean it is less reliable. There is not, in short, the direct relationship between this distinction and plausibility necessary for this rule to work well. Regardless, the critical question is whether there is a difference in these pleadings that makes a difference from the perspective of the optimal construction of the legal system. It is hard to see what that might be. Both are perfect examples of *Conley* type cases where costs are low and information symmetrically distributed.

In his 2007 paper, Richard Epstein meticulously unpacks the economic implications of *Twombly* and writes what is essentially a compelling brief on the merits for dismissal at the pleading stage.¹⁹⁶ When he generalizes, though, he moves from the dynamics of economic

193. *Id.* at 14.

194. RONALD J. ALLEN, RICHARD B. KUHN, ELEANOR SWIFT & DAVID S. SCHWARTZ, *EVIDENCE: TEXT, PROBLEMS, AND CASES* 124-26 (4th ed. 2006).

195. Spencer, *supra* note 190, at 18.

196. R. Epstein, *supra* note 6, at 62-72.

analysis to the traditional static language of (some) rules: “[t]here are two kinds of error in all cases, and so long as the plaintiff relies solely on public evidence that is refuted or explained away by the same type of evidence . . . then the balance of error has clearly shifted. . . . [This] should lead to a dismissal at the close of pleadings in any case where the defendant has negated all inferences of culpability by using the same kinds of public evidence that the plaintiff has used to establish a factual underpinning to the underlying complaint.”¹⁹⁷ However well this explains *Twombly*, it is immediately apparent that its explanatory value is constrained. Cases may rely on “public knowledge” but not necessarily involve a huge cost imposition on defendants. The *a priori* probability of liability may be higher than in antitrust cases (which Prof. Epstein assumes is quite low¹⁹⁸), and thus the likelihood of an erroneous finding against a defendant low as well. The distinction between public and private knowledge is not immediately apparent, as a party may exercise a great deal of control over what becomes public about his activities. *Iqbal*, which came down after the initial drafts of Prof. Epstein’s article, is a perfect example of the type of situation where a powerful defendant had a great deal of control over the information available about his activities and in which the need to control this information itself became an argument for dismissal. Conversely, as was likely the case in *Conley*, private knowledge obtained through discovery may be relatively cheap and quite dispositive, and so on. Rather than this awkward static rule, the questions to ask are the ones that animate his critique and justification of *Twombly*, which are the ones we discussed above.

We know of no exception to the assumption of the commentators on *Iqbal/Twombly* that rules are static.¹⁹⁹ As we pointed out earlier, many

197. *Id.* at 98.

198. *Id.* at 99 (arguing that in an efficient market, antitrust conspiracies should “collapse of their own weight”).

199. The most recent example of yet another very interesting discussion of the pleading problem that again operates on the implicit assumption that rules are static is Steinman, *supra* note 1 at 1314-1325, 1334-35, in which an incisive analysis is followed with a static rule. Pardo makes this point effectively:

According to Professor Steinman, the “conventional wisdom” that *Bell Atlantic* and *Iqbal* impose a plausibility requirement is wrong as a descriptive matter—he contends that the problem with the complaints was that they were “conclusory,” and that “plausibility” may be a way to save a conclusory complaint but not a way to dismiss a non-conclusory complaint. For example, he argues that the complaint in *Bell Atlantic* alleged conduct consistent with an agreement but did not “take the next logical step” and allege that the defendants “agreed to undertake that conduct.” Likewise, in *Iqbal*—although the complaint alleged that (1) Ashcroft and Mueller approved of the policy to subject the plaintiff to alleged the [sic] detention conditions because of religion and national origin, (2) Ashcroft was the “principal architect” of the policy, and (3) Mueller was “instrumental” in implementing it—Steinman contends the

legal rules are dynamic rather than static, although to our knowledge this is never the terms used to discuss them. Hopefully one contribution of this article will be to make clear the power of the distinction generally, and how the distinction in turn highlights critical aspects of the pleading problem.

