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FROM *CONLEY* TO *TWOMBLY* TO *IQBAL*: A DOUBLE PLAY ON THE FEDERAL RULES OF CIVIL PROCEDURE

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ABSTRACT

This Article discusses the effects of the recent Supreme Court decisions in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *on the model of civil litigation established by the Federal Rules of Civil*

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The title seeks to evoke the image of Joe Tinker, Johnny Evers, and Frank Chance, Hall of Fame Chicago Cubs infielders in the early years of the twentieth century, whose remarkable double-play skills were immortalized in a poem by Franklin Pierce Adams in the *New York Evening Mail* on July 12, 1910. Franklin P. Adams, *That Double Play Again*, N.Y. EVENING MAIL, July 12, 1910, at 6.

This Article is dedicated to Professor-then-Justice Benjamin Kaplan, my mentor, role model, and friend, who first unlocked the mysteries of procedure and copyright for me, and then always asked what I wanted to do when I "grew up." After ninety-nine remarkable years, he no longer needs to be concerned about demurrers, joinder, and plausibility pleading.

Procedure in 1938. Those Rules created a procedural system giving a litigant, using plain language and presenting the essential elements of a claim for relief, an opportunity to pursue discovery and have his or her rights adjudicated on the merits. This Article discusses the basic values underlying that system and its importance in promoting broad citizen access to our federal courts and enabling the private enforcement of substantive public policies.

The Article then discusses how Twombly *and* Iqbal *have destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years. The cases are seen as the latest in a sequence of increasingly restrictive changes during the last quarter century. These have created expensive and time-consuming procedural stop signs that produce earlier and earlier termination of cases, thereby increasingly preventing claimants from reaching trial—particularly jury trial. This Article contends that there has been too much attention paid to claims by corporate and other defense interests of expense and possible abuse and too little on citizen access, a level litigation playing field, and the other values of civil litigation. Much fine-grained empirical research is needed to separate fact from fiction.*

This Article finds that setting significantly higher and more resource-consumptive procedural barriers for plaintiffs and moving to the ever-earlier disposition of civil suits—now exacerbated by the two Supreme Court decisions—runs contrary to many of the values underlying the Federal Rules. Concluding that the Court's preoccupation with defense costs is misplaced and its belittlement of case management as a way of cabining those costs is unpersuasive, the Article offers several proposals that the Advisory Committee on Civil Rules (or Congress) might consider to reverse recent developments and ameliorate some of their negative aspects.

Ultimately, the Article asks a basic question: after Twombly *and* Iqbal*, is our American court system still one in which an aggrieved person, however unsophisticated and under-resourced he may be, can secure a meaningful day in court? Finding that the important values of civil litigation are in jeopardy, this Article urges that the egalitarian, democratic ideals espoused by the original Federal Rules not be subordinated to one-dimensional claims of excessive litigation costs and abuse that have not been validated.*

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INTRODUCTION

History matters. When adopted in 1938, the Federal Rules of Civil Procedure represented a major break from the common law and code systems. Although the drafters retained many of the prior procedural conventions, the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and

adjudication on the merits based on a full disclosure of relevant information.[1] The structure of the Rules sharply reduced the prior emphasis on the pleadings and the extensive related motion practice that served more to delay proceedings and less to expose the facts, ventilate the competing positions, or further adjudication on the merits.[2] According to the Supreme Court in *Conley v. Gibson*,[3] pleadings only needed to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" to survive a motion to dismiss.[4] Fact revelation and issue formulation would occur later in the pretrial process.[5]

Moreover, rather than eliminating claims based on technicalities,[6] the Federal Rules created a system that relied on plain language and

1. *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 188, 190 (1958) (discussing how the philosophical ideals of allowing any individual "to come in and put his claim before the judge" and putting "truth ahead of cleverness and tactics" shaped the Federal Rules); *see also* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554–62 (2002) (providing a more thorough treatment of the history of Rule 8 and the liberal ethos of the Federal Rules); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912, 943–1002 (1987) (discussing "the inherent nature of the Federal Rules and . . . the basic choice of procedural form made by their promulgators").

2. *See* AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed., 1938); *see also* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008) ("When the Federal Rules of Civil Procedure were first adopted in 1938, 'they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through.'" (footnote omitted) (quoting Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 2–3 (1988))).

3. Conley v. Gibson, 355 U.S. 41 (1957). *Conley*'s philosophy of pleading was previsioned in *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1202 (3d ed. 2004) (discussing how Rule 8 is the "keystone" of the pleading system created by the Federal Rules of Civil Procedure).

4. *Conley*, 355 U.S. at 47.

5. *Id.* at 47–48.

6. Under common law and code pleading, there "seem[ed] to be a persistent idea that you could get the other fellow to prove *your* case by making a misstep or by saying too much in his pleading." AM. BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM IN NEW YORK CITY 40 (Edward H. Hammond ed., 1939).

minimized procedural traps,[7] with trial by jury as the gold standard for determining a case's merits. Generalized pleadings, broad discovery, and limited summary judgment became integral, interdependent elements of the pretrial process.[8] Although so-called notice pleading allowed a wide swath of cases into the system, discovery and summary judgment[9] were designed to expose and separate the meritorious from the meritless.

Beneath the surface of these broad procedural concepts lay several significant policy objectives. The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process. It should abjure technical decisionmaking and "promote the ends of justice."[10] The simple but ambitious notion was that the legal rights of citizens should be enforced. This idea was a baseline democratic tenet of the 1930s and then of postwar America with regard to such matters as civil rights, the distribution of social and political power, marketplace status, and equality of opportunity.[11]

As significant new areas of federal substantive law emerged and existing ones were augmented, the importance of private enforcement of key national policies, of litigation as an instrument of social policy, and of expanding state-based tort and consumer-protection theories came to the fore in numerous contexts.[12] The openness and simplicity of the Rules facilitated citizen enforcement of congressional and constitutional policies through civil litigation. The federal courts increasingly were seen as an alternative or an adjunct to centralized,

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7. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 48.

8. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

9. In seeking summary judgment, the movant always has "the burden of showing the absence of a genuine issue as to any material fact." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Cases generally narrowed in scope as they approached trial.

10. *See* 4 WRIGHT & MILLER, *supra* note 3, § 1029 (3d ed. 2002) (discussing the purpose and construction of the Federal Rules of Civil Procedure).

11. *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000) (discussing the evolution of the American judiciary in the context of the *Erie* doctrine).

12. *See infra* notes 275–92 and accompanying text.

or administrative governmental oversight in fields such as competition, capital markets, product safety, and discrimination. Even though private lawsuits might be viewed as an inefficient ex post method of enforcing public policies, they have dispersed regulatory authority; achieved greater transparency; provided a source of compensation, deterrence, and institutional governance; and led to leaner government involvement. Without this private-attorneys-general concept, the substitution of an alternative methodology would be necessary. This probably would mean the establishment of the type of continental-style, centralized bureaucracies and administrative enforcement that many think are inconsistent with our culture and heritage.[13]

Perhaps the case that best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules is *Dioguardi v. Durning*.[14] As many may remember from their law school civil procedure course, John Dioguardi, an immigrant and pro se plaintiff, asserted various grievances against the Collector of Customs of the Port of New York.[15] His home-drawn complaint alleged in broken English a number of factual circumstances but failed to make any coherent legal presentation. Judge Charles E. Clark, the principal draftsman of the Federal Rules,[16] wrote for the Second Circuit in overturning the district court's Rule 12(b)(6) dismissal of Dioguardi's action.[17] The court found enough information within the complaint's allegations to satisfy Rule 8(a)(2)'s pleading standard.[18] Judge Clark's opinion reminded the profession that the

13. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003) (arguing that the United States, unlike other industrialized nations, relies on an adversarial legal system to develop law and public policy rather than on judges and professional bureaucrats). For additional discussion of the phenomenon, see *infra* notes 275–92.

14. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). *See generally* 5 WRIGHT & MILLER, *supra* note 3, § 1220 (showing how *Dioguardi* is illustrative of the pleading philosophy created by the Federal Rules of Civil Procedure).

15. *Dioguardi*, 139 F.2d at 774.

16. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting) (describing Judge Clark as the "principal draftsman" of the Federal Rules).

17. *Dioguardi*, 139 F.2d at 775. Rule 12(b)(6) provides for a motion to dismiss the complaint for its "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). *See generally* 5B WRIGHT & MILLER, *supra* note 3, §§ 1355–1357 (discussing the history, purpose, and practice of Rule 12(b)(6)).

18. *Dioguardi*, 139 F.2d at 775. The rule requires a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). *See generally* 5A–B WRIGHT & MILLER, *supra* note 3, §§ 1315–1354.

then-relatively new Rule 8 required only "a short and plain statement of the claim showing that the pleader is entitled to relief" and no longer demanded "facts sufficient to constitute a cause of action," as was required under code pleading.[19] Judge Clark's lecture on the new pleading standard was confirmed thirteen years later by the Supreme Court's ruling in *Conley v. Gibson*,[20] in which it famously stated, "[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 . . . ."[21] That philosophy was recited by the Court on several occasions during *Conley*'s fifty-year reign.[22]

Much, however, has changed in the world of litigation in the sixty-six years since *Dioguardi*. The cultures of the law and of the legal profession are far different. Long gone are the days of a fairly homogenous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of claims or parties. Law practice today has many attributes of a business and has succumbed to various marketing practices, including television advertising. And litigation in the federal courts has become a world unimagined in 1938: often a battleground for titans of industry to dispute complex claims

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19. *Dioguardi*, 139 F.2d at 775 (quoting FED. R. CIV. P. 8(a)); *see also* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–60 (1943) (discussing how the cumbersome pleading requirements led to a call for reform). In his dissent in *Twombly*, Justice Stevens noted that Judge Clark's opinion in *Dioguardi* "disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a 'cause of action,'" but that the effort failed. *Twombly*, 550 U.S. at 582 (Stevens, J., dissenting); *see also* O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 125–26 (1952) (discussing how a plaintiff's lawyer could use the *Dioguardi* ruling to more liberally plead cases). In 1955, the Advisory Committee rejected a proposal that Rule 8(a)(2) be amended to require the complaint to plead "facts constituting a cause of action." ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (1955), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf.

20. Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (citing *Dioguardi* in support of a liberal pleading standard).

21. *Id.*

22. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) . . . ."); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."); *see also* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

involving enormous stakes; a forum in which disparate ideological forces contest some of the great issues of the day; and the situs for aggregate litigation on behalf of large numbers of people and entities pursuing theories and invoking statutes unknown in the 1930s and 1940s. Complicated issues of technology, science, and economics are commonplace. In some cases, the size of the claims and the litigation costs are stunning. Over the years the number of lawsuits filed has increased, but judicial resources have not kept pace.[23] Opposing counsel compete on a national and even a global scale and employ an array of litigation tactics often designed to wear out or deter opponents (or mount billable hours), making the maintenance of shared professional values difficult, if not impossible.

Many cases seem interminable. The pretrial process has become so elaborate with time-consuming motions, hearings, and discovery that it often seems to have fallen into the hands of some systemic Sorcerer's Apprentice. Yet trials are strikingly infrequent, and, in the unlikely event of a jury trial, only six or eight citizens typically are empanelled.[24] What some would call cults of judicial management and

23. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 59–95 (1985). A sharp increase in criminal matters, coupled with the federalization of such matters as securities litigation and class actions, may have outstripped the growth of the federal judiciary. I do not believe, however, that the data support the notion that we have been struck by a "litigation explosion." *See generally* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (arguing that American litigation rates are not much higher than in the recent past and are not dissimilar to other industrialized countries); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (tracing the decline in the percentage of cases that terminate at trial and the decline in the absolute number of trials in American courts); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909 (1989) (stating that businesses' concerns about judicial caseloads are a "weapon of perception, not substance").

24. *See* FED. R. CIV. P. 48(a) (setting the number of jurors between six and twelve). In Marc Galanter & Angela Frozena, 'A Grin Without a Cat': Civil Trials in the Federal Courts (May 1, 2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/AD5073BA32C448C18525771F0038C680/$File/Marc%20Galanter%20and%20Angela%20Frozena%2C%20A%20Grin%20Without%20a%20Cat.pdf?OpenElement, the authors note the percentage and absolute drop in federal court trials over the past quarter century despite the growth in the legal system and conclude "that the civil trial is approaching extinction." *Id.* at 1. *See generally* 9B WRIGHT & MILLER, *supra* note 3, § 2491 (3d ed. 2008) (discussing the size of the jury); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (stating that "an abundance of data shows that the number of trials—federal and state, civil and criminal, jury and bench—is declining"); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40

alternative dispute resolution have arisen, eroding certain aspects of the adversary system and blocking access to the courtroom for a trial on the merits. In short, the world of those who drafted the original Federal Rules largely has disappeared, causing one district judge to remark that the "reality" is that our "system [is] becoming increasingly inaccessible to the average citizen."[25] Sadly, in some respects today's civil litigation is neither civil nor litigation as previously known.

Along with these changes in litigation realities have come corresponding judicial shifts in the interpretation of the Rules and the erection of other procedural barriers to a meaningful day in court. To some degree these shifts are a response to a powerful drumbeat of criticism from the business community, the members of the legal profession representing that constituency, and conservative political forces that have secured a significant change in the demographic character of the federal bench.[26] Deregulation is the watchword; so-called American litigiousness is decried and lawyers demonized; the system's costs and delays are deplored; and litigation is characterized as a lottery.[27] Federal civil procedure has been politicized and subjected to ideological pressures. Thus, the Supreme Court's recent

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SUFFOLK U. L. REV. 67, 73 (2006) ("For some time now, circumstances and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past.").

25. Scheetz v. Bridgestone/Firestone, Inc., 152 F.R.D. 628, 630 n.2 (D. Mont. 1993) (quoting Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 3 (1992) (internal quotation marks omitted)); *see also* Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) ("[N]or can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.").

26. *See generally* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (claiming that judges' political convictions affect their decisions in cases when the law does not provide a clear answer); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (charting the development of the conservative legal movement from the 1970s); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1 (arguing that the Supreme Court under Chief Justice Roberts has become "the most conservative [Court] in living memory").

27. The appointment of a Council on Competitiveness under the leadership of Vice President Dan Quayle was designed to protect and promote American business in the global marketplace. Its Agenda for Civil Justice Reform proposed many probusiness changes in the civil-justice system. *See generally* M.E. BEESLEY, PRIVATIZATION, REGULATION AND DEREGULATION (1997); WILLIS EMMONS, THE EVOLVING BARGAIN: STRATEGIC IMPLICATIONS OF DEREGULATION AND PRIVATIZATION (2000).

decisions in *Bell Atlantic Corp. v. Twombly*[28] and *Ashcroft v. Iqbal*[29] should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth. To a significant degree, the liberal-procedure ethos of 1938 has given way to a restrictive one.

A few illustrations of what has transpired should suffice. Two decades before these two pleading decisions, the 1986 trilogy of Supreme Court summary judgment cases[30] broke with prior jurisprudence that sharply restricted the motion's application to clear cases in which no genuine issue of material fact was present.[31] The three decisions in one term sent a clear signal to the legal profession that Rule 56 provides a useful mechanism for disposing of cases short of trial when the district judge feels the plaintiff's case is not plausible.[32] Many courts responded to this invitation with considerable receptivity.

A further exemplar of the shift in the focus of federal litigation to the pretrial phase occurred a few years after the summary judgment

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28. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). The complaint charged the "Baby Bells" with anti-competitive conduct in the form of parallel conduct discouraging competition and their failure to compete with each other. *Id.* at 548–49.

29. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The plaintiff asserted a wide range of constitutional and statutory violations of his civil rights by governmental officials, which was challenged by a motion to dismiss based on qualified immunity. *Id.* at 1942.

30. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

31. The Court previously had said:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (footnote omitted); *see also* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970) (holding that it was error to grant summary judgment because the respondent did not meet its "burden of showing the absence of a genuine issue as to any material fact").

32. *See* FED. R. CIV. P. 56. For a more in-depth discussion of the impact of the 1986 trilogy, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1044–73 (2003).

trilogy when the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[33] which established judicial gatekeeping on the introduction of expert testimony. The resultant challenge and hearing process—often time consuming and expensive—has provided defendants with another opportunity to eviscerate cases that depend on experts and proliferate the pretrial process, thereby supporting strategies of attrition and delay.[34]

On the legislative front, and with the supposed aim of reducing "frivolous suits," Congress, having been lobbied by corporate, accounting, and investment interests, enacted the Private Securities Litigation Reform Act (PSLRA) in 1995.[35] The statute created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery until after resolution of an inevitably protracted motion to dismiss, often based on complex questions such as scienter, loss causation, reliance, and materiality[36]—questions that formerly would have been considered trial worthy.

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33. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

34. *Id.* at 597; *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999) (holding that expert testimony could be excluded); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146–47 (1997) (upholding the district court's exclusion of expert testimony). Closely analogous is the intense judicial examination of class certifiability. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 100 (2009) ("Class certification is not a matter of mere pleading but, rather, of affirmative proof that the requirements stated in Rule 23 have been satisfied. The court must make a 'definitive assessment' that these requirements have been met, even if that assessment entails the resolution of conflicting proof and happens to overlap with an issue—even a critical one—on the merits."); *see also* cases cited *infra* note 185.

35. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). Three years later, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. § 78a (2006)), which preempted almost all class actions related to "covered" securities, thereby virtually ending the growth of state remedial securities law. The same interests secured the enactment of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 (2006), which effectively gives the supposedly defense-friendly federal courts exclusive jurisdiction over almost all significant class actions denying plaintiffs access to supposedly more receptive state courts. *See* Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 448–49 (2010) ("In literally 'making a federal case' out of the vast majority of class actions, Congress intentionally or otherwise complicated and marked up the price tag on the delivery of 'fair and prompt recovery to class members with legitimate claims' by forcing class actions into competition for the scarce judicial resources of a well-respected, but under-populated, federal judicial community.").

36. S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683; H.R. CONF. REP. NO. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Court adopted a test for pleading a "strong inference" of scienter under the PSLRA. *Id.* at 314. In examining a complaint for

Despite the well-established position of notice pleading under *Conley*, and absent any revision of Rule 8 by the rulemaking process, a number of lower court federal judges—perhaps emboldened by the summary judgment trilogy or feeling overburdened by their caseloads—frequently applied more-demanding pleading standards in many types of cases, resulting in a greater number of Rule 12(b)(6) dismissals over the years.[37] This arguably unauthorized shift in the pleading sphere provided a foundation for the Court's *Twombly* decision.[38]

Responding to the business community's complaints about costs, amendments to the Federal Rules and changes in various judicial practices have been designed, for more than a quarter century, to contain or control discovery and enhance the power of judges to manage cases throughout the pretrial process.[39] These developments seem to reflect a growing emphasis on efficiency, which some believe has enabled defense interests to employ the procedural system to avoid, or at least delay, reaching an adjudication of a dispute's merits.

Finally, the great expansion of contractual limitations on private law enforcement by consumers through the insertion of arbitration clauses into agreements that are often adhesive—and the validation by the Supreme Court of such clauses[40]—may be seen as part of an

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sufficiency, "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id.*

37. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (finding that after *Conley*, Rule 12(b)(6) motions were granted 46 percent of the time, after *Twombly*, the number increased to 48 percent, and after *Iqbal*, the number increased to 56 percent). *See generally* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 989 (2003) (stating that "notice pleading as a universal standard is a myth"); Fairman, *supra* note 1, at 574–90 (discussing the rise and proliferation of judicially imposed heightened pleading requirements); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1986) (stating that fact pleading "seems to be enjoying a revival in a number of areas"). In the years between *Conley* and *Twombly*, attempts to convert Rule 8(a) from notice to fact pleading were rejected by the Advisory Committee. *See supra* note 19.

38. *See* Bell Atl. Co. v. Twombly, 550 U.S. 544, 560–63 (2007).

39. *See* FED. R. CIV. P. 16, 26. Rule 16 was amended in 1983 and 1993, and Rule 26 was amended in 1993, 2000, and 2006. For more information about the revisions, see the Advisory Committee's Notes to these changes. There have been other constraints imposed on discovery. *See, e.g.*, FED. R. CIV. P. 30(d)(2), 33(a). *See generally* Richard Marcus, Essay, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 7 (2004) (discussing the Advisory Committee's response to electronic discovery).

40. *See, e.g.*, Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 587 (2008) (holding that a court "must grant" an application for the confirmation of an arbitration award unless certain

overall campaign to reduce the effectiveness of federal regulatory law and public enforcement proceedings.[41] These clauses impair citizen access to a judicial forum with the possibility of jury trial. And quite recently the Supreme Court indicated that the availability of the class action in arbitration may be extremely limited,[42] potentially impairing the effectiveness of consumer remedies in various contexts.

In the background, several commentators have criticized rulemaking—once thought to reflect the efforts of neutral professionals—as being overly politicized by economic and ideological forces.[43] Increasingly, it has been recognized that procedural rules are a source of societal power, that the formulation and application of those rules often are not value neutral, and that the manipulation of procedural rules frequently is used to advance or

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"prescribed" exceptions apply); Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.").

41. *See generally* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009) (discussing the Supreme Court's evolving role as "superlegislator"). One accomplished empiricist has suggested, somewhat counter-intuitively, that the relatively limited use of arbitration clauses actually suggests that corporate defendants are less concerned about, and in need of less protection from, litigation than the Supreme Court's *Twombly* and *Iqbal* decisions suggest. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 158–59 (2009) (statement of Theodore Eisenberg, Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences, Cornell University).

42. *See* Stolt-Nielson v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010).

43. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888–89 (1999) (discussing criticisms of court rulemaking); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. (forthcoming Dec. 2010) (manuscript at 2–19) (on file with the *Duke Law Journal*) (discussing the political stress that creates a crisis in federal rulemaking); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 685 (1975) (recommending changes in Supreme Court rulemaking); Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 903 (2002) (discussing the "pervasive and valid concerns about a crisis in rulemaking"); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613–17, 636–37 (2001) (noting the conservative and defense orientation of rulemaking and recommending greater "socio-political makeup"). *See generally* Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798–99 (1991) (discussing the "politicization of the civil rulemaking process").

retard substantive goals.[44] Viewed realistically, rules of procedure represent policy tradeoffs.[45]

Yet, until *Twombly* in 2007, the Supreme Court stood firm in its commitment to the rulemaking process and to the principle of access at the pleading stage.[46] But the Court's opinion in *Twombly* "retired" *Conley*'s "no set of facts" language and insisted on "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action."[47] The Court demanded "enough facts to state a claim to relief that is plausible on its face."[48] With the advent of "plausibility" pleading,[49] the Rule 12(b)(6) motion seems to have stolen center stage. It has become the vehicle of choice for both disposing of allegedly insufficient claims and protecting defendants from supposedly excessive discovery costs and resource expenditures—objectives previously thought to be achievable through the utilization of other rules and judicial practices.

The cumulative effect of these procedural developments may well have come at the expense of access to the federal courts and the ability of citizens to obtain an adjudication of their claims' merits. Some proceduralists have suggested that what has been established is not a neutral solution for an important litigation problem, but rather the use of procedure to achieve results that undermine important national policies by limiting their private enforcement through

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44. Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519–25 (2010).

45. *See* Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 840 (1993) (discussing the challenge of "mov[ing] forward without losing hold of the basic elements that make our legal system so successful"). *See generally* Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Procedure System* (Apr. 14, 2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/7F15D55E983415D085257707004A6316/$File/Alan%20Morrison%2C%20The%20Necessity%20of%20Tradeoffs.pdf?OpenElement (discussing the tradeoffs inherent in the Federal Rules of Civil Procedure).

46. *See supra* note 22.

47. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, 555, 579 (2007). The Court ignored its admonition in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). *See supra* note 31.

48. *Twombly*, 550 U.S. at 570. The Supreme Court of Arizona has retained its notice-pleading standard and has not adopted *Twombly*. *See* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 348 (Ariz. 2008) (en banc) (vacating the portion of the lower court's opinion that cited *Twombly*).

49. For a description of "plausibility" pleading, see *infra* Part I.

various systemic and process changes designed to benefit special economic interests.[50] In recent years, the business community has used its influence to weaken the enforcement of public laws and policies regulating their activities.[51] Procedural modifications have been employed to achieve substantive changes for defense interests. With *Twombly* and *Iqbal*, the favored disposition technique has moved earlier in time from summary judgment to the motion to dismiss.

Recognizing the importance of *Twombly* and *Iqbal*, most[52]—but

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50. To paraphrase a friend who is an accomplished proceduralist, it is the view of some that what we have seen is the "subversion of statutory protections to benefit Wall Street at the expense of Main Street."

51. *See* TELES, *supra* note 26; *see also* Leslie M. Kelleher, *Amenability to Jurisdiction as a "Substantive Right": The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1194 (2000) ("On occasion, lobbyists have convinced Congress to bypass the rulemaking process entirely, and provide special procedures for specific classes of cases by legislation, in order to favor certain interest groups."). For a highly partisan and rather distorted view of plaintiffs' lawyers and private enforcement, see James R. Copland, *A Message from the Director*, TRIAL LAWYERS INC.: K STREET, http://www.triallawyersinc.com/kstreet/kstr01.html (last visited Aug. 25, 2010).

52. *See, e.g.*, Robert G. Bone, Twombly *Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV. 873, 882–90 (2009) (discussing *Twombly*'s impact); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) (stating that *Iqbal* "exacerbated confusion about pleading standards"); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (opining that these cases "have destabilized the entire system of civil litigation"); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 455 (2010) (explaining that *Twombly* and *Iqbal* mark "the beginning of a new phase in the history of American pleading requirements"); Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go off Track?*, LITIGATION, Summer 2008, at 5, 62 (stating that "*Twombly* reversed a 50-year-old precedent").

Even judges and academics who one assumes are sympathetic to the decisions recognize their significance. *See, e.g.*, Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R.R. Co., 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, C.J., joined by Posner, J., concurring in the denial of rehearing en banc) ("In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier . . . ."); Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 64 (2007) ("The Supreme Court in *Twombly* held that the phrase 'no set of facts' has been 'questioned, criticized, and explained away long enough.' But on this matter Justice Stevens's dissent surely has the better argument. *Conley* has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere and the plaintiffs' allegations are quite in the spirit of the Federal Rules. The *Conley* complaint is fact-free but gives notice of the basic elements of the claim. *Twombly* can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases." (footnotes omitted)).

not all[53]—observers believe these two cases represent a major departure from the Court's established pleading jurisprudence and that the decisions have brought the long-simmering debate over the proper role of pleadings and pretrial motions to a fever pitch in some quarters. The defense bar, along with the large entities it typically represents, asserts that a heightened pleading standard is necessary to reduce the cost of litigation, weed out abusive lawsuits, and protect American business interests at home and abroad.[54] The plaintiffs' bar, supported by various civil rights, consumer, and environmental protection groups, argues that heightened pleading is a blunt instrument that will keep out or terminate meritorious claims before discovery, undermine various state and national policies, and increase the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery.[55] This sharp divide even may imperil the credibility and effectiveness of the rulemaking process as rulemakers try to chart a path from this point.[56]

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53. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 175–214 (statement of Gregory G. Garre, Partner, Latham & Watkins, LLP) (arguing that *Twombly* and *Iqbal* were rightly decided and that Congress should not try to override these decisions); *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 33 (2009) (statement of Gregory C. Katsas, former Assistant Att'y Gen., Civil Division, U.S. Department of Justice) (claiming that *Twombly* and *Iqbal* "faithfully interpret" the Federal Rules of Civil Procedure and are consistent with precedent); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1069 (2009) (arguing that the plausibility standard is both coherent and required by the Federal Rules of Civil Procedure). For a moderate view of the effect of the two decisions, see Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010), and see also Dobyns v. U.S., 91 Fed. Cl. 412 (2010). An optimistic view of what may be feasible under *Twombly* and *Iqbal* is offered in Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010).

54. AM. COLL. OF TRIAL LAWYERS, FINAL REPORT OF THE JOINT PROJECT OF THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM 2–3 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053.

55. *See generally* Letter from John Vail, Vice President, Ctr. for Const. Lit., to the Advisory Comm. on Civil Rules (Nov. 10, 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-046-Testimony-Center%20For%20Constitutional%20Litigation%20(Vail).pdf (arguing for greater flexibility in summary judgment practice).

56. The cleavage between the plaintiffs' and defendants' bar regarding pleading and motion to dismiss practices is manifest throughout AM. BAR ASS'N SECTION OF LITIG.,

Given the dramatic changes and sharp debate precipitated by *Twombly* and *Iqbal*, the Federal Rules—indeed, federal civil practice in general—stand at a critical crossroads. It is incumbent upon the courts and rulemakers to consider the full range of important questions and policy choices that have surfaced not just in *Twombly* and *Iqbal*, but as a result of the overarching trend toward pretrial disposition. That wide-angle consideration should take account of the various policy objectives of federal litigation, many of which have not been accorded sufficient weight in connection with the procedural alterations of the past quarter century.[57] Those alterations have been accreting slowly. But now, with *Twombly* and *Iqbal*, their cumulative effect and inexorable movement toward earlier case disposition have become quite apparent.

Part I of this Article explores the nature and implications of the new plausibility-pleading standard. Part II critiques the Court's disparagement of case management and the role that the fears of discovery abuse, meritless lawsuits, and litigation costs have played in influencing changes in pleading and pretrial motion practice. It also explores some of the competing system values that may have been impaired in recent years. Part III discusses the impact of the Court's decisions in *Twombly*, *Iqbal*, and the 1986 summary judgment trilogy on the continued viability of the rulemaking process; the future of the Federal Rules' transsubstantivity; and the possibility of corrective legislation. Part IV offers some suggestions for tackling the difficult issues and questions that have arisen concerning the pretrial process. The Article concludes by asking how the new pleading and pretrial-motion philosophy might lead a judge to rule on Dioguardi's complaint or a contemporary variant thereof. Because of my sense of the dimension of the subject and its ramifications, I have written at length and asked many questions, some of which, of necessity, have been left unanswered. For that I apologize to the reader.

I. PLEADING UNDER *TWOMBLY* AND *IQBAL*

The Supreme Court's enhancement of the Rule 8(a) pleading burden and its extension to all cases has far-reaching consequences. As argued in this Part, the center of gravity of federal litigation has

MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (2009), as well as other surveys presented at the Duke Conference.

57. *See infra* Part II.C.

been shifted forward in time and the Court has accorded the Rule 12(b)(6) motion to dismiss potentially life-or-death significance for the pleader of an affirmative claim.[58] The enhanced scope of the district court's inquiry on the motion established by *Twombly* and *Iqbal*, especially its extra-pleading and discretionary elements, alters the motion's limited historic function, obscures the long-standing distinction between Rule 12(b)(6) and Rule 56 motions, and poses a number of other difficulties for judges and lawyers.

A. Plausibility in the Eye of the Beholder

1. *The Transmogrification of Notice Pleading and the Motion to Dismiss.* Under *Conley*'s notice-pleading standard, courts were authorized to grant motions to dismiss under Rule 12(b)(6) only when "it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[59] Judges were to accept all factual—but not conclusory—allegations as true and draw all inferences in favor of the pleader. With limited exceptions, they were not to look beyond the pleading. Despite the vagueness of the *Conley* standard, judges employing it on a motion to dismiss had years of precedent providing some consistency and continuity. Moreover, they understood, in accordance with *Conley*, that the motion should be denied except in clear cases.[60] The Rules, it was thought, were designed to keep cases in court at the pleading stage, rather than to exclude them. Something in the nature of a bend-over-backwards principle favoring the pleader was in force. Although in the decades immediately preceding *Twombly* and *Iqbal* a number of lower courts effectively ignored the standard while insisting on heightened or what amounted to fact pleading in certain

58. *See infra* notes 70–75 and accompanying text.

59. Conley v. Gibson, 355 U.S. 41, 45–46 (1957). This passage applied to the legal sufficiency of the complaint—whether any legally cognizable wrong has been stated—not the quality of its notice-giving content. The former is a Rule 12(b)(6) function; the latter should be addressed under Rule 12(e). *See* Leimer v. State Mut. Life Assurance Co., 108 F.2d 302, 305–06 (8th Cir. 1940). This distinction was ignored in both *Twombly* and *Iqbal*, and that has recurred repeatedly ever since.

60. For numerous cases illustrating the liberal and simplified pleading regime under *Conley*, see 5 WRIGHT & MILLER, *supra* note 3, §§ 1202, 1215–1218.

types of cases,[61] *Conley*'s notice-pleading approach remained the accepted, articulated benchmark.[62]

By establishing plausibility pleading, *Twombly* and *Iqbal*, have transformed the function of a complaint from *Conley*'s limited role by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended.[63] Indeed, it is striking to note that the *Iqbal* majority did not once use the word "notice" in its opinion or cite the Court's other basic pre-*Twombly* decisions.[64] After *Twombly* and *Iqbal*, mere notice of a claim for relief likely does not satisfy the Court's newly minted demand for a factual showing.[65] To state it differently, whereas *Conley*

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61. Fairman, *supra* note 37, at 988; Marcus, *supra* note 37, at 435.

62. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). As Justice Stevens noted in his *Twombly* dissent, "today's opinion is the first by *any* Member of the Court to express any doubt as to the adequacy of the *Conley* formulation." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

63. For a glimpse at the initial application of the enhanced factual pleading established by *Twombly* and *Iqbal* in a variety of substantive contexts, see Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283 (11th Cir. 2010) (RICO and conspiracy claims; Rules 8 and 9(b) applied); Sanchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009) (Fourth Amendment rights and supervisory liability claim); Hensley Mfg., Inc. v. ProPride, Inc., 579 F.3d 603 (6th Cir. 2009) (consumer confusion regarding trademark and fair use claims); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (Alien Tort Statute and Torture Victims Protection Act claims); Moss v. U.S. Secret Serv., 572 F.3d 962 (9th Cir. 2009) (First Amendment viewpoint-discrimination claim); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (employment standards); St. Clair v. Citizens Fin. Group, 340 F. App'x 62 (3d Cir. 2009) (per curiam) (RICO claim); Farash v. Cont'l Airlines, Inc., 337 F. App'x 7 (2d Cir. 2009) (negligence and assault claims under New York law); Morgan v. Hubert, 335 F. App'x 466 (5th Cir. 2009) (per curiam) (Eighth Amendment deliberate-indifference claim); Sheehy v. Brown, 335 F. App'x 102 (2d Cir. 2009) (§§ 1983 and 1985 claims); Lopez v. Beard, 333 F. App'x 685 (3d Cir. 2009) (per curiam) (First, Eighth, Fourteenth Amendment, and Age Discrimination Act claims); Major Tours, Inc. v. Colorel, Civil No. 05-3091 (JBS/JS), 2010 WL 2557250 (D.N.J. June 22, 2010) (§§ 1981 and 1985 claims); Spencer v. DHI Mortg. Co., Ltd., 642 F. Supp. 2d 1153 (E.D. Cal. 2009) (negligent breach of duty claim); Logan v. Sectek, Inc., 632 F. Supp. 2d 179 (D. Conn. 2009) (Age Discrimination Act claim); Vallejo v. City of Tucson, No. CV 08-500TUC DCB, 2009 WL 1835115 (D. Ariz. July 26, 2009) (Voting Rights Act claim).

64. The Court seemed to reaffirm notice pleading in *Erickson v. Pardus*, 551 U.S. 89 (2007), three weeks after *Twombly*, *id.* at 93, but its unique facts and *Iqbal* cast doubt on the significance of that case, *see* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6–9 (2009); *see also* Dottolo v. Byrne Dairy, Inc., No. 5:08-CV-0390 (GTS/ATB), 2010 WL 2560551, at *4 (N.D.N.Y. June 22, 2010) (stating that *Erickson* was merely an application of the statement in *Twombly* that a pleading does not need to set out in detail the facts upon which a claim is based).