VII. SUGGESTIONS FOR ACCOMPLISHING THE TASK

As the foregoing makes clear, scrutiny of the pleadings is no longer just a question of fair notice—and almost certainly never was.²⁰⁰ Each of the Court’s avoidance mechanisms—conclusory assertions, context, and plausibility—simply reinforces that the Court was involved in a relative plausibility inquiry that was informed by the benefits and costs of correct decisions and errors. Although “plausibility” and “probability” are not synonymous, neither are they hermitically sealed off from one another. Moreover, to engage in any form of comparison of the relative plausibility of inferences will require engagement with the evidence

agreement was a “distinct” event and the complaint failed because it did not allege anything about “the content of this agreement.” The failure of both complaints was that they described the “goals or future consequences” of agreements without “identifying the content[s]” of the agreements themselves.

Steinman’s reading of these cases is provocative and an important challenge to the “conventional interpretation” of the pleading cases, but it does not stand up to close scrutiny. This is so because the idea of “conclusory” allegations cannot support the weight it is being asked to bear. Steinman proposes defining “conclusory” in “transactional” terms: “an action is conclusory when it fails to identify the real-world acts or events that entitle the plaintiff to relief.” But anyone reading either complaint would know to what real-world events the plaintiffs are referring: an agreement not to compete, etc. in *Bell Atlantic* and a policy to discriminate in *Iqbal*. It is not clear how merely saying “agreement” (as opposed to “conspiracy”) in the complaint in *Bell Atlantic* would make it any less conclusory. Nor is it clear how saying, shortly after September 11, 2001 Ashcroft and Mueller approved a policy with the content “subject Pakastani Muslims to maximum security conditions because of their religion and national origin” is any less conclusory than saying that one designed and the other implemented a policy with these effect for these reasons. Moreover, a number of satisfactory examples of complaints are similarly “conclusory” and would fail this test. The complaint in *Swierkiwicz*, for example, does indeed describe “real-world acts or events”—i.e. “the plaintiff’s firing.” But like *Iqbal*, this is simply the “future consequence” of a prior action (the decision to fire plaintiff because of age), and the complaint does not describe the *content* of that decision. And, as in *Iqbal* and *Bell Atlantic*, the reason for the future action is what matters for purposes of the substantive law. Similarly, Form 11 describes the defendant’s negligent driving but does allege what this defendant *did* that was negligent.

Pardo, *supra* note 17, at 39–41 (footnotes omitted).

200. See, e.g., *Bell Atlantic v. Twombly*, 550 U.S. 544, 561 (2007) (wherein the Court subjects the language of *Conley* to extensive criticism); Spencer *supra*, note 6 at 431; see also Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 140 (2007), www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf.

related to those inferences. Everything, in short, that the Court was denying that it was doing, it did in *Twombly*; in *Iqbal* it unequivocally ordered the trial courts to do it as well. Justice Stevens' suggestion that the Court is engaging in an evidentiary inquiry when evaluating pleadings is true to the extent it recognizes that the court is considering the strength of the inferences within a complaint.²⁰¹ What is a reasonable expectation that discovery will reveal relevant evidence of wrong doing? And what does a plaintiff have to allege to establish such an expectation given the costs and risks of error involved?

Some think answering the kinds of questions should be the task of rule makers rather than common law courts.²⁰² The concern is that the domain of such decisions is too wide, requires too much knowledge, and as a result individual judicial decisions will be idiosyncratic and unpredictable.²⁰³ That may be correct, but as we have argued it neglects, first, the power of the generative common law process, itself an example of dynamic rule making, and, second (and more importantly), the comparative nature of litigation generally. On the assumption that the federal courts have been pointed down such paths, we can identify a number of principles that could guide the journey, although we will leave it to others to decide if it is the optimal solution for the legal system.