65. *See* Tahir v. Import Acquisition Motors, L.L.C., No. 09 C 6471, 2010 WL 2836714, at *1 (N.D. Ill. July 15, 2010) (holding that "simply providing a defendant with notice of the claims against her is not enough"); Ghaster v. City of Rocky River, No. 1:09CV02080, 2010 WL

accepted complaints showing the possibility of a right to relief, *Twombly* requires a pleading to show the plausibility of a claim; the Court has not demanded that the pleader demonstrate a probability of the claim prevailing on the merits, however. At a minimum, the pleading requirement has become one of notice-plus. In reality, that is a form of fact pleading by another name.[66]

The Court's signal was loud and clear. Motions to dismiss based on *Twombly* and *Iqbal* have become routine, and the perception among many practicing attorneys and commentators is that the grant rate has increased, particularly in civil rights cases, employment discrimination, private enforcement matters, class actions, and proceedings brought pro se. Some initial empirical evidence supports these impressions.[67] A two-year study of post-*Twombly* antitrust cases

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2802682, at *3 (N.D. Ohio July 13, 2010) (holding that "fair notice" cannot be enough to survive dismissal); *see also* Spencer, *supra* note 64, at 19–21 ("[A] complaint that adequately provides notice is not necessarily sufficient to state a claim."). One hopes that Judge Wood was not being too optimistic in her majority opinion in *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010), when she wrote: "The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by [New York's 1848] Field Code or even more modern codes. We know that because it said so in *Erickson* . . . ." *Id.* at *2.

66. *See* Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly*,* Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 918 (2010) (claiming the complaints in both *Twombly* and *Iqbal* would have been sufficient under *Conley* and would have survived had they pled more facts, thereby suggesting a heightened fact-pleading requirement).

67. *See* Schneider, *supra* note 44, at 519–26. As of this writing, only a small amount of data is available. Moreover, the research techniques employed thus far generally have been limited to what is reported in Westlaw and LEXIS, which omits decisions from the bench, thought by some to be more commonly denials than grants of a Rule 12(b)(6) motion. There are, however, a few studies suggesting a greater frequency of dismissal under *Twombly* and *Iqbal* than under *Conley*. *See* Hatamyar, *supra* note 37, at 556 (finding that after *Conley*, *Twombly*, and *Iqbal*, respectively, Rule 12(b)(6) motions were increasingly granted); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010) (finding dismissals increased from 54.2 percent to 64.6 percent in disability cases after *Twombly*); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (finding a higher rate of dismissals in Title VII cases after *Twombly*); *see also* Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1813 (2008) (stating that *Twombly* has had "*almost* no substantive impact" except in civil rights cases). *But cf.* Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to the Civil Rules Advisory Comm. and the Standing Rules Comm.: Application of Pleading Standards Post-*Ashcroft v. Iqbal* (Nov. 25, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf (providing a summary of cases). Some fragmentary statistics from the Administrative Office of the United States Courts show little change in the frequency of the motion to dismiss. ADMIN. OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS (2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/motions%20to%20dismiss.pdf.

by a prominent New York City defense firm, after noting a 2 to 1 dismissal ratio, concludes that the case has had a "substantial impact" and has "raised the bar" for plaintiffs.[68] The Supreme Court's change in policy seems to suggest a regression in time, taking federal civil practice back toward code and common law procedure and their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint or code motion to dismiss[69]—all of this without any real reason to believe that demanding stricter pleading provides an adequate basis for identifying meritless claims.

Twombly and *Iqbal*, in fact, have altered the Rule 12(b)(6) procedure even more dramatically. By insisting on a showing of plausibility, the past practice of construing the complaint in the light most favorable to the pleader and drawing all inferences in his favor effectively has been replaced in some quarters by the long-rejected practice of construing a pleading against the pleader.[70] In the same vein, some lower court opinions appear to reflect an impairment of the principle that allegations of fact are to be accepted as true,[71] even though the *Iqbal* opinion states that a court should assume the veracity of "well-pleaded factual allegations."[72] Most significantly, the

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68. SHEARMAN & STERLING LLP, ANTITRUST DIGEST: EMERGING TRENDS AND PATTERNS IN FEDERAL ANTITRUST CASES AFTER *BELL ATLANTIC CORP. V. TWOMBLY* 3, 6 (2009), http://www.shearman.com/files/upload/AT-030609-Antitrust%20Digest.pdf; *see also* REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON STANDARDS FOR PLEADING IN FEDERAL LITIGATION 18–19 (2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=URL_Manager&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=37197 ("[S]tatistics . . . do not tell the whole story.").

69. *See* AM. BAR ASS'N, *supra* note 2, at 225.

70. *See, e.g.*, Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1296 (11th Cir. 2010) (affirming dismissal of the case for failure to state a claim); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009) (holding that the court was "not required to admit as true this unwarranted deduction of fact"). Although a PSLRA case, *In re Synchronoss Securities Litigation*, No. 08-4437, 2010 WL 1409664 (D.N.J. Apr. 7, 2010), shows an extremely grudging application of Rule 8 and Rule 9(b). Similarly, in *Market Trading, Inc. v. AT&T Mobility*, No. 09-55445 (GEB), 2010 WL 2836092 (9th Cir. 2010), the Ninth Circuit was unwilling to accept a "bare allegation" of the pleader's intent. *Id.* at *1.

71. *See, e.g.*, Phillips v. Bell, 365 F. App'x 133, 141 (10th Cir. 2010) (finding it "fairly implausible" that the defendant would use self-damning information for the purposes the plaintiff contended); Hollis v. Gonzalez, No. 1:08-cv-1834 OWW DLB PC, 2010 WL 2555781, at *5 (E.D. Cal. June 18, 2010) (finding the same factual allegations plausible to state a retaliation claim against a prison guard, but not the prison director). *See generally* A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 196–97 (2010) (noting that *Iqbal* clearly challenged the principle that a plaintiff's allegations are assumed to be true).

72. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

decisions have unmoored our long-held understanding that the motion to dismiss simply tests a pleading's notice-giving and substantive-law sufficiency.

The Federal Rules replaced the demurrer and the code motion to dismiss with the Rule 12(b)(6) motion in order to reduce adjudications based on "procedural booby traps."[73] Yet even the more technical and much harsher demurrer and code motion focused exclusively on the legal sufficiency of the plaintiff's statement of each substantive element of a cause of action, and did not involve a judicial assessment of the case's facts or actual merits.[74] *Twombly* and *Iqbal* may have transformed the relatively delineated purpose of the Rule 12(b)(6) motion into a potentially draconian method of foreclosing access based on an evaluation of the plausibility of a challenged pleading's factual presentation, filtered through the Court's invocation of extra-pleading "judicial experience and common sense" factors.[75] But should the motion to dismiss be transmogrified in this fashion? How far should this threshold procedure be allowed to drift from its historical function and defined scope of inquiry?

Not only has plausibility pleading undone the relative simplicity of the Rule 8 pleading regime and the limited function of the Rule 12(b)(6) motion, but it also has granted virtually unbridled discretion to district court judges. This enhanced discretion has sparked a concern that some judges will allow their own views on various substantive matters to intrude on their decisionmaking and no longer will feel bound by the four corners of the complaint, as historically was true.[76] Over two decades ago, Professor Richard L. Marcus

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73. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

74. For discussions of the earlier procedures, see 1 CHITTY'S TREATISE ON PLEADING AND PARTIES TO ACTIONS 692–702 (J.C. Perkins ed., Springfield, G. & C. Merriam 16th Am. ed. 1876) (describing the requirements for a demurrer); CHARLES EDWARD CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §§ 78–79 (2d ed. 1947); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 157–62 (Samuel Tyler ed., Washington, William H. Morrison 3d Am. ed. 1882) (same); Robert Wyness Millar, *The Fortunes of the Demurrer*, 31 ILL. L. REV. 429, 429–30 (1936) (comparing the Anglo-Saxon demurrer with civil law equivalents).

75. *Iqbal*, 129 S. Ct. at 1950. As the famed fictional English barrister Horace Rumpole might say: "I'm afraid what we have here is a case of premature adjudication." JOHN MORTIMER, RUMPOLE MISBEHAVES 176–77 (2007).

76. *See* Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852–53 (2008) ("As both district court and appellate court judges try to parse the meaning of a few key phrases in the *Twombly* decision, what was once uniform dogma about the pleading standard for most

recognized the reemergence of fact pleading and cautioned that a threshold filtering system based on individual judicial discretion carried dangerous implications for the Federal Rules' foundational principles.[77] He explained that the application of Rule 12(b)(6) would depend on "the very real attitudinal differences among judges," who, lacking the benefit of a developed record, would feel free to decide motions on instinct.[78] Professor Marcus's forewarning appears to have materialized.

2. Iqbal*'s Two-Step Process.* Under the plausibility-pleading standard, the Court has vested trial judges with the authority to evaluate the strength of the factual "showing"[79] of each claim for relief and thus determine whether it should proceed.[80] In *Iqbal*, Justice Kennedy's opinion for the Court described a two-step approach for the plausibility inquiry that is quite different from the questions of legal sufficiency and notice giving that were the focus of the "showing" required under prior Rule 12(b)(6) and Rule 12(e) practice.[81] First, district court judges are to distinguish factual

causes of action is being fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis. We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.").

77. *See* Marcus, *supra* note 37, at 482 (noting that increased judicial discretion could allow judges to dismiss claims simply because they disfavor them).

78. *Id.* at 482–83; *see also* Burbank, *supra* note 52, at 115–16 (arguing that increasing judicial discretion allows judges to rely on their personal preferences when deciding motions).

79. FED. R. CIV. P. 8(a)(2). It appears that the textual core of the *Twombly* decision, namely its focus on the sufficiency of a complaint's factual "showing," is the first time the Court emphasized that word in Rule 8 in considering a motion to dismiss. In *Iqbal*, the Court offered what many would regard as a new construction of the word "generally" in the second sentence of Rule 9(b) relating to that provision's mandate allowing the simplified pleading of conditions of a person's mind. *See Iqbal*, 129 S. Ct. at 1954 (explaining that the term "generally" is relative and should be construed in light of the particularity requirements necessary to show fraud or mistake under Rule 9).

80. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 & n.3 (2007). *See* Kilaru, *supra* note 66, at 910–11 (clarifying that the Supreme Court set forth a legal plausibility standard that assesses whether the facts plausibly suggest illegal conduct, rather than factual plausibility, which questions whether the conduct actually occurred).

81. The critical allegation in *Iqbal* stated that Attorney General Ashcroft and FBI Director Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [Iqbal's] religion, race, and/or national origin and for no legitimate penological reason." *Iqbal*, 129 S. Ct. at 1944 (quotations omitted). Ashcroft was alleged to have been the "principal architect" of the plan

allegations from legal conclusions, since only the former need be accepted as true.[82] Then, they must decide on the basis of the factual allegations and their "judicial experience and common sense" whether a plausible claim for relief has been shown.[83]

The fact–legal conclusion dichotomy presented by *Twombly*'s first step is shadowy at best. Worse, the categories are likely to generate motion practice unrelated to the merits. Moreover, it is precisely what the drafters of the original Rules intentionally rejected as counterproductive and sought to eliminate by substituting "short and plain" and "claim for relief" for any reference to the troublesome code categories of "facts," "conclusions," "evidence," and "cause of action."[84]

Although Justice Souter, *Twombly*'s author, consented to the theory of this first step, his disagreement with the *Iqbal* majority lay in the undefined method by which the Court distinguished the complaint's factual allegations from its legal conclusions.[85] In his dissenting opinion, the Justice criticized "[t]he fallacy of the majority's position" because it classified many of the allegations as conclusory and considered only a select number of factual allegations in isolation, rather than construing the entire pleading in the plaintiff's favor.[86] He and three other dissenters argued that the majority's classification was entirely arbitrary and failed to guide the lower courts on how to draw the fact-conclusion distinction.[87]

Some post-*Iqbal* decisions suggest the Justice's concern may have been well founded. The conclusion category is being applied quite expansively, embracing allegations that one reasonably might classify

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and Mueller was alleged to have executed it. *Id.* at 1944, 1951. The Court found these to be conclusions. *Id.* at 1951.

82. The classic article on the subject is Walter Wheeler Cook, *'Facts' and 'Statements of Fact*,' 4 U. CHI. L. REV. 233 (1936).

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

84. *See generally* 5 WRIGHT & MILLER, *supra* note 3, §§ 1215–1218 (discussing the pleading requirements of Rule 8); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921) (noting that there is no logical distinction between categories such as "statements of fact" and "conclusions of law"); Miller, *supra* note 32, at 1082–93 (describing the conceptual and practical difficulties inherent in the law-fact distinction); Subrin, *supra* note 1, at 963, 975–77 (describing how the Federal Rules of Civil Procedure avoided the factual and cause of action requirements of civil codes).

85. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting).

86. *Id.*

87. *Id.* at 1960–61.

as factual and therefore potentially jury triable,[88] including the key allegations in *Iqbal* itself. It is now fairly common for federal courts to channel words used in *Iqbal* and characterize allegations as merely "formulaic," "conclusory," "speculative," "cryptic," "generalized," or "bare."[89] By transforming arguably factual allegations into legal conclusions and refusing to draw favorable inferences from them—thereby ignoring portions of the complaint—judges are both failing to construe the complaint in favor of the pleader as prior Rule 12(b)(6) doctrine required and performing functions previously thought more appropriate for the factfinder. And they are doing so based only on the complaint.[90] If nothing else, the emerging case law is revealing

88. *See* sources cited *supra* note 63; *cf.* al-Kidd v. Ashcroft, 580 F.3d 949, 975–77 (9th Cir. 2009) (distinguishing the complaint before the court from the complaint in *Iqbal* and finding sufficient facts to satisfy plausibility).

89. *See, e.g.*, Maldonado v. Fontanes, 568 F.2d 263, 274 (1st Cir. 2009) (characterizing some allegations as "conclusory" before determining whether the remaining facts plausibly stated a claim); Knaus v. Town of Ledgeview, No. 10-C-502, 2010 WL 2640272, at *3 (E.D. Wis. June 24, 2010) (characterizing the plaintiff's allegations as "conclusory"); Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217, 222 (D.P.R. 2009) (characterizing the allegations as "generic" and "conclusory"); Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC, 637 F. Supp. 2d 185, 200 (S.D.N.Y. 2009) (characterizing the allegations as "cryptic"); Consumer Protection Corp. v. Neo-Tech News, No. CV-08-1983-PHX-JAT, 2009 WL 2132694, at *2 (D. Ariz. July 16, 2009) (holding that the complaint contained enough factual allegations to be more than "conclusory"); Fletcher v. Phillip Morris USA, Inc., No. 3:09CV284-HEH, 2009 WL 2067807, at *6 (E.D. Va. July 14, 2009) (characterizing the allegations as "conclusory"). In *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), an antitrust case, the court asserted, without explanation, that an allegation that the defendants agreed to a price floor "is obviously conclusory" and would not be accepted as true. *Id.* at 319 n.2. A number of courts have acknowledged that complaints that would have survived under *Conley* do not (or might not) survive under *Twombly* and *Iqbal*. *See, e.g.*, Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs, No. 09-3008, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) (noting that the complaint might have survived under the pre-*Iqbal* standard); Ansley v. Fla. Dep't of Revenue, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009) (noting that the allegations might have survived a motion to dismiss prior to the *Twombly* and *Iqbal* decisions); Kyle v. Holinka, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (noting that conclusions about allegations must be revisited in light of *Iqbal*).

90. This concern and the ramifications of it are strikingly demonstrated in Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Professor Suja Thomas discussed a similar principle. *See* Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760–61 (2009) (asserting that judges dismiss cases based on their own views of the facts). Examples may be *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 9–10 (1st Cir. 2007), where the First Circuit upheld the discharge of a government worker allegedly based on political activity, and *Adams v. Lafayette College*, No. 09-3008, 2009 WL 2777312, at *4 (E.D. Pa. Aug. 31, 2009), where the Eastern District of Pennsylvania upheld an employment discipline measure allegedly based on age. With a few exceptions, the application of facts to legal principles

that, like the Emperor in the well-known fable, the fact–conclusion dichotomy has no clothes.[91]

As to *Iqbal*'s second step, once trial judges have identified the factual allegations, they then must decide whether a plausible claim for relief has been shown. They may do so, according to the Court's majority opinion, by relying on their "judicial experience and common sense,"[92] highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning. Further, the plausibility of factual allegations appears to depend on the relative likelihood that legally actionable conduct occurred versus a hypothesized innocent explanation. In both *Twombly* and *Iqbal*, the Court proposed explanations for the alleged factual pattern that were thought to be an "obvious alternative"[93] to or "more likely"[94] than the plaintiffs' inferences of wrongdoing—findings strikingly analogous to those made by factfinders in the trial setting.

As Justice Souter stated during oral argument in *Iqbal*, *Twombly* presented "an either-or choice" between conspiracy and lawful parallel conduct, which made the "obvious alternative explanation" of a lack of wrongdoing highly logical given the case's context.[95] This in turn made it easier for the Court's majority to demand more than what it characterized as legal conclusions to support a plausible antitrust conspiracy claim.[96] In *Iqbal*, however, the majority's description of the alleged conduct—the rounding up of Muslim men following the September 11 terror attack on New York City—as merely having incidental disparate impact on the plaintiff seemed neither obvious nor more likely to the dissenting Justices because the

historically has been left to the jury. *See generally* James B. Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147, 170 (1890) (describing the jury's role in weighing facts).

91. In Steinman, s*upra* note 53, an excellent and highly analytic article, the author argues that the key to *Twombly-Iqbal* is that critical allegations were conclusory and that the Court's new pleading paradigm is that a complaint will be sufficient if it "provides non-conclusory allegations for each element of a claim for relief." *Id.* at 1314. But that simply is another way of describing fact pleading. The author offers what he calls a "transactional approach," calling for the pleader to provide a narrative that identifies "real-world acts or events underlying the plaintiff's claim." *Id.* at 1344. He acknowledges that there is no formula for distinguishing between an adequate and inadequate identification of the liability-creating events. *Id.* at 1335.

92. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). A newly or recently appointed judge theoretically is relegated to his or her common sense.

93. Bell Atl. Co. v. Twombly, 550 U.S. 544, 567 (2007).

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

95. Transcript of Oral Argument at 10, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

96. *Twombly*, 550 U.S. at 556–57.

same simple dichotomy was not present.[97] This point seems enhanced by the fact that several critical allegations involved the defendants' states of mind, which may be alleged "generally."[98]

At the same time, it is not entirely clear how this either-or concept fits in. It seems that any issue essentially could be reduced to an either-or choice. In *Twombly*, the conduct was either conspiratorial or it was not. In *Iqbal*, the either-or choice was between the plaintiffs having been affected by the rounding up of Muslim men, or not having been impacted. The latter situation may be more ambiguous, but is the inquiry really analytically different? Is the argument that no cases can be reduced to an either-or determination, or that most cases cannot be analyzed in that way? Was that analysis appropriately applied in *Twombly* but not in *Iqbal*, or was it inappropriate in both cases?

There are reasons to believe that *Iqbal* actually establishes a more demanding pleading standard than *Twombly*.[99] First, whereas the earlier case only requires the complaint to suggest plausibility, the later case calls for a reasonable inference of plausibility. Second, *Iqbal* seems to favor a somewhat sterilized evaluation of the complaint by stating that conclusions may be disregarded on a motion to dismiss. The plausibility analysis is thus limited to what the court deems to be the purely factual allegations. This analysis is inconsistent with the notion that the entire complaint should be examined holistically on a motion to dismiss.[100] The effect of this limitation is compounded by the aforementioned tendency to expand the conclusion category, thereby inevitably contracting the fact category and the judge's field of vision. This phenomenon is exacerbated by yet another development: dismissals based on the court's use of what has been termed a "slice and dice" technique of making a sufficiency judgment by telescopically looking at each element separately rather than taking a wide-angle view of the

97. *Iqbal*, 129 S. Ct. at 1959–61 (Souter, J., dissenting).

98. *See id.* at 1954 (majority opinion).

99. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 851 (2010) (arguing that the *Iqbal* standard is stricter than the *Twombly* standard).

100. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322–23 (2007) (stating that courts must consider complaints in their entirety).

pleading.[101] Thus, *Iqbal* may eliminate a range of arguably weak but potentially meritorious cases, not merely meritless actions. *Twombly* seemed to focus only on the latter. Obviously, that heightens the risk of premature terminations.

Many, if not most, aspects of judicial experience and common sense—which have become elements of balancing potential litigation costs against the likelihood that a claim plausibly has merit[102]—are not matters found within the four corners of a pleading. Thus, the Court in *Twombly* and *Iqbal* implicitly rejected the long-standing proposition that only matters found within or integrally related to the complaint may be considered on a motion to dismiss, unless the district judge chooses to convert the motion into one for summary judgment, which would make the full discovery process available to the parties, thereby further confusing Rule 12(b)(6) practice.[103]

This radical departure from prior practice raises novel questions of how the new pleading-motion regime will work going forward, and whether efficiency actually is achieved by it. Given the expanded judicial scope of inquiry on a Rule 12(b)(6) motion, is it now incumbent on a plaintiff to negate any and all potentially innocent explanations for the defendant's challenged conduct, a long-proscribed form of anticipatory pleading?[104] If a plaintiff must plead

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101. *See, e.g.*, In re Synchronoss Sec. Litig., No. 08-4437 (GEB), 2010 WL 1409664 (D.N.J. Apr. 7, 2010).

102. *Iqbal*, 129 S. Ct. at 1940 (citing Bell Atl. Co. v. Twombly, 550 U.S. 544, 556 (2007)). Surprisingly, the Court cites to *Twombly* for the proposition, but the *Twombly* opinion makes no explicit mention of these two terms. *Twombly* does indicate that sufficiency "turns on the suggestions raised by this conduct when viewed in light of common economic experience." *Twombly*, 550 U.S. at 565. In addition, the judge only is authorized to consult "prior rulings and considered views of leading commentators." *Id.* at 556. The *Iqbal* interpretation of this passage, one that should have been construed in the antitrust context, seems like an overly broad expansion of a minor suggestion.

103. Before *Twombly* and *Iqbal*, trial judges only had the ability to consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment." 5B WRIGHT & MILLER, *supra* note 3, § 1357; *see also Tellabs*, 551 U.S. at 322–23 (stating that courts may consider documents incorporated by reference and items subject to judicial notice). If "matters outside the pleadings" are presented and not excluded by the court on a Rule 12(b)(6) motion, it "must be treated" as one for summary judgment. FED. R. CIV. P. 12(d).

104. *See* sources cited *infra* note 137. The Second Circuit, however, has stated that an antitrust complaint does not need to allege facts that exclude independent, self-interested conduct. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 325, 327 (2d Cir. 2010).

self-protectively, will it result in "phone book" pleading? Is this specter a realistic one? Should parties be permitted to explore and contest the relevance as well as the content of a judge's experience and common sense in their Rule 12(b)(6) motion submissions?[105] Since the costs of and time needed for discovery and a possible trial often cannot be appraised accurately by examining the complaint, should those issues also be a matter of adversarial combat on a motion to dismiss? This expansion of pleading under Rule 8(a)(2) and Rule 12(b)(6) may well dissipate the supposed time and resource economies early termination is thought to achieve.

As is true of the division between facts and legal conclusions, the Court provided little direction on how to measure the palpably subjective factors of "judicial experience," "common sense," and a "more likely" alternative explanation it has inserted into the Rule 12(b)(6) dynamic.[106] Although judicial discretion normally is to be applauded, it should be constrained in the context of a threshold motion theoretically addressed solely to the notice-giving quality and legal sufficiency of the complaint. If unconstrained, it allows judges to deny access to a merits adjudication whenever an equivocal set of facts can be interpreted as "more likely" to reflect lawful conduct.[107]

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105. The decisions are an invitation to counsel to investigate the background of district judges, not only for purposes of the motion to dismiss but also for forum selection. The existence of websites such as THE ROBING ROOM, http://www.therobingroom.com (last visited Aug. 26, 2010), suggest that judicial privacy may be at risk.

106. *See* 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, 1257 (2008) ("Virtually everyone (except, perhaps, the five Justices in the majority in *Twombly*) regards plausibility as an ambiguous standard."). For a particularly striking example of this subjectivity, see *Mangum v. Town of Holly Springs*, 551 F. Supp. 2d 439, 443–46 (E.D.N.C. 2008).

107. There is no obvious benchmark for what information is necessary to overcome a "more likely" explanation. Some courts are more lenient than others in allowing a claim to go forward even if there is an alternative explanation. *Compare* Foust v. Stryker Corp., No. 2:10-cv-00005, 2010 WL 2572179, at *4–5 (S.D. Ohio June 22, 2010) ("The fact that Plaintiff's hip replacement could have failed for multiple reasons is not relevant at this stage in the pleadings."), *and* Cole v. FBI, No. CV-09-21-BLG-RFC-CSO, 2010 WL 2541216, at *22 (D. Mont. June 17, 2010) (finding facts sufficient even though there "may be alternative explanations"), *with* Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1286 (11th Cir. 2010); *and* Phillips v. Bell, No. 08-1420, 2010 WL 517629, at *7 (10th Cir. Feb. 12, 2010) (dismissing the complaint because it was "fairly implausible" given there were more plausible reasons). Many are concerned, however, that the "more likely" explanation analysis will impact civil rights claims disproportionately because discrimination may be viewed as "an aberration from 21st century norms . . . [and] thus considered an implausible explanation for a particular event or occurrence." *Has the Supreme Court Limited*

This process is uncomfortably close to a weighing of the evidence and an invasion of the jury's domain, suggesting that the Court's decisions represent a potentially significant change in the division of functions between judge and jury.[108] In other words, a trial-like scrutiny of the merits is being shifted to an extremely early point in the pretrial phase. This concern is compounded by the fear that rulings on motions to dismiss may be affected by differences in background and pre-judicial life experiences or turn on individual ideology regarding the claim being advanced or personal attitudes toward the private enforcement of federal statutes and other public policies, perhaps coupled with an evaluation of extra-pleading matters hitherto considered far beyond the legitimate scope of a motion to dismiss.

As a result, inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible.[109] For instance, the *Iqbal* majority decided that its "judicial experience" and "common sense" refuted Iqbal's claims of intended invidious discrimination by government officials.[110] Yet the four dissenting Justices—and a

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Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary, *supra* note 41, at 70 (statement of John Payton, President, NAACP Legal Defense and Educational Fund).

108. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 445 (2008) (noting that plaintiffs no longer can survive a motion to dismiss by pleading equivocal facts); *see also* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1867–71 (2008) (analyzing the constitutional implications of the *Twombly* standard on the role of the jury); Kilaru, *supra* note 66, at 925–26 (comparing the plausibility standard to the standard for the weighing of evidence in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)).

109. *Cf.* Hoffman, *supra* note 106, at 1259–60 ("A more significant, though less well publicized, finding reached by the FJC [Federal Judicial Center] was that summary judgment filing and grant rates vary—and sometimes wildly—by case type and by court. . . . These stark disparities in filing rates and, more importantly in grant rates, offer a powerful reason to be wary of expanding the scope of judicial pleading review authority, at least if the goal of transsubstantive rules is not to be entirely jettisoned.").

110. Relying on facts found outside Iqbal's complaint, the majority reasoned as follows:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009). *But cf.* Tim Reid, *George W. Bush 'Knew Guantánamo Prisoners Were Innocent*,' TIMES ONLINE (Apr. 9, 2010), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7092435.ece (reporting that former Secretary of State Colin Powell's chief of staff had signed a declaration stating that

majority of the Second Circuit panel[111]—disagreed and found that his allegations established a plausible claim of constitutional violations.[112] If each of the nine Supreme Court Justices had been serving instead as district court judges in separate cases, Iqbal's complaint would have survived the motion to dismiss nearly half the time.

Other inconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers. For example, the Third Circuit has ruled that the 2002 Supreme Court decision in *Swierkiewicz v. Sorema N.A.*,[113] which upheld notice pleading in employment discrimination actions,[114] was no longer authoritative after *Iqbal*.[115] *Iqbal* did not refer to *Swierkiewicz*. The Seventh Circuit[116] and courts in other circuits have disagreed.[117]

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the president, the vice president, and the Secretary of Defense knew that "hundreds of innocent men" were sent to the Guantánamo Bay prison camp).

111. Iqbal v. Hasty, 490 F.3d 143, 177–78 (2d Cir. 2007) (Newman & Sack, JJ.), *rev'd sub. nom. Iqbal*, 129 S. Ct. 137; *id.* at 178 (Cabranes, J., concurring).

112. *Iqbal*, 129 S. Ct. at 1954–61 (Souter, J., dissenting).

113. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

114. *Id.* at 513. The continued validity of this decision seemingly was accepted in *Twombly*. Bell Atl. Co. v. Twombly, 550 U.S. 544, 569–70 (2007).

115. Guirguis v. Movers Specialty Servs., Inc., 346 F. App'x 774, 776 n.7 (3d Cir. 2009); Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009); *see also* Francis v. Giacomelli, 588 F.3d 186, 192 n.1 (4th Cir. 2009) ("The standard that the plaintiffs quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*."). According to Steinman, *supra* note 53, the Third Circuit's "logic is deeply flawed." *Id.* at 1332. However, a different panel of the Third Circuit now has referred to its previous analysis of *Swierkiewicz* in *Fowler* as dictum and approvingly cited the Second Circuit's analysis that *Twombly* is consistent with *Swierkiewicz*. *In re* Ins. Brokerage Antitrust Litig., Nos. 08-1455, 08-1777, 07-4046, 2010 WL 3211147, at *9, n.17 (3d Cir. Aug. 16, 2010). (stating that although *Fowler* said *Twombly* and *Iqbal* "repudiated" *Swierkiewicz*, "we are not so sure"); *see also* Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (stating that *Twombly* and *Iqbal* were consistent with *Swierkiewicz* in not requiring heightened fact pleading).

116. Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010). The court's division is an exemplar of the problem. Chief Judge Easterbrook joined in Judge Wood's opinion finding plausibility in a pro se plaintiff's housing discrimination complaint relying on *Swierkiewicz*. *Id.* at 4. Judge Posner dissented, concluding that the plaintiff's "hypothesis of racial discrimination does not have substantial merit; it is implausible," *id.* at *9 (Posner, J., dissenting in part), and finding *Swierkiewicz* distinguishable.

117. al-Kidd v. Ashcroft, 580 F.3d 949, 974 (9th Cir. 2009) (noting in dictum that *Twombly* "reaffirmed the holding of *Swierkiewicz*"); EEOC v. Universal Brixius, LLC, No. 09-c-774, 2009 WL 3400940, at *3 (E.D. Wis. Oct. 15, 2009); Gillman v. Inner City Broad. Corp., No. 08 Civ. 8909 (LAP), 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009) ("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*."); *see also Arista Records*, 604 F.3d at 119–21 (citing and implicitly recognizing *Swierkiewicz*'s continued vitality). *But see* Argeropoulos v. Exide Techs.,

Moreover, in some instances when a multiparty or multiclaim case is partially dismissed, the plaintiff has been authorized to use discovery in connection with the surviving portion of the litigation to see if it will yield information that will resuscitate the dismissed portion,[118] creating a practice that is discontinuous with what is possible in a dismissed single-defendant-single-claim dispute. The ability to access the discovery system should not turn on the particular party structure or substantive complexity of an action.

It is possible that the *Iqbal* Court's willingness to substitute a benign explanation for the government defendants' alleged purposeful discrimination and illicit treatment of the plaintiff may have been based on the case's sensitive nature—a terrorism suspect claiming discrimination by federal officials in the wake of September 11—as much as it was on an assessment of the legal standards involved.[119] But allowing trial judges to take external considerations into account on a threshold motion that historically has been resolved on a pleading's contents may provide yet another avenue for unrestrained discretion to deny a plaintiff access to an adjudication

No. 08-cv-3760, 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009) ("[T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss. But it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in *Iqbal*." (citation omitted)).

118. *See, e.g.*, Arocho v. Nafziger, 367 F. App'x 942, 954–55 (10th Cir. 2010); Mitchell v. Township of Pemberton, Civil No. 09-810 (NLH) (AMP), 2010 WL 2540466, at *6 (D.N.J. June 17, 2010); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *12 (N.D. Cal. July 27, 2009); Kyle v. Holina, No. 09-cv-90-slc, 2009 WL 1867671, at *3 (W.D. Wis. June 29, 2009). However, one academic who is in favor of exploiting discovery for related claims cautions that if such a procedure is followed, judges should toll the statute of limitations on dismissed claims while discovery is underway so plaintiffs are not disadvantaged if they uncover facts sufficient to state a claim. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 245 (statement of Alan B. Morrison, Professor, George Washington University Law School).

119. The majority cited Judge Cabranes' concurring opinion in the Second Circuit, which "expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to 'a national and international security emergency unprecedented in the history of the American Republic'—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's." *Iqbal*, 129 S. Ct. at 1945 (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring), *rev'd sub. nom. Iqbal*, 129 S. Ct. 137). Arguably, by terminating the case on the complaint, the Court preempted what might have been a useful constitutional exploration of governmental immunity by substituting something tantamount to absolute immunity for what only should have been an issue of qualified immunity. *See, e.g.*, *al-Kidd*, 580 F.3d at 957–79 (distinguishing between claims of absolute and qualified immunity). That, however, should have been treated a matter of substantive law, not pleading.

based on a developed summary-judgment or trial record. Given the realpolitik of modern litigation, the two Supreme Court decisions have provided defendants with a plethora of possibilities for attacking complaints.

Although judicial discretion—and its potential for inconsistency—is hardly a novel aspect of Rule 12(b)(6) motion practice, the invocation in *Twombly* and *Iqbal* of highly subjective factors may have made it the determinative factor in deciding whether a plaintiff will be allowed to proceed to discovery. Without question, according discretion to experienced, talented judges is a valuable keystone of the federal civil-justice system; but it threatens to become excessive when taken to the extreme of causing unpredictability and permitting reliance on individual predilection, especially in light of the terminal potential of pretrial motions to dismiss and summary judgment. Both jurists and academics frequently have suggested that the application of a judge's subjective impressions can lead to inappropriate and inconsistent results if devoid of strictures.[120]

It is somewhat ironic that in *Burnham v. Superior Court*,[121] Justice Scalia, who joined the majority in *Twombly* and *Iqbal*, argued that Justice Brennan's dissenting proposal for using "fairness" and "contemporary notions of due process" in deciding personal jurisdiction questions based on the defendant's physical presence in the forum was grounded in the "subjectivity" of a presiding judge and, thus, provided an "uncertain[]" and "inadequate" standard for lower courts to apply.[122] Yet by instructing judges to use their "judicial experience" and "common sense" to determine the plausibility of complaints, the Court has introduced the subjectivity and resulting variances that Justice Scalia suggested in *Burnham* should be avoided.[123] If the protection of constitutional norms and the

120. *See* McMahon, *supra* note 76, at 867 (noting that different courts invariably will reach different results when confronted with complaints that do not contain detailed facts); Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 809–10 (2004) (arguing that judicial subjectivity produces inconsistent results). *See generally* Hoffman, *supra* note 106, at 1259–60 (detailing the disparities in summary judgment filing and grant rates across court and case types).

121. Burnham v. Superior Court, 495 U.S. 604 (1990).

122. *Id.* at 623, 626.

123. Not surprisingly, as of this writing, courts have adopted varying approaches to interpreting *Twombly* and *Iqbal*. Although many courts have applied a demanding reading of the decisions in cases dealing with a defendant's mental state—such as agreement, conspiracy,

enforcement of substantive legislation and common law principles are to be entrusted in significant part to federal civil litigation, consideration must be given to whether the pleading and motion structure currently evolving strikes a proper balance between the need to rely on private attorneys general to effectuate important policies and responding to the concerns about costs and abusive litigation that apparently has motivated the Court.