First, allegations which simply restate the elements of a claim as required by the substantive law and allegations of specific conduct are not fundamentally distinct; they are simply allegations which are made with differing degrees of generality. This is why the distinction between facts and conclusions has historically been difficult to maintain and why it would be a mistake to read *Iqbal* as inviting a return to a fact pleading regime.²⁰⁴ A second and related point is that conclusory allegations generally are plausible to some degree. The question is not whether a conclusion is plausible, but whether it is sufficiently plausible. This, in turn, can only be determined by comparing the competing inferences proposed by the opposing party.

Third, requiring additional factual specificity beyond mere recitation of the formal elements of claim is likely to reduce a defendant's proportional share of discovery costs, as the plaintiff will have been required to expend more effort to research his allegations

201. See *Twombly*, 550 U.S. at 579.

202. See, e.g., Robert G. Bone, *Making Effective Rules: The Need For Procedure Theory*, 61 OKLA. L. REV. 319, (2008) (discussion relationship between underlying legal norms and contours of procedure).

203. See *id.* at 323 (discussion relationship between underlying legal norms and contours of procedure). See also Bone, *Plausibility Pleading*, *supra* note 1, at 851.

204. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (rejecting notion that *Twombly* announced anything other than a new pleading standard).

before filing his claim.²⁰⁵ This tends to discourage claims brought against defendants in the hope of compelling a settlement. And vice versa, of course. In some cases, such as the *res ipsa* cases, perhaps even the *Conley* standard imposes too high of a hurdle for plaintiffs.

Fourth, the basic framework for sorting actionable conduct from inactionable conduct is the substantive law and those presumptions used to allocate evidentiary burdens between plaintiff and defendant at trial.²⁰⁶ By requiring the plaintiff to plead what he must prove at trial, the plaintiff is required to show that he or she is entitled to relief, but this is facilitated by allowing the plaintiff to take advantage of those legal devices which would allocate the risk of error due to incomplete information, so that he is not placed in a position where he must plead more than he would have to prove.²⁰⁷

Fifth, the plausibility of a complaint can only be evaluated by examining the inferential connections between the legal elements and the more specific factual allegations that have been made to instantiate those elements. In some cases, this may require considering whether one set of conclusory allegations is supported by a second set of conclusory allegations which are themselves supported by specific factual allegations—like in *Iqbal* where a plaintiff would have to negate an affirmative defense at trial.²⁰⁸ Whether particular allegations support his entitlement to relief depends on whether the defendant can offer a more plausible theory to account for them.

Sixth, the level of particularized allegations can vary from case to case based on the degree to which a party is likely to bear a disproportionate share of the costs during the discovery phase, the probability and costs of errors, the degree to which a plaintiff could be expected to offer more particularized facts without the aid of discovery, and the *a priori* likelihood of liability.²⁰⁹ The ultimate question

205. See FED. R. CIV. P. 11; see also 28 U.S.C. § 1915 (1996).

206. See *Iqbal*, 129 S. Ct. at 1946-47 (“whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded. In that sense the sufficiency of respondent’s pleadings is both inextricably intertwined with and directly implicated by the qualified immunity defense.”) (citations omitted). While this statement could be read as applying to the limited area of civil rights complaints, we think that the principle articulated is much broader. “[The] basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation. . . . If a Government official is to devote time to his or her duties . . . it is counterproductive to require substantial diversion . . . in litigation. . . .” See *id.* at 1953.

207. See generally Pardo, *supra* note 17. This is central to Pardo’s reconciliation of the procedural and evidentiary regimes.

208. See *Iqbal*, 129 S.Ct. at 1948 (2009).

209. See FED.R.CIV.P. 9. Rule 9’s provisions for alleging states of mind in fraud cases can be seen as endorsing just such an exhaustion exemption. Since the cost of providing a plausible inference regarding a defendant’s state of mind by way of

remaining is whether the plaintiff provided sufficient matter in the complaint, taken as true, to justify the potential costs of going forward.