3. *A New Model of Civil Procedure.* Plausibility pleading and trial-type determinations on a motion to dismiss are the latest step toward a far different model of civil procedure than previously has existed: the Federal Rules once advanced trials on the merits, but cases post-*Twombly* and *Iqbal* now turn on Rule 12(b)(6) and Rule 56 motions; jurors once were trusted with deciding issues of fact and applying their findings to the applicable principles of law following the presentation of evidence, but now judges are authorized to make these determinations using nothing but a naked complaint and their own discretion.[124] In sum, this new reliance on judicial experience and common sense to the exclusion of juror experience and popular common sense comes at the expense of the democratic values inherent in a jury-trial system and the utility of private enforcement of a wide range of public policies.[125]

Even if our civil litigation system has moved from a trial to a settlement culture, the pretrial process should not simply be a series of procedural stop signs. Rather, it should be crafted to permit the parties to achieve resolution of their dispute on the basis of an intelligent and fair agreement, which often can be achieved only if both parties have the information needed to appraise the costs and risks of continued litigation.[126] It is imperative that policymakers on

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and discrimination—others apply a liberal repleading approach to ensure that plaintiffs have another opportunity to meet the standard. *See supra* note 63; *see also* Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009) ("Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.").

124. *See, e.g.*, R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873) (Story, J.) ("It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

125. For an expression of concerns along these lines, see *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 912 (6th Cir. 2009) (Merritt, J., dissenting).

126. Professor Richard A. Nagareda, who also sees the developments of the last quarter century as erecting a series of procedural cost-imposition stop signs and the replacement of trial

and off the bench give thought to what is a critical inquiry: identifying what type of pleading and pretrial-motion system would be appropriate for the future, and determining what is really meant by the words "just," "speedy," and "inexpensive" in Federal Rule 1.[127]

Are the conventions regarding the construction of pleadings and the inferences to be drawn therefrom a thing of the past? Is there an inverse relationship between whether a stated claim is plausible and the projected extent and resource burdens of continued litigation—the claim being treated as less plausible when the assumed discovery activity appears extensive and vice versa? And has the traditional de novo standard used on appellate review of a grant of a Rule 12(b)(6) motion been compromised by the subjective appraisals the Court has authorized? If the answer to any of these questions is yes, then federal practice has moved even further from its original premises than the Court may have realized when it decided *Twombly* and *Iqbal*.

There are a few rays of light for parties asserting claims, however. The Court's opinions do not call for a probability showing or "detailed factual allegations" or require the pleading of evidence.[128] Fortunately, they merely require "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]."[129] Moreover, in reaching its conclusions in *Twombly*, the Court stated that it did "not apply any 'heightened' pleading standard."[130] Nor did

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with pretrial, has noted that in our settlement-oriented culture, the procedural system should develop mechanisms that would help parties appraise the value of their cases rather than simply give them a binary choice between dismissal and full-throttle movement forward. Richard A. Nagareda, *1938 All Over Again? Pre-trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2011) (manuscript at 1–6, 33–34), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568127; *see also* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 167–68 (proposing that the use of preliminary judgments as "tentative assessment[s] of the merits of a case" would "provide litigants with a highly credible evaluation of the case" and avoid settlement obstacles).

127. FED. R. CIV. P. 1. Spencer, *supra* note 64, argues that *Twombly* (and he presumably would extend his view to *Iqbal*) has "determined that efficiency is the priority." *Id.* at 23–25. *See generally* Elizabeth J. Cabraser, Uncovering Discovery 3 (2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/12C00D75EEE2711D8525764800454561/$File/Elizabeth%20Cabraser%2C%20Uncovering%20Discovery.pdf?OpenElement (summarizing various proposals to solve discovery problems and modify pleading standards).

128. *See* Steinman, *supra* note 53, at 1328–33 (noting that *Twombly* and *Iqbal* commonly are misread to require evidentiary support at the pleadings stage).

129. Bell Atl. Co. v. Twombly, 550 U.S. 544, 556 (2007).

130. *Id.* at 569 n.14. This statement is questioned in Part I.C, *infra*.

the Court overrule its decision in *Swierkiewicz*.[131] Perhaps the most significant source of optimism is that the concepts articulated by the Court are malleable enough to enable federal judges to apply them in a manner consistent with systemic values other than cost and efficiency. In that vein, the Seventh Circuit took a restrained view of *Twombly* and *Iqbal* in *Swanson v. Citibank, N.A.*,[132] a case alleging racial discrimination in connection with the denial of a housing loan. In her majority opinion, Judge Diane P. Wood remarked,

> "Plausibility" . . . does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . As we understand it, the Court is saying instead that the plaintiff must give enough details . . . to present a story that holds together. . . . [*C*]*ould* these things have happened, not *did* they happen.[133]

If Judge Wood proves accurate, we may be entering an age of storytelling pleading. But will the tales be happy or sad ones? The answer may lie in the eye of the beholder.

B. Should the Plausibility Standard Be Cabined?

In *Iqbal*, the Court laid to rest any thought that *Twombly* might be limited to antitrust actions by announcing that plausibility pleading "governs . . . all civil actions and proceedings in the United States district courts."[134] The Court did not have to reach that far. Nothing in

131. *See Twombly*, 550 U.S. at 569–70 (explaining why the Court's holding accorded with *Swierkiewicz*). The Second Circuit, in *Arista Records LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010), adverted to a number of these factors in concluding that the notion that *Twombly* imposed a heightened pleading standard including "specific evidence, factual allegations in addition to those required by Rule 8, and declarations from persons who collected the evidence is belied by the *Twombly* opinion itself." *Id.* at 119–20; *see also* Dobyns v. U.S., 91 Fed. Cl. 412, 425 (2010) (holding that notice pleading is affirmed by the "part of *Twombly* in which the Court stated that 'once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.' This statement would not be accurate, of course, if all the facts 'consistent with the allegations in the complaint' had to be in the complaint" (quoting *Twombly*, 550 U.S. at 561)).

132. Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297 (7th Cir. July 30, 2010).

133. *Id.* at *3. Judge Posner's dissent concluded that *Twombly* and *Iqbal* established a much more demanding pleading standard than his two colleagues acknowledged. *Id.* at *8–10 (Posner, J., dissenting in part).

134. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1) (internal quotation marks omitted). Some courts and commentators had concluded that the *Twombly* opinion was narrow and possibly applied only to antitrust cases. *E.g.*, Allan Ides, Bell Atlantic

its pre-*Twombly* jurisprudence suggests that the plausibility requirement somehow has been embedded in the word "showing," which has been in Rule 8 since 1938.[135] Nor did the situation in *Iqbal* require the universal application of plausibility pleading. The official immunity at issue in that case is a judicially created doctrine. Thus, rather than altering the Rule 8 pleading regime, a limited fact- or heightened-pleading requirement obliging the plaintiff to negate that defense in the complaint could have been mandated as a matter of federal common law to effectuate the doctrine's underlying policies,[136] although that would have created a somewhat awkward anticipatory-pleading requirement.[137]

Despite the Court's global statement, the *Iqbal* majority made clear that the determination of a complaint's plausibility is a context-specific task.[138] It requires courts to examine "the [substantive] elements a plaintiff must plead to state a claim,"[139] a concept firmly embedded in the case law.[140] But context is not a simple, unitary

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and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice, 243 F.R.D. 604 (2006).

135. None of the hundreds of pre-*Twombly* cases cited in 5 WRIGHT & MILLER, *supra* note 3, §§ 1202, 1215–1219, place any emphasis on "showing."

136. Other academics also have questioned the *Iqbal* Court's decision to extend its holding beyond the qualified immunity context. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 93 (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) ("Alternatively, the Court should have forthrightly required fact pleading as a matter of substantive federal common law, that is, as a necessary protection for the judge-made defense of qualified immunity.").

137. Anticipatory pleading long has been thought inappropriate in federal practice because it violates the "well-pleaded complaint" rule. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908) (holding that plaintiffs could not establish federal question jurisdiction by anticipating a defense); *see also* Gomez v. Toledo, 446 U.S. 635, 638–42 (1980) (holding that qualified immunity is an affirmative defense and need not be negated by the plaintiff). *See generally* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783–85 (1998) (noting that federal courts generally dislike attempts by plaintiffs to fashion federal question jurisdiction by anticipating defenses).

138. *Iqbal*, 129 S. Ct. at 1940.

139. *Id.* at 1947.

140. *See, e.g.*, Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323–27 (2d Cir. 2010) (reversing the lower court's dismissal on grounds that the plaintiff had asserted sufficient, non-conclusory factual allegations); Breaux v. Am. Family Mut. Ins. Co., 554 F.3d 854, 862 (10th Cir. 2009) (reversing the lower court's dismissal because it had interpreted the plaintiff's complaints too narrowly); Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 225 (2d Cir. 2008) (reversing the lower court's dismissal because plaintiffs had alleged a sufficient injury in fact for purposes of standing); Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008) (noting the importance of context in examining factual allegations).

measure. Not only does it refer to the substantive law governing a case but also, among other things, to whether the action turns on objective facts or subjective matters such as the intent or motive of the parties, the complexity or simplicity of the case, and whether or not the litigation will be resource consumptive.[141] These variations in context may confine the seemingly unbridled grant of discretion and universality that the Court appears to have promised for plausibility pleading.

For instance, in the antitrust context, substantive precedent clearly influenced the Court's judgment in deciding *Twombly*, leading the Justices to reach a similar conclusion on a motion to dismiss as it did on summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[142] in which the Court found that circumstantial evidence of parallel conduct was not enough to make claims of conspiracy factually or economically plausible.[143] Similarly, the *Iqbal* Court looked to existing jurisprudence regarding unconstitutional discrimination[144] when it held that the complaint had to plead sufficient facts regarding defendants'—Attorney General John Ashcroft and FBI Director Robert Mueller—purposeful mental states

141. For a useful discussion of the relevance of context, see Spencer, *supra* note 64, at 32–36.

142. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). It has been argued that "plausibility" was used in *Matsushita* as an element of antitrust law, and therefore it was improperly absorbed into pleading doctrine in *Twombly*. *See* Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 510–11 (2009).

143. *Matsushita*, 475 U.S. at 587; *see also* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 552 (noting that the Court in *Twombly* interpreted the plaintiff's complaint as alleging only parallel conduct); Miller, *supra* note 32, at 1030 (same); Spencer, *supra* note 108, at 487 (same). In *Sony*, the Second Circuit upheld allegations of an antitrust conspiracy relying on the difference in factual context between the complaint before it, which contained allegations that went beyond parallel conduct, and the one in *Twombly*. *Sony BMG Music Entm't*, 592 F.3d at 324–27.

144. *Iqbal*, 129 S. Ct. at 1947. The Court effectively altered the law of official immunity. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding that a city ordinance designed to prohibit a specific religious practice was unconstitutional discrimination when there was no compelling governmental interest to prohibit the practice); Pers. Adm'r v. Feeney, 442 U.S. 256, 279–81 (1979) (holding that a Massachusetts policy of giving preference to military veterans when hiring for state jobs was not unconstitutional sex discrimination); Washington v. Davis, 426 U.S. 229, 279 (1976) (holding that the racially disproportionate impact of a written test used in the process of hiring police officers was not racial discrimination).

despite the very modest pleading standard set out in the second sentence of Rule 9(b).[145]

Adherents of the Court's more demanding pleading direction as well as those who argue that the two recent cases have changed little or nothing rely on pre-*Twombly* Supreme Court decisions to support their contentions. But, these cases do not justify *Iqbal*'s extension of *Twombly* to "all civil actions and proceedings."[146] *Dura Pharmaceuticals, Inc. v. Broudo*,[147] for example, was a securities fraud action governed by the pleading strictures of the Private Securities Litigation Reform Act. The Court concluded that the plaintiff had failed to identify loss causation, a critical substantive requirement of such actions comparable to issues of consideration or negligence in breach-of-contract or tort actions. Typically overlooked is the passage in Justice Breyer's opinion for the Court indicating that pleading loss causation should not be "burdensome"; it simply calls for indicating the loss and its connection with the fraud the plaintiff "has in mind."[148]

A second case referred to in support of *Twombly* and *Iqbal*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*,[149] was a sizable antitrust action that failed to identify the coercion alleged to be at the heart of a conspiracy. Justice Stevens, who dissented in both *Twombly* and *Iqbal*, did remark in his opinion for the Court that the district judge could require "some specificity" in pleading.[150] But he was referring to the district court's ability to require a more definite statement under Rule 12(e), not a dismissal under Rule 12(b)(6).[151] In neither of these cases did the Court go outside the four corners of the pleading or attempt to assess

145. *Iqbal*, 129 S. Ct. at 1948–54. *See generally* 5A WRIGHT & MILLER, *supra* note 3, § 1301 (discussing the requirement of Rule 9(b) that allegations of malice or intent be made generally).

146. FED. R. CIV. P. 1; *see also Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 11–12 (statement of Gregory G. Garre, Partner, Latham & Watkins, LLP) (arguing prior Supreme Court precedent already established a stricter pleading standard).

147. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347–48 (2005).

148. *Id.* at 347. Also mentioned by those claiming that little change has occurred is *Papasan v. Allain*, 478 U.S. 265 (1985), a case challenging Mississippi's distribution of public-school land funds, which raised a difficult, fact-driven, controversial constitutional question. Nothing in the Court's opinion in that case, however, previsions *Twombly* and *Iqbal*.

149. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

150. *Id.* at 528 n.17.

151. *Id.*

or weigh the factual allegations, the most significant departures from prior practice taken in *Twombly* and *Iqbal.*

Moreover, antitrust, securities-fraud, and constitutional-deprivation claims represent an extremely small fraction of federal court dockets, raising the obvious question: what was the reason—and the motivation—for the Court's extension of plausibility to all cases, the vast majority of which do not raise the concerns articulated to justify the need for heightened pleading? Perhaps it was out of respect for the transsubstantivity principle, which requires uniform application of the Federal Rules. As discussed below,[152] that is unlikely. In any event, it is a slim rationale indeed, because the Court also made it clear that the plausibility inquiry was context specific. Philosophically, that is at odds with the prior understanding of the universal, transsubstantive application of the pleading formulation in Rule 8(a), although that is not necessarily inconsistent with the actual practice in some federal courts prior to *Twombly* and *Iqbal.*

It remains to be seen, however, whether district courts will extend the demands of plausibility pleading to require factual allegations of the elements of relatively uncomplicated civil actions, as exemplified by Official Form 11—formerly Form 9—the paradigm negligence complaint.[153] Although the *Twombly* Court was careful to assert the continuing validity of Form 11,[154] it nevertheless stated that factual allegations—not mere conclusions—would be required to surmount the plausibility hurdle. However, a word such as "negligently," which appears in Form 11, may be viewed as either a factual allegation or a legal conclusion analogous to the treatment of "agreement" in *Twombly*, or a mixture of the two categories. If it is

152. *See infra* notes 338–58 and accompanying text.

153. FED. R. CIV. P. form 11.

154. Bell Atl. Co. v. Twombly, 550 U.S. 554, 565 n.10 (2007). "Negligence" is also implicated in Forms 12 and 14. The forms are said to "suffice under these rules" in Rule 84. FED. R. CIV. P. 84; *see also* Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297, at *3 (7th Cir. July 30, 2010) ("[I]n many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions."). Questions also have been raised about the sufficiency of Form 18 for a patent-infringement complaint. *Compare* McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1360 (Fed. Cir. 2007) (finding that "a bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement"), *with* Colida v. Nokia, 347 F. App'x 568, 571 n.2 (Fed. Cir. 2009) (noting that the claimant did not argue sufficiency under Form 18 and that the form is not suited for infringement claims with respect to design patents). If the forms are held to be outside the ambit of *Twombly* and *Iqbal*, there would be significant variance in practice between words in the forms and words not found in the forms.

considered a fact, courts should accept an allegation of negligent conduct as true and thereby confirm that Form 11 remains a sufficient model for this category of actions. On the other hand, if courts begin interpreting "negligently" as a legal conclusion, plaintiffs may have to channel tort law and specify the factual elements to qualify as a plausible claim.[155] For example, plaintiffs may have to recite the precise actions taken or not taken by a defendant motorist that made his or her driving negligent.[156] In highlighting the benefits of the liberal ethos of the Federal Rules, Judge Charles E. Clark specifically pointed to this type of pleading burden as one that happily would be avoided and that probably motivated the way Form 11 was drafted.[157]

In one striking negligence case that relied on *Twombly* and *Iqbal* and involved a simple slip and fall, the complaint was dismissed because it failed to allege "facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred."[158] In addition to the dubious propriety of demanding that level of particularity in such a common, garden-variety case, it is unrealistic to expect the plaintiff to know or have access to information about the facts relating to many of these matters without discovery.

Should *Iqbal*'s assertion of universality prove accurate, federal courts will be required to devote much more time to evaluating factual allegations than in the past—time that might be better spent

155. The same may be said of a number of other critical words—for example, "conspiracy," "illicit," and "motive." Under a "transactional approach" to pleading, Form 11 would be sufficient since the challenged event is identified in time and space. *See* Steinman, *supra* note 53, at 1328–31.

156. In *Farash v. Continental Airlines, Inc.*, 337 F. App'x 7 (2d Cir. 2009), the court indicated that the plaintiff is required to allege in what manner he was injured and how the defendant was negligent. *Id.* at 9. In connection with the plaintiff's assault claim, the court also wanted allegations of the circumstances that would induce a reasonable apprehension of bodily harm. *Id.* at 10; *see also* Branham v. Dolgencorp, Inc., No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (finding that the plaintiff's allegations of negligence did not meet the *Twombly* standard because the plaintiff did not allege sufficient facts as to the circumstances leading to the accident); Doe *ex rel.* Gonzales v. Butte Valley Unified Sch. Dist., No. 09-245 WBS CMK, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (noting that the sufficiency of the Official Forms has "been cast into doubt").

157. Judge Clark told a story about a negligence lawyer who, under the code-pleading regime, regularly attached "two and a half pages of type-written allegations of detailed things that might happen in an automobile accident" to his complaint in order to allege every fact that possibly could constitute negligence while driving. AM. BAR ASS'N, *supra* note 2, at 224; *see also* Clark, *supra* note 1, at 191 (stating that the forms are "the most important part of the rules").

158. *Branham*, 2009 WL 2604447, at *2.

appraising the merits of a well-developed record presented at summary judgment or trial, especially with regard to uncomplicated matters. Add to that burden the possibility that defendants might be obliged to show the plausibility of affirmative defenses like contributory negligence or assumption of risk—or even a simple denial of negligence—a subject to be explored later.[159] In other words, the full effect plausibility pleading will have on judicial time and party resource expenditures is very uncertain.[160] This uncertainty raises a basic question as to what, if anything, has been gained by *Twombly* and *Iqbal* in terms of time, expense, and efficiency, the Court's primary justifications for the newly announced pleading requirement.[161]

The federal courts may well face something of a Catch-22 in the complex litigation environment. Those cases, frequently involving constitutional and statutory rights implicating national or state policies and affecting large numbers of people, include actions in which factual sufficiency is most difficult to achieve at the pleading stage and in which the pretrial process tends to be highly resource consumptive. Courts may well apply the plausibility standard more rigorously, claiming that complex cases require more extensive pleading to address the supposed shortfalls of notice pleading.[162] Recent decisions suggest that complex cases—such as those involving claims of discrimination, conspiracy, and antitrust violations—have been particularly vulnerable to the demands of *Twombly* and *Iqbal*.[163]

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159. *See infra* notes 386–96 and accompanying text.

160. *See supra* notes 102–05 and accompanying text.

161. In *DeLotta v. Dezenzo's Italian Restaurant, Inc.*, No. 6:08-cv-2033-Orl-22KRS, 2009 WL 4349806 (M.D. Fla. Nov. 24, 2009), the court, relying on *Twombly-Iqbal*, refused to enter an otherwise-appropriate default judgment because the plaintiff had not pled facts showing he was a covered employee under the Fair Labor Standards Act. *Id.* at *2–4.

162. *See* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 JUDICATURE 163, 165 (2008) (discussing the historical and normative causes of the complexity of litigation in the United States); Epstein, *supra* note 52, at 66, 98 (noting the benefits of a stricter pleading requirement in the context of antitrust litigation); *see also* Hoffman, *supra* note 106, at 1224 (discussing when and whether claims should receive greater scrutiny).

163. *See, e.g.*, *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 908–11 (6th Cir. 2009) (dismissing an antitrust collusion claim because the "defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free market behavior'" (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009))); Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009) (dismissing a conspiracy claim based on lack of "any suggestion, beyond a bare conclusion, that the remaining defendants were leagued in a conspiracy with the

Yet, these are the very cases that should be given greater pleading latitude and necessitate other forms of attention and oversight by district judges.

It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant,[164] especially when the defendant denies access.[165] As Professor A. Benjamin Spencer writes, "claims for which intent or state of mind is an element—such as discrimination or conspiracy claims—are more difficult to plead in a way that will satisfy the plausibility standard."[166] Demands for plausibility pleading may shut "the doors of discovery"[167] on the very litigants who most need the procedural resources the Federal Rules previously made

dismissed defendants"); Dorsey v. Ga. Dep't of State Road & Tollway Auth., No. 1:09-CV-482-TWT, 2009 WL 2477565, at *6–7 (N.D. Ga. Aug. 10, 2009) (holding that "numerous" racially discriminatory remarks were insufficient for a hostile-work-environment claim); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *8–11 (N.D. Cal. July 27, 2009) (dismissing a discrimination complaint because plaintiff failed to allege sufficient facts to establish that defendants took action because of, and not merely in spite of, the fact that plaintiff was a Muslim and a citizen of Malaysia); Vallejo v. City of Tucson, No. CV08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. July 26, 2009) (dismissing a Voting Rights Act claim brought by a disabled Mexican American veteran because the asserted denial of a provisional ballot was an "isolated incident"); Fletcher v. Phillip Morris USA, Inc., No. 3:09CV284-HEH, 2009 WL 2067807, at *5–7 (E.D. Va. July 14, 2009) (dismissing an employment discrimination claim based on plaintiff's failure to plead specific factual allegations that similarly situated employees, who were not members of a protected class, received more favorable treatment than plaintiff); *see also* sources cited *supra* note 67.

164. *See* Burbank, *supra* note 143, at 561 ("Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries."); Spencer, *supra* note 64, at 36 (concluding that the pleading standard now embodies a view toward increased judicial efficiency). The Court took no note of Rule 11(b)(3), which specifically addresses situations in which a document presented to the court is signed by someone who lacks but expects to obtain information to support its content through "investigation or discovery." FED. R. CIV. P. 11(b)(3).

165. *See* Pa. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, No. 09 C 5619, 2010 WL 1979569, at *13–14 (N.D. Ill. May 17, 2010) (finding that allegations that defendants withheld information that made it impossible to identify which plan participants did not receive benefits and which provisions were violated excused plaintiff's failure to provide facts to state ERISA claim).

166. *See* Spencer, *supra* note 108, at 459 (arguing that plaintiffs will face a higher pleading hurdle when evidence supporting an allegation of wrongdoing is more difficult to identify).

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

available. Perhaps it is appropriate to obligate plaintiffs to plead in greater detail about those matters on which they are informed or on which they reasonably can inform themselves, even though there may be understandable tactical reasons why they might not want to do so. The pleading system should not be reduced to a game of hide the ball nor should it tolerate laziness or sloth.[168] But to demand fact pleading on pain of dismissal when the facts are unknown or unknowable is a negation of the pleader's ability to access the civil justice system.

It is difficult to quarrel with the proposition that a prospective plaintiff should inform himself prior to instituting litigation. Indeed, Rule 11(b) requires that every signer of any paper submitted to the court make "an inquiry reasonable under the circumstances."[169] And in our information-rich society there is no doubt that modern technology, mandatory disclosure laws, and governmental investigations make a great deal of data available that is useful to many potential plaintiffs. Some of it will support and some of it will undermine their claims. What is available will not be useful—let alone determinative—on the plausibility issue in many cases, however.[170]

But any presuit-inquiry requirement must itself be a "reasonable" one. It is much too facile to say that the pleader should be obliged to explore the entire public domain.[171] That is a universe of incomprehensible vastness today, one that is expanding with every

168. The difference in the pleader's obligation based on what is known and what is not is demonstrated by two fact patterns District Judge John G. Koeltl of the Southern District of New York has presented in conversation and in public. In the first, the plaintiff simply asserts "I have been subjected to a hostile work environment because I am black and request damages" but pleads nothing else. In the second the plaintiff simply asserts "I have been fired because I am white and request damages." In the first situation, the plaintiff presumably knows the events that led her to conclude that she has been exposed to a hostile work environment and can plead enough to enable the court to determine the plausibility of the assertion. Perhaps she should be obliged to do so. In the second, the plaintiff may not know the facts underlying his discriminatory firing or have access to them, let alone access to the employer's records to determine whether his discharge is part of a pattern of improper conduct. *Cf.* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 231 n.211, 595 (2004) (noting that in the German procedural system, which requires the pleadings to contain developed factual assertions and identify potential sources of proof for them, less detail is required when the necessary information is held by the opposing party or nonparty).

169. FED. R. CIV. P. 11(b).

170. *See* Colin Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. (forthcoming Dec. 2010) (manuscript at 49–59) (on file with the *Duke Law Journal*).

171. It is true that declining search costs and widespread Internet availability are facilitating pretrial investigation. *See id.* at 27–33.

passing moment.[172] Moreover, speaking autobiographically, not everyone in our society—including lawyers—has access to the necessary technological tools or the knowledge of how to use them effectively, even when they are available. And, of course, the Internet and social networks are a world of both fact and fiction, it often being difficult to tell one from the other.

This problem of information asymmetry—which generally is a much more formidable concern for plaintiffs than for defendants[173]—presents itself in many litigation contexts. It is prevalent in actions challenging the conduct of large institutions—for example, antitrust and securities cases—when the necessary information relating to issues such as fraud, conspiracy, price-fixing, and corporate governance can be found only in the defendant's files and computers.[174] The problem is exacerbated in multiple–defendant situations in which access to information is critical to indicating the alleged wrongdoing in order to focus on the alleged wrongdoer.

The same is true of questions like intent and malice. A similar asymmetry exists in other important litigation contexts such as actions against governmental entities. Particularly affected are civil rights and employment-discrimination cases, in which issues of motivation, state

172. In Richard A. Epstein, Of Pleading and Discovery: Reflections on *Twombly* and *Iqbal* with Reference to Antitrust (Aug. 2, 2010) (unpublished manuscript) (on file with the *Duke Law Journal*), the author argues that a prospective plaintiff should be obliged to plumb public domain sources prior to pleading. In Spencer, *supra* note 64, at 26–31, the interesting notion is advanced that requiring detailed pleading in information-asymmetry situations is inconsistent with the Constitution's Petition Clause, U.S. CONST. amend. I.

173. Because it is the defendant's conduct that has been challenged, the defendant generally will have more access to the information relevant to the litigation. Moreover, unless the defendant wishes to assert a counterclaim, in many, if not most cases, it will not be called upon to plead until after a motion to dismiss is resolved—or, if it does plead, it typically can do so in conclusory fashion. Information asymmetry occasionally is used to describe the imbalance in the costs of discovery, which are assumed to fall more heavily on defendants than on plaintiffs. *See* Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297, at *3 (7th Cir. July 30, 2010); *id.* at *9 (Posner, J., dissenting in part). Given the current preoccupation with defense costs and the radical differences in the economic situations of plaintiffs' and defendants' lawyers, *see infra* Part II.B, that assumption may be questioned, at least in terms of the comparative impact of the cost burden.

174. *See* Alison Frankel, *Two More* 'Iqbal' *Dismissals Emerge in Product Liability Cases*, LAW.COM (Aug. 4, 2009), *available at* http://www.law.com/jsp/article.jsp?id=1202432738346&Two_More_Iqbal_Dismissals_Emerge_in_Product_Liability_Cases (arguing that *Iqbal*, and implicitly *Twombly*, are "the best thing to happen to the products liability defense bar since *Daubert*" because plaintiffs will not have access to information necessary to support their claims without discovery).

of mind, and insidious practices are hidden by agents and employees or are buried deep within an entity's records.[175] Discrimination in hiring, promotion, or employee discipline depends on comparative data drawn from the employer's records that simply are inaccessible absent discovery. Several[176]—but not all[177]—post-*Twombly-Iqbal* discrimination cases seem insensitive to the seriousness of this problem.

As early as 1947, the Supreme Court recognized the central role access to discovery under the Federal Rules plays in achieving the objectives of the American civil justice system when it penned the line: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[178] Fifty years later, Court of Appeals Judge Patrick E. Higginbotham echoed that philosophical principle:

> Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.[179]

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175. *See generally Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 256–69 (statement of John Payton, President, NAACP Legal Defense and Educational Fund) (cautioning about the adverse effect of the heightened pleading standard on civil rights cases); *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, *supra* note 53, at 79–92 (statement of Depo P. Adegbile, Director of Litigation, NAACP Legal Defense and Education Fund) (noting the detrimental impact of *Twombly* and *Iqbal* in both civil rights cases and more generally in all cases); Bone, *supra* note 99, at 876 (noting the potential problems posed by the new pleading standard for civil rights cases); Schneider, *supra* note 44 (arguing that the heightened pleading standard will result in an increase in dismissals for civil rights cases).

176. *See, e.g.*, Adams v. Lafayette Coll., No. 09-3008, 2009 WL 2777312 (E.D. Pa. Aug. 31, 2009) (dismissing an employment discrimination claim); Ocasio-Hernández v. Fortuno-Burset, 639 F. Supp. 2d 217 (D.P.R. 2009) (dismissing equal-protection and related claims by former employees of governor's mansion); Logan v. Sectek, Inc., 632 F. Supp. 2d 179 (D. Conn. 2009) (dismissing the complaint in a case about federal regulations' level of protection for airline employees).

177. *See, e.g.*, Braden v. Wal-Mart Stores, Inc. 588 F.3d 585, 597–98 (8th Cir. 2009) (ERISA claim); Bryant v. Pepco, Civ. No. 09-CV-1063 (GK), 2010 WL 3118705, at *6 (D.D.C. Aug. 9, 2010) (Title VII claim); Mitchell v. Township of Pemberton, Civil No. 09-810 (NLH)(AMD), 2010 WL 2540466, at *6 (D.N.J. June 17, 2010) (§ 1983 claim).

178. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

179. Patrick E. Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).

The federal court system once championed access for potentially meritorious claims in all cases, but *Twombly* and *Iqbal* have swung the pendulum in the opposite direction, significantly confining a plaintiff's ability to reach information needed for a meaningful adjudication. Inevitably, the challenge facing future policymakers will be how to construct pleading and motion standards that make sense given the substantive variety of federal litigation. This may necessitate exploring the merits of a differential pleading system, which obviously departs from the long-standing transsubstantivity principle, a possibility discussed below.[180] In effect, the plausibility-pleading standard risks increased difficulty for many prospective claimants—some with claims that may well have merit and involve important public policies—to survive a Rule 12(b)(6) motion.[181] In an unknowable number of instances, the increased risk of dismissal and the resources needed to defend against it may deter the institution of a potentially meritorious case. That result would be a far cry from the foundational philosophy of the original Rules and the handling of certain other procedural issues in the not-too-distant past.

In the late 1990s, for instance, the Civil Rules Committee considered a proposal to amend the Rule 23 procedures for certifying subdivision (b)(3) classes that, in effect, would vest judges with discretion to deny certification according to something in the nature of an "it ain't worth it" standard. Under this standard, district courts would balance "whether the probable relief to individual class members justifie[d] the costs and burdens of class litigation."[182] When numerous people and groups raised objections, the rulemakers abandoned the plan. It was inconsistent with the importance of merits adjudication, and the rulemakers were concerned that what is and is

180. *See infra* notes 338–59, 401–34 and accompanying text.

181. *See* Spencer, *supra* note 108, at 460 ("Such a fluid, form-shifting standard is troubling . . . . [I]t is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, *creating a class of disfavored actions* in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits." (emphasis added)).

182. COMM. ON RULES OF PRACTICE & PROCEDURE, FED. JUDICIAL CONFERENCE OF THE U.S., MEETING OF JUNE 19–20, 1997, DRAFT MINUTES 19 (statement of Judge Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1997-min.pdf. Judge Niemeyer, the then-chair of the Civil Committee, "pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions." *Id.*

not "worth it" often lies solely in the eyes of the beholder.[183] The Committee's decision echoed a similar judgment by the Supreme Court more than twenty years earlier in *Eisen v. Carlisle & Jacquelin*,[184] in which the Court rejected a "preliminary inquiry into the merits of a suit" on a class-certification motion as contrary to that procedure's purpose.[185] These episodes illustrate the dramatic shift in attitude regarding the federal civil-procedure system that plausibility pleading reflects. Whereas the Justices and rulemakers once refused to grant district judges the authority to filter out class actions on the basis of an evaluation of the merits or a cost-benefit analysis, years later the Court has done precisely that in the context of pleadings and motions to dismiss.

No procedural system can entirely avoid discarding some wheat with the chaff. But how many potentially meritorious claims should

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183. For a glimpse of some reactions to the proposed Rule 23(b)(3)(F) amendment, see COMM. ON RULES OF PRACTICE & PROCEDURE, FED. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 36–38 (1997), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1997.pdf.

> This proposal drew more comment than any other. The comments ranged from strong support to vehement opposition. In many ways, the proposal became the focal point for abiding disputes over the "private attorney-general" function of (b)(3) class actions. The most fundamental question is whether a procedural rule that emanated from the Enabling Act process should become the authority that supports private initiation and control of public law-enforcement values.

Id.; *see also* COMM. ON RULES OF PRACTICE & PROCEDURE, FED. JUDICIAL CONFERENCE OF THE U.S., MEETING OF OCTOBER 17–18, 1996, DRAFT MINUTES, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-1796.htm ("As a group, these changes can be read either to encourage or to discourage small-claim class actions. A more accurate assessment is that they increase trial court flexibility, expanding discretion in ways that will further reduce the scope of effective appellate review." (statement of Judge Niemeyer)).

184. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

185. *Id.* at 177. In the past decade, there has been a notable expansion in the procedures for class-action certification, as a result of which the merits of a suit may be examined—theoretically only as part of the inquiry into the prerequisites for class certification, such as predominance of the common questions and superiority. *See, e.g.*, *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 6, 20 (1st Cir. 2008) ("A district court must formulate some prediction as to how the specific issues will play out in order to determine whether common or individual issues predominate in a given case."); *In re* Hydrogen Peroxide Antitrust Litig., 522 F.3d 305, 311 (3d Cir. 2008) (vacating class certification in antitrust claim based on lack of predominance); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 32 (2d Cir. 2006) (noting Rule 23's additional requirements of predominance and superiority and rejecting the argument based on *Eisen* that a judge cannot consider the prerequisites of Rule 23 that overlap with the merits of the case); *see also* Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 271 (5th Cir. 2007) (vacating class certification in a securities fraud claim because plaintiffs failed to prove that defendants' misrepresentations were the proximate cause of plaintiffs' loss).

the system be permitted to sacrifice to achieve a reasonable quantum of filtration? It seems obvious that in many contexts attempting to distinguish the frivolous from the potentially meritorious on the basis of a single pleading is a dangerously uncertain endeavor.[186] And where is the evidence that fact-based pleading enhances the extrusion of meritless, as opposed to potentially meritorious, cases? And what is the comparative proportion between the two? To my knowledge there is none. Indeed, some preliminary research suggests the opposite may be true;[187] heightened pleading may not be a better filter.

There are some critical macro-questions that need to be addressed as well. How frequently should plaintiffs have their cases terminated without a meaningful day in court when they lack sufficient information to plead with factual plausibility because they cannot effectively access it? Should our judicial system only open its doors to claimants who have the necessary resources and pre-action information to satisfy a judge's judicial experience and common sense? Have courts abandoned the gold standard—adjudication on the merits, with a jury trial when applicable—and replaced it with threshold judicial judgments based on limited information? Will district courts discard all suits they believe are not plausible—today's version of "it ain't worth it"?