Seventh, in making these determinations, the courts have no choice but to rely on the relationship between what the parties present and their own experience with similar matters and the experience of other courts with similar situations, and how those apply to the case at hand, but that is to say that the courts will have to consider the evidence. They will have to make judgments about the relative balance of availability of information and costs, and *a priori* probabilities that one side or the other deserves to win. As we have said, here is where objections to this development will focus.

The proposals set forth above carry forward the two “operating principles” the Court identified in *Twombly* and the hierarchy of pleadings set forth in *Iqbal*.²¹⁰ To be sure, the testing of the inferences that can be drawn from allegations in a complaint is a fundamentally different inquiry than the one a court would pursue if it were only seeking to determine whether a complaint gave fair notice to a defendant of the charges against him. However, it is not fundamentally different from the numerous other types of gatekeeping inquiries in which courts already engage.²¹¹

The most important aspects of the explanation we offer is that it recognizes, first, the relationship between static and dynamic rules and contexts, and second, the relationships between evidence, procedure, and substantive law. These relationships are intrinsic to the way the Court has analyzed complaints in the trilogy of pleading cases which explore the plausibility standard. Our explanation merely makes explicit these relationships and their implications.

Twombly and *Iqbal* may represent important changes in the way complaints are evaluated at the pleadings stage. However, they need not be viewed as a rejection of trans-substantive approaches to pleadings or an improper intrusion of “evidentiary” concerns into “procedural” inquiry, and they may be an important first step toward developing a more rational and coherent pleading process. There are potential difficulties, of course. In one sense, predictability regarding pleadings may be lessened, but as we have pointed out, predictability in pleading

particularized allegations would put a heavy burden on the plaintiff, it is reasonable to allow the plaintiffs in a typical case to allege this point generally, and then place the defendant in the position of rebutting it.

210. Further, they unpack the understanding of inferences outlined in *Tellabs*. See, *supra* note 76 and accompanying text.

211. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 (2007) (discussing instances of ‘judicial gatekeeping’ such as expert testimony decisions, summary judgment, and judgment as a matter of law).

may carry with it perverse substantive results. We leave it to others to balance all these matters. Our effort here has simply been to understand them.

We close with one last point. Our analysis may appear to be radically unstabilizing of the orderliness of rules. In addition to difficulties about the extension of terms and the relationship between different variables that presently plague the process of applying rules, we now overlay another question about the conceptual foundation of a rule—is any particular rule to be understood as dynamic or static? Can the apparent implications of a rule be avoided merely by claiming that what was thought to be a static rule is dynamic or vice versa?

These are serious questions and we have two responses to them. First, most rules are clear on their face as to their nature, as in the famous example of “keep off the grass,”²¹² and the equally famous, and opposite from this perspective, examples of do not act negligently and be reasonable. Second, and much more importantly, perhaps rules are often not clear precisely because of the failure to consider the difference between static and dynamic rules and conditions, and a traditional static approach is taken to what calls for a dynamic one. Rule 8 may be an example. From the face of it alone, one cannot say which it is. The *Conley* gloss is one way to understand the phrase “entitled to relief” in Federal Rule 8. However, Rule 8 may also be understood as requiring that a pleading must show that the objectives of the legal system will not be subverted by continuing the lawsuit. Perhaps this reflects the fact that its drafters were under the influence of the then and now prevalent notion of a rule, but were such sophisticated observers of the legal system that they knew, at least intuitively, of its evolutionary character and the difficulty of capturing the evolving future in a presently articulated set of necessary and sufficient conditions which could be reduced to a specific verbal formula. Whatever the drafters were thinking, or the present members of the Supreme Court, hopefully we have at least shown that the distinctions between static and dynamic rules and between evidence and context, as well as the complex relationships between evidence, procedure, and substantive law, are jurisprudentially deep and interesting matters that bear attending to. If they are attended to, perhaps the result will lead to more rather than less stable results.

212. Gerald Graff, “Keep off the Grass,” “Drop Dead,” and other Indeterminacies: A Response to Sanford Levinson, 60 TEXAS L. REV. 405 (1982).