C. Plausibility and the Pressure for Pre-Adjudicatory Disposition

The advent of plausibility pleading suggests obvious parallels to the rise of the Supreme Court's plausibility test for summary judgment motions.[188] As a result of the Court's 1986 summary judgment trilogy,[189] which formally equated that motion with the

186. *See* Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 293–95 (2002).

187. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. (forthcoming 2011) (manuscript at ii), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666770 (finding "no correlation between the heft of a pleading and the ultimate success of a case").

188. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (holding that to survive a motion for summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial).

189. *See* Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); *Matsushita*, 475 U.S. 574.

directed-verdict motion[190] and introduced a new plausibility standard in the pretrial context, Rule 56 motions have become a potent weapon for terminating cases before trial. As I have discussed elsewhere at length,[191] the 1986 trilogy produced a significant escalation of summary judgment activity and, in my opinion, occasionally has taken the procedure beyond its function of separating the factually trial-worthy from the factually trial-worthless.[192] As one of the nation's most accomplished procedure scholars writes, ultimately, the federal judiciary's "retreat from the goal of adjudication on the merits [saw] the trial-termination rate decline precipitously, to the point that it is a quarter or less of the termination rate by summary judgment."[193] The same expanded characterization of allegations as conclusory, rather than factual, and increased judicial decisionmaking in the fact-application arena now being seen in post-*Twombly-Iqbal* pleading decisions has occurred under Rule 56. But the Court's summary judgment shift did not satisfy those demanding that the system be tightened further; the new pleading regime seems designed to meet the pressures created by those interests.

Just as the 1986 trilogy was concerned with restraining the so-called—but unproven—litigation explosion through the "powerful tool" of summary judgment,[194] so too the Court in both *Twombly* and *Iqbal* was concerned with developing a stronger judicial gatekeeping role for Rule 12(b)(6) motions.[195] Plausibility pleading may well become the federal courts' primary vehicle for achieving pre-adjudicatory disposition.[196] If so, the Supreme Court has transferred

190. A motion for directed verdict is now called a motion for judgment as a matter of law. *See* FED. R. CIV. P. 50.

191. Miller, *supra* note 32, at 1048–56.

192. *Id.* at 1048–49; *see also* Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 863–69 (2007) ("Overuse of summary judgment is a recent complaint. . . . [S]ome commentators have become concerned that courts now rely too heavily on summary judgment and other procedural means of disposing of cases prior to trial.").

193. Burbank, *supra* note 143, at 561.

194. Miller, *supra* note 32, at 1056; *see also supra* text accompanying notes 30–32.

195. *See* Hoffman, *supra* note 106, at 1220, 1224.

196. *See* Spencer, *supra* note 108, at 450 ("In effect, then, the Court has moved forward the burden that plaintiffs must carry at later stages in the litigation up front to the pleading stage.").

the primary gatekeeping function performed by summary judgment motions even earlier in the action to motions to dismiss.[197]

This morphing of the directed verdict into summary judgment and then into the motion to dismiss is unsettling. There are significant differences among these procedures. A directed-verdict motion under Rule 50 follows the presentation of evidence subject to cross-examination before the trier of fact in open court and only eliminates cases that are not jury-worthy.[198] A summary judgment motion under Rule 56 typically is based on a developed record that follows discovery and only prevents cases lacking genuine issues of material fact from proceeding.[199] In sharp contrast, plausibility pleading employs a gatekeeping function at a case's genesis. The decision as to whether it can proceed will be based solely on one document, without giving the plaintiff an opportunity to unlock the doors of discovery. This is particularly true if a district judge stays all proceedings during the often-lengthy period between the motion to dismiss and its determination. For many plaintiffs, this effectively denies any hope of investigating and properly developing their claims, and leads to judicial decisionmaking without a meaningful record.[200] The absence of the focusing effect of a developed record is likely to magnify the subjective aspects of the judge's thinking about the motion.

Plausibility—the Court's word du jour—now applies both to summary judgment and to pleadings, although the difference between these two uses of the word is murky at best. Not surprisingly, some have argued that the motion to dismiss under *Twombly* and *Iqbal* has become a disguised summary judgment motion, attacking not only the legal sufficiency of a pleading, but striving for a resolution by

197. *See id.* at 447 n.93 ("It is my contention that such scrutiny inappropriately moves forward summary judgment-like screening to the pleading phase.").

198. FED. R. CIV. P. 50(a)(1).

199. *Id.* 56(c)(2).

200. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). The pleading stage is far too early for courts to make reasoned decisions on the cost-benefit value of proceeding to discovery in many cases. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 896 (2009) ("[P]roportionality rules ask the impossible: judges must decide when discovery cost is proportional to some measure of 'value' that includes both *evidence value* . . . and *case value* . . . . This yields a fundamental information-timing problem: discovery disputes occur before parties marshal all the evidence, so how can courts measure the value of particular evidence, much less case merits?").

appraising the facts.[201] The positions of the two motions on opposite sides of the discovery process means that only plaintiffs who have survived the first hurdle have an opportunity to find relevant information to back up their factual allegations in the hope of surviving the second. As Professor Spencer writes, "[t]he only distinction is that at the pleading stage, the plaintiff's factual allegations simply may be asserted rather than evidenced. But in both instances, if the facts presented do not present a plausible picture of liability, the claims will not survive."[202] This approach contradicts—or at least obscures—the text of the two Rules: whereas Rule 56 demands that claimants "set forth specific facts" that remain in dispute following the availability of discovery, Rule 8(a)(2) only asks for a "showing" of the pleader's entitlement to relief based on preinstitution investigation. The current confusion suggests that the time may come when it will be necessary either to return to prior principles regarding the two motions or to redefine their respective roles, standards, procedures, and limitations to illuminate the distinction between them and rationalize pretrial motion practice.

Moreover, why were *Twombly* and *Iqbal* necessary? The 1986 summary judgment trilogy had made that motion a powerful pretrial terminator, especially when coupled with judicial control over the pretrial process. For a quarter century, successive amendments to the Federal Rules had impressed limits on the extent of discovery, established mandatory disclosure, and narrowed the scope of what matters could be inquired into under the discovery rules. For years

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201. *See* Epstein, *supra* note 52, at 69; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 18 (2010) ("The motion to dismiss is the new summary judgment motion."); *see also* Clermont & Yeazell, *supra* note 52, at 833 ("This unavoidably probabilistic standard appears equivalent to the standard of decision for summary judgment.").

202. *See* Epstein, *supra* note 52, at 69; Thomas, *supra* note 201, at 28–31 ("[T]he Supreme Court has established standards for summary judgment and for the motion to dismiss that are substantially the same. . . . [U]nder both standards, a court determines the plausibility of the claim."); *see also* Clermont & Yeazell, *supra* note 52, at 834 ("To explore this jarring novelty further, consider the actual complaints that the *Twombly* and *Iqbal* courts held insufficient because the allegations were too conclusory to pass into the promised land of plausibility."). Professor Epstein has offered the following clarification of his statements:

> [T]he point of the disguised summary judgment motion was not to appraise the facts in each and every case, but to examine a narrow subset of cases where it makes no sense to bear the heavy costs of discovery when its massive dislocation and expense is manifestly unlikely to produce any evidence of value.

Epstein, *supra* note 172, at 10.

before *Twombly* and *Iqbal*, the Rule 12(b)(6) dismissal rate had been rising.[203] Judicial gatekeeping seemed to be working. The Supreme Court's coup de grace simply was not needed. To be sure, new challenges are always arising. The expanding e-discovery phenomenon presents real and troubling cost and logistical problems. But that subject is being intensely studied, a first generation of Federal Rule changes is in place, and experience is developing.[204] And, again, why focus on Rule 8 and Rule 12(b)? The Court's concerns more appropriately should be viewed as matters of promoting effective judicial management, especially methods of controlling discovery and improving lawyer behavior.

II. CASE MANAGEMENT, LITIGATION COSTS, AND COMPETING SYSTEM VALUES

The advent of plausibility pleading in *Twombly* and *Iqbal* was motivated in significant part by a desire to develop a stronger role for motions to dismiss to filter out a hypothesized excess of meritless litigation, to deter allegedly abusive practices, and to contain costs. Indeed, repeatedly sounded assumptions concerning the frequency and significance of these phenomena have led to dramatic changes in pretrial litigation practice—most notably an increase in judicial case management, a more powerful summary judgment motion, and, since *Twombly* and *Iqbal*, a heightened pleading standard—many of which have not been sanctified by amendments to the Federal Rules.

Although some criticisms of today's civil justice system have merit, as discussed below,[205] the picture generally portrayed is incomplete and is distorted by a lack of definition and empirical data regarding the alleged negative aspects of federal litigation. This generates rhetoric that often reflects ideology or economic self-interest, rather than reality. As a result, reliance on these assertions threatens to impair the ability of courts, rulemakers, and commentators to reach dispassionate, reasoned conclusions as to

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203. *See, e.g.*, EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1(2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

204. *See infra* note 216 and accompanying text. There was a heavy focus on e-discovery at the Duke Conference, both in the panel discussions and in the papers.

205. *See infra* Part II.B.

what is needed. Moreover, the picture of how our federal procedure system is functioning generally has been viewed for a number of years through a lens trained on concerns voiced by defense interests, with the difficulties faces by the other side of the litigation equation going largely ignored.[206] If assumptions about litigation costs, judicial management, and abusive use of the system are driving pretrial process changes, the policymakers must strive to understand these matters fully and appraise what is real and what is illusion before the procedure is altered any further.

A. Combating Cost and Delay with Pretrial Management

The increased complexity, magnitude, and number of cases on federal court dockets in the past few decades have caused many to lament the "twin scourges" of the federal civil litigation system—namely, cost and delay—concerns that apparently affect other legal systems and whose existence can be traced back to ancient times.[207] Reacting to these complaints, increased judicial control over the pretrial process has been provided in recent decades through legislation, rulemaking, Supreme Court decisions, and various less formal means, most notably the *Manual for Complex Litigation*.[208]

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206. *See, e.g.*, Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 LITIGATION 3 (2009); Schneider, *supra* note 44, at 562. The Court's *Twombly* and *Iqbal* opinions focus on defense costs. In thinking about system costs, it should be remembered that the period under discussion is one in which federal court caseloads have dramatically increased, the number of federal judges has remained relatively constant, a significant number of judgeships have been vacant for significant periods of time, judicial salaries have been frozen, docket-control mechanisms have become commonplace, and the Supreme Court has reduced the frequency of granting certiorari petitions—leaving certain issues unresolved.

207. *See* Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 LECTURES ON LEGAL TOPICS 87, 88 (1926) (noting that in the third millennium before Christ people were complaining about the inefficiency of the legal process); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984) ("The inefficiency with which the wheels of justice grind is not unique to our time. In ancient China, a peasant who resorted to the courts was considered ruined, no matter what the eventual outcome of the suit. Hamlet rued 'the law's delay.' Goethe quit the legal profession in disgust over cases that had been languishing in the German courts for three hundred years. And in *Bleak House* Charles Dickens applied his great talent for social criticism to the ramifications of one of the classic examples of English legal ineptitude—Jarndyce v. Jarndyce."). *See generally* CHARLES DICKENS, BLEAK HOUSE (George Ford & Sylvere Monod ed., Modern Library 1985) (1853) (focusing his social commentary on the long-running litigation in Jarndyce v. Jarndyce, which concluded only after the lawyers' fees had consumed all of the money in the estate in question).

208. MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004). For a discussion of judicial control through management, see *infra* notes 207–43.

During my tour as Reporter to the Advisory Committee on Civil Rules beginning in the late 1970s, it became increasingly clear that rulemaking policy should turn its attention away from the trial and toward the increasingly important and protracted pretrial process. The Committee consciously chose to concentrate on the pretrial phase as the best hope for meaningfully attacking cost and delay, especially because only a small percentage of cases actually reached trial even then. The 1983 amendments to the Federal Rules, therefore, were an attempt to reduce cost and delay by giving district judges the tools to prevent excessive discovery and to take a more active role in moving cases through pretrial and encouraging settlement.[209] The techniques included formally validating the concept of judicial management by expanding the role and scope of Rule 16, giving the district judge the power to impose some constraints on redundant and disproportionate discovery in Rule 26, and enhancing the functionality of sanctions under Rule 11 in the hope of improving lawyer behavior.[210] Subsequent amendments to Rule 16 and Rule 26 reflected the Committee's continued commitment to case management as an effective means to combat cost and delay[211] and to encourage rational, merits-based settlements.[212]

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209. *See generally* ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY, EDUCATION AND TRAINING SERIES (1984) (summarizing the objectives of the Federal Rules Advisory Committee in drafting the 1983 Amendments, including an effort to increase pretrial efficiency by establishing the principle of judicial management).

210. As the Advisory Committee noted at that time,

> [e]mpirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

FED. R. CIV. P. 11 Advisory Committee Notes to the 1983 Amendment, *reprinted in* 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL, at app. C (3d ed. 2010); *see also* 5A WRIGHT & MILLER, *supra* note 3, at 1334 (outlining the purpose and effects of Rule 11); 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1521 (3d ed. 2010) (summarizing the history of Rule 16).

211. *See* Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 913 (2008) ("The amendments to the Federal Rules of Civil Procedure in 1983, 1993, and 2000 have provided the parties and courts greater resources to control runaway, excessive discovery. The amendments to the rules include giving greater authority to district court judges to exercise meaningful managerial control of the scheduling and scope of discovery under Federal Rule of Civil Procedure 16."); *see also* Edward D. Cavanagh, Twombly*:*

Since the 1983 amendments, case management has been encouraged as a valuable judicial tool and enjoys widespread use in various forms. In 1985, the second edition of the *Manual for Complex Litigation*[213] was released, and like the original *Manual*, suggested various case management techniques that had proven successful and deserved further use and development.[214] Most would say that the *Manual*, now in its fourth edition, has been highly instructive for the members of the bar and valuable in helping judges manage complex cases effectively.[215]

Congress participated in the management trend by enacting the Civil Justice Reform Act of 1990,[216] which required all district courts to develop and implement plans to reduce expense and delay. "Litigation management," systematic differential treatment, and early

The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement, 28 REV. LITIG. 1, 25 (2008) ("The judicial role in supervising discovery was broadened significantly by the 1993 Amendments to the Federal Rules.").

212. "For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process." FED. R. CIV. P. 11 Advisory Committee Notes to the 1983 Amendment, *reprinted in* 12A WRIGHT, MILLER, KANE & MARCUS, *supra* note 210, at app. C; *see also* THOMAS E. WILLGING, LAURA L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 69 (1996) (concluding that case management practices "limit the ability of a party to coerce a settlement without regard to the merits of the case" in the class action context).

213. MANUAL FOR COMPLEX LITIGATION (SECOND) (1985). The original *Manual* was published in 1969.

214. *See* Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2231 (2000) ("In the introduction, Judge Pointer wrote that '[t]he various techniques suggested . . . either have been used regularly with success or deserve, in the opinion of the Board of Editors, further use and experimentation in appropriate cases.'").

215. *See, e.g.*, Edward D. Cavanagh, Twombly*, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 888 (2008) ("The Manual has been used successfully in numerous cases to keep down discovery costs and reduce unnecessary delay, proving that a willing court can exercise meaningful control over claims and defenses asserted by the parties and discovery."). In 2006, the Federal Judicial Center published a pocket book for judges that describes some additional management techniques thought to be useful. *See* WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES (2d ed. 2006).

216. 28 U.S.C. §§ 471–482 (2006). In major part, the 1990 legislation was sunset after seven years. For a chronicling of the formulation and early developments under the Act, see generally Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303 (1994).

ongoing control by a judicial officer were elements to be considered by each district.[217] Although the resultant plans varied, most of them further developed the core elements of Rule 16 and the *Manual*, thereby calling for a considerable amount of district judge involvement, especially with regard to the discovery process. While the Rules, the *Manual*, and the expense and delay plans were making more tools available for managing pretrial procedure, the Supreme Court's strengthening of the summary judgment motion with its 1986 trilogy was having an effect in the lower federal courts.[218] Summary judgment, coupled with the district judge's power to manage, were thought to be an effective combination for controlling the pretrial process.[219]

Until *Twombly*, the Supreme Court consistently sanctioned the efficacy of these techniques for containing discovery costs and eliminating meritless cases. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[220] Chief Justice Rehnquist wrote that, without formal amendments to Rule 8 and Rule 9, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[221] The Court reaffirmed these sentiments in *Crawford-El v. Britton*[222] in 1998[223] and in *Swierkiewicz* in 2002.[224] And both the

217. The quoted words appear in a number of the statute's sections. *See, e.g.*, 28 U.S.C. §§ 471, 473. For further discussion of the statute, see *infra* notes 463, 471–72.

218. *See supra* text accompanying notes 30–32, 37.

219. Some commentators, myself included, even have argued that the more stringent summary judgment procedure has provided the bench with too much authority to dispose of cases before trial and that the motion occasionally has been (and continues to be) used too hyperactively. *See* Miller, *supra* note 32, at 1044–48.

220. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

221. *Id.* at 168–69.

222. Crawford-El v. Britton, 523 U.S. 574 (1998).

223. *Id.* at 599 ("The trial judge can therefore manage the discovery process to facilitate prompt and efficient resolution of the lawsuit; as the evidence is gathered, the defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official's intent, which frequently turn on credibility assessments."). The preceding pages of the opinion provide an extended look at the ways a federal judge can manage a case in the context of qualified immunity.

224. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002) ("The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of

1983 and 1993 amendments to Rule 16, which dramatically expanded the scope and delineated the contours of judicial conferences, were approved by the Court, as was the 2006 group of amendments that gave the district court extensive control and discretion in the context of e-discovery.[225]

Therefore, the Court's shift in attitude toward case management in *Twombly* was unexpected. Based largely on a somewhat dated and highly theoretical 1989 journal article by Judge (then Professor) Frank H. Easterbrook,[226] Justice Souter expressed the view that "the success of judicial supervision in controlling discovery has been on the modest side."[227] This was the first time the Court had questioned the ability of district judges to manage pretrial procedures in a way that might limit cost and delay.[228] This conclusion served as an important

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the court." (quoting 5C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1202 (2d ed. 1990))).

225. *See* FED. R. CIV. P. 26(b)(2)(B), 33(d), 34(b)(2)(E), 37(e), 45(d)(1). *See generally* SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE (2010); WORKING GRP. ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2005); Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875 (2008). The e-discovery field is canvassed in MILBERG LLP & HAUSFELD LLP, E DISCOVERY TODAY: THE FAULT LIES NOT IN OUR RULES (2010). The K&L Gates law firm maintains a computerized file of over 1000 e-discovery matters.

226. "Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)). The Court also cited data that discovery can account for 90 percent of litigation costs when it is actively employed. *Id.* (citing Memorandum from Judge Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Judge Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)). This data, which is questionable as to its coverage and is not borne out by more contemporary surveys, does not necessarily corroborate the failure of case management to control discovery costs. But its association with the claim that case management has failed seems to imply that Justice Souter did feel that it supported his conclusion that case management has failed.

227. *Twombly*, 550 U.S. at 559. The basis for that statement is unknown. There is no data indicating how a particular case might fare without management. Not cited was the excellent essay by Judge Richard A. Posner, later Judge Easterbrook's Seventh Circuit colleague, on the use of management techniques to avoid a premature dismissal in *American Nurses' Ass'n v. Illinois*, 786 F.2d 716 (7th Cir. 1986), which appeared almost contemporaneously with the article. Justice Stevens's dissent contended that the Court's majority "vastly underestimates a district court's case management arsenal." *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting).

228. *See* Bone, *supra* note 52, at 898–99 (pointing out that *Twombly* is the first time the Supreme Court questioned the effectiveness of case management and that prior to that case, the

justification for *Twombly*'s establishing the plausibility-pleading standard,[229] with Justice Souter citing the potential for imposing large discovery costs on defendants as a reason to weed out cases not deemed plausible at the very beginning of litigation.[230] The *Iqbal* majority extended this line of thinking to government defendants.[231]

Dissenting in *Iqbal*, however, Justice Breyer explicitly endorsed "alternative case-management tools"[232] designed "to prevent unwarranted litigation."[233] He argued,

> The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials.[234]

Twombly and *Iqbal* appear to have set up a somewhat illogical dichotomy. In deciding a motion to dismiss, judges may consider the hypothesized cost of discovery to the defendant, but they cannot look at the potential techniques for cabining those costs with effective judicial management.[235] It is curious that, in the same opinions, the

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Advisory Committee had operated on the assumption that the management tools were quite useful).

229. *Twombly*, 550 U.S. at 559. The *Iqbal* opinion refers to Justice Souter's conclusion as the "rejection of the careful-case-management approach." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

230. *Twombly*, 550 U.S. at 558 ("Thus, 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."). The Court's opinion pays little attention to the various developments in case management described in the text.

231. "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." *Iqbal*, 129 S. Ct. at 1953.

232. *Id.* at 1962 (Breyer, J., dissenting).

233. *Id.* at 1961.

234. *Id.* at 1961–62 (citations omitted).

235. "We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Id.* at 1954 (majority opinion) (citing *Twombly*, 550 U.S. at 559).

Court entrusted district judges with the freedom to use judicial experience and common sense[236] to dismiss a claim at genesis for noncompliance with a plausibility-pleading requirement, but, at the same time, denied them the freedom to manage the early phases of their cases efficiently and economically to test the viability of the challenged claim for relief.[237] Moreover, it has been noted that it is odd that the Court so easily dismissed case management across the board when none of the then-sitting Justices had been a federal district court judge and therefore they collectively lacked federal civil trial experience.[238] The Court's dismissal is especially dubious because many district court local rules actively endorse case management, most judges use it,[239] and a number of post-1989 Rule amendments have established constraints on discovery and broadened the matters that can be considered at pretrial conferences. Also significant is the empirical data recently collected by the Federal Judicial Center[240] and the American Bar Association Section of Litigation,[241] which reveals a general consensus among the surveyed practicing attorneys in favor of preserving case management in its current form.[242] At the Duke

236. *Id.* at 1950.

237. *See Twombly*, 550 U.S. at 559.

238. McMahon, *supra* note 76, at 869.

239. *See id.* ("It is unfortunate that the *Twombly* majority views the efforts of district judges in this regard to be less than adequate, commenting that 'the success of judicial supervision in checking discovery abuse has been on the modest side.' But with hundreds of civil cases on their dockets, district court judges do their best. Moreover, criticism about case management from a Court that collectively lacks much experience with trial-level civil litigation is difficult to digest." (footnote omitted) (quoting *Twombly*, 550 U.S. at 1967 (Stevens, J., dissenting))); Paul W. Grimm & Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases: Must the Rules be Changed to Reduce Costs and Burdens or Can Significant Improvements Be Achieved Within the Existing Rules? 28–32 (2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/47D6E0CDEF6484DA852576EA004A9FDA/$File/Judge%20Grimm,%20The%20State%20of%20Discovery%20Practice%20in%20Civil%20Cases.pdf?OpenElement; Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar*, 157 F.R.D. 69 (1994). *But see* Robert E. Keeton, Commentary, *Time Limits as Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2056–58 (1989) ("I doubt . . . that it is possible to design such a shorter, better focused trial, without changing the trial judge's role to one of somewhat more rigorous control over the process than that implicit in the role of the judge in the traditional adversary trial.").

240. LEE & WILLGING, *supra* note 203, at 27–33.

241. AM. BAR ASS'N SECTION OF LITIG., *supra* note 56, at 3, 6, 11, 123–44.

242. "Taking questions 74 and 75 [of the Center's survey] together, there appears to be some consensus that the Rules should not be revised to discourage case management by federal

Conference, speaker after speaker stressed the importance of management, with most emphasizing that judicial involvement in the process was critical.[243]

B. The Costs of Litigation

The Supreme Court's negative view of case management in *Twombly* and *Iqbal* is instructive in that it is a reminder of how much is not known about litigation cost and delay. *Twombly*'s emphasis on the defendant's costs also reveals how one-sided the discussions about expense and the expressions of concern have become. Moreover, the Court's ready acceptance of the blunt instrument of plausibility pleading as a barrier to discovery indicates how little information is available about the potential positives and negatives of any solution that is advanced to counteract the perceived deficiencies of the pretrial system. It seems axiomatic that it would be highly desirable to conduct the needed research and analysis of the entire range of relevant considerations before the system succumbs further to the current pressure for more frequent and earlier pretrial dispositions.

If litigation costs are to be considered in applying the pleading and motion-to-dismiss rules, *all* costs should be taken into account, including those borne by plaintiffs, the expenditure of system resources, and the loss to society from any impairment of important public policies as a result of non-enforcement. The costs to defendants—in particular, large corporate and government entities—have been decried frequently.[244] *Twombly* justified establishing

judges and that, moreover, the Rules should not be revised to encourage additional case management by those same judges." LEE & WILLGING, *supra* note 203, at 62–64.

243. One of the nation's most highly regarded district judges and a long-term participant in the rulemaking process offers two "suggestions" to enhance judicial involvement in cases that require judicial supervision. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 240–43 (2010). In Epstein, *supra* note 172, the author—who is quite sympathetic to the supposed burdens of contemporary complex litigation on the defense—argues that judicial involvement in managing discovery on defendants is essential without acknowledging that relevant tools and practices are in place and being used by many judges. *See id.* at 26 ("[T]he process of discovery in large cases needs extensive management . . . .").

244. *E.g.*, *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, *supra* note 53, at 33, 46–53 (statement of Gregory G. Katsas, former Assistant Att'y Gen., Civil Division, U.S. Department of Justice). A number of corporate representatives forcefully argued for the reduction of litigation costs at the Duke Conference but again, they only focused on their companies' costs.

plausibility pleading on the basis of assumptions about excessive discovery costs for these organizations and the threat of extortionate settlements.[245] Justice Souter asserted that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases,"[246] regardless of the merits. And, of course, a corporate defendant faces pressures beyond the purely monetary, in terms of disrupting a company's operations, diminishing the value of its assets, decreasing investor confidence and stock prices, impairing its reputation, and intruding on pending business negotiations.

How much of this is fact? How much is fiction? Large expenditures do characterize many complex cases that drag on for years. And it is true that litigants may face significant costs. But the extent of the costs may be somewhat overstated—or partially self-inflicted—and certainly they are not universally imposed across the litigation universe. The excessive costs of discovery cited in *Twombly* seem to occur in a rather small percentage of cases. Indeed, according to work done for the Advisory Committee more than a decade ago, 40 percent of federal cases employed no discovery at all, and a "substantial percentage" of the remaining docket employed very little.[247] According to that same report, however, discovery may have constituted 90 percent of the costs in cases in which it was actively employed,[248] and discovery still generated 50 percent of litigation costs overall.[249] These figures may be questioned, and more recent surveys suggest significantly lower percentages.[250]

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245. As the Court stated in *Twombly*,

> [w]e alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc.* v. *Broudo* when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "a largely groundless claim" be allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

246. *Id.* at 559. The *Twombly* majority's concerns recently were repeated by Judge Posner in his dissent in *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at *9 (7th Cir. July 30, 2010) (Posner, J., dissenting in part).

247. Memorandum from Judge Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Judge Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure, *supra* note 226.

248. *Id.*

249. *Id.*

250. *See, e.g.*, LEE & WILLGING, *supra* note 203, at 38–40 (reporting that lawyers who primarily represent defendants estimate that discovery accounts for 27 percent of total litigation costs, whereas lawyers who primarily represent plaintiffs estimate that discovery accounts for 20 percent of total litigation costs).

It may be true that some of these costs, in an amount that remains unquantified, may be attributable to meritless suits and excessive discovery requests, but those costs may be smaller than claimed given the advent of judicial control through case management, rule amendments limiting discovery, and the techniques the system has developed for early termination. And how much of the overall cost reflects unnecessary or marginal resistance to discovery requests and motion practice billed at the high hourly rates typically charged by the major law firms that usually represent defendants in large-scale cases?[251] The truth is that no one really knows. The empirical research has not investigated that deeply and it may prove difficult to reach beyond the impressionistic.

Because there is no common definition of what is abusive or frivolous or excessive or purely tactical—let alone agreement on how frequently any of those types of discovery and motion activities occur—greater study is necessary to distinguish unavoidable high costs from those caused by inappropriate litigation behavior. The data that does exist—namely recent research by the Federal Judicial Center[252]—does not bear out Justice Souter's major assertion that discovery costs push defendants to settle.[253] In fact, the majority of the Center's survey respondents reported that discovery costs had no effect on the likelihood of settlement,[254] suggesting that the assumptions at the heart of *Twombly* may well wrong. Nor did the Court acknowledge the myriad factors other than discovery expense that can lead an economic or governmental entity to settle—for example, the maintenance of institutional secrets, the existence or desire to prevent the generation of adverse precedent, the distraction of employee energy, or the avoidance of reputational injury. Moreover, no one knows what is meant by excessive discovery cost. There is no established common ground for this metric; indeed, it

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251. *See, e.g.*, Nelson D. Schwartz & Julie Creswell, *Who Knew Bankruptcy Paid So Well?*, N.Y. TIMES, May 2, 2010, at B1 (reporting hourly billing by partners of $1,000 or more and charges of $500 or more an hour for second-year associates in major bankruptcy cases).

252. LEE & WILLGING, *supra* note 203.

253. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

254. LEE & WILLGING, *supra* note 203, at 32, 33 (finding that 49.8 percent of plaintiffs attorneys and 52.6 percent of defendant attorneys surveyed reported that the cost of discovery did not affect the likelihood that a case would be settled). *But see* AM. BAR ASS'N SECTION OF LITIG., *supra* note 56, at 145 (reporting that 97.5 percent of survey respondents answered that overall discovery costs were somewhat or very important factors when considering whether to settle a matter).

must be evaluated contextually. The matter at issue in many cases—whether it be economic or ideological—may justify a substantial investment in discovery by the contestants. The resulting expenditures thus may not be excessive, even though the dollar amount is large.

Thus, it may be that the concern about costs voiced by the *Twombly* Court is somewhat exaggerated. The Federal Judicial Center's preliminary study regarding attorneys' experiences with discovery and related matters sheds an interesting light on the question of cost; it indicates that expenditures for discovery, including attorneys' fees, in the surveyed matters amounted to between 1.6 and 3.3 percent of the total value at stake in the litigation.[255] Although the significance of these numbers may be debated and the research to date has not explored the depths of what needs to be analyzed, they certainly do not seem to be the litigant-crushing figures *Twombly* indicated they might be. After all, real estate brokers (and others) charge a higher percentage for their services.

Although discovery can be enormously expensive in a small percentage of federal cases, *Twombly* and *Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. For the great body of litigation, *Twombly*'s and *Iqbal*'s cure may be counterproductive and worse than the supposed disease. As the Judicial Center's work product indicates, anecdotal evidence of cost, delay, and abuse can depart widely from the reality experienced by most litigants.[256]

Other aspects of the Center's study are sobering: overall satisfaction with the pretrial process is higher and discovery costs appear more reasonable than the apocalyptic rhetoric has suggested. A majority of survey respondents disagreed with the idea that "discovery is abused in almost every case in federal court."[257] By and large, survey respondents were satisfied with the current levels of case management,[258] and over half reported that the costs and extent of discovery were the "right amount" in proportion to the economic and

255. LEE & WILLGING, *supra* note 203, at 2. Admittedly these numbers are dependent on what it meant by the value at stake and on the accuracy of the recollections about expenses of the surveyed attorneys.

256. *Id.* at 27, 35–41.

257. *Id.* at 71.

258. *Id.* at 67–68.

substantive law values involved in their cases.[259] Some surveys of lawyer impressions on these matters are somewhat at variance with the Judicial Center's findings, however,[260] which only emphasizes the need for further work.

Not only are claims of excessive litigation costs questionable, but there is also no litmus test to identify extortionate settlements or measure how frequently they occur. Indeed, the wide range of factors that motivate settlements make assertions about extortion extremely speculative.[261] It is reasonable to assume that litigation cost is a factor that may encourage or induce one or more parties to settle in some cases. Similarly, litigation cost is a factor that may discourage a citizen from asserting a potentially meritorious claim at all.

Even more elusive are the benefits that accrue to society as a result of discovery that furthers the private enforcement of important public policies (some statutorily or constitutionally based), promoting deterrence, increasing oversight, providing transparency, and avoiding the expenditures that otherwise might be needed to support government bureaucracies.[262] The diminution of these benefits

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259. *Compare id.*, *with* AM. BAR ASS'N SECTION OF LITIG., *supra* note 56, at 145 (citing discovery costs as a very important factor when attorneys decide whether to settle a matter). The Federal Judicial Center also has issued another study identifying the factors associated with higher litigation costs and confirming that very predictable causes are dominant. LEE & WILLGING, *supra* note 203, at 1–6.

260. *See, e.g.*, AM. BAR ASS'N SECTION OF LITIG. ET AL., SUMMARY COMPARISON OF BAR ASSOCIATION SUBMISSIONS TO THE DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE § 3 (2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/0F0CC2092ECAAEE2852577130049EBDD/$File/ABA%20Section%20of%20Litigation%2C%20Comparison%20of%20Duke%20Conference%20Recommendations.pdf (discussing various legal organizations' proposed changes and additions to rules governing pre-litigation discovery).

261. Nonetheless, the speculation is repeated. For example, in *William O. Gilley Enterprises v. Atlantic Richfield Co.*, 588 F.3d 665 (9th Cir. 2009), in the course of affirming the dismissal of an entity's claim, the court remarked, "this is the type of '*in terrorem* increment of the settlement value' that the Supreme Court mentioned in *Twombly*." *Id.* at 668 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007)). Ironically, the fact that only a small percentage of legally cognizable injuries—private or public—are ever the subject of litigation (or any form of remediation) goes comparatively unnoticed. Perhaps the more significant problem is underenforcement, not hyperactivity or meritless litigation.

262. It has been suggested that the plausibility standard may encourage manufacturers to hide evidence, thereby impairing the incentives state tort actions generally provide to improve product safety. William Funk, Thomas McGarity, Signey Shapiro & James Goodwin, *Plausibility Pleading: Barring the Courthouse Door to Deserving Claimants* 1–19 (Ctr. for Progressive Reform, White Paper No. 1005, May 2010), *available at* http://www.progressivereform.org/articles/Twombly_1005.pdf.

represents a "cost" to society. Unfortunately, the empirical work done so far on the expense of litigation, including the submissions to the Duke Conference, only explores one side of the cost-benefit equation.

In addition, the costs incurred by plaintiffs are noted infrequently; indeed, they are not discussed anywhere in *Twombly*, *Iqbal*, or the empirical studies presented at the Duke Conference.[263] But they are no less important from a policy-formation perspective. As already noted, the defense bar and its clients are not always innocent victims of frivolous litigation or abusive conduct; indeed, defense attorneys—who usually are compensated by the hour at rather handsome levels and paid contemporaneously—frequently protract pretrial processes for various reasons, including to enhance their fees, to avoid reaching trial (particularly jury trial), and to coerce contingent-fee lawyers, who often have cash-flow difficulties and resource limitations, into settlement.[264] The different litigation economics of the respective parties and the prospect of early termination encourage resource-consumptive practices by defendants in many situations.[265] Given the present environment, contingent-fee lawyers usually must expend large amounts of time and money to

263. The closest the Court came in *Twombly* to discussing the plaintiffs' costs is when it found that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery." *Twombly*, 550 U.S. at 558. The Court alluded to the potential cost of throwing out a claim before discovery. After that, it only discussed the burdens of allowing a claim to proceed to discovery that would be imposed on a defendant. The Court in *Iqbal* only discussed the costs imposed on defendants: "The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

264. The existing studies of federal litigation costs do not break them down sufficiently to determine what portion is attributable to excessive activity by plaintiffs, particularly with regard to discovery requests (occasionally referred to as "pushing"), and which portion is attributable to defendants' motion practice and resistance to plaintiffs' attempted discovery (occasionally referred to as "tripping"). Although the effects of hourly billing are adverted to in general terms, no attempt has been made to calibrate them.

265. In *Twombly*, the plaintiff sought to limit the scope of the initial discovery and proposed a phasing approach—a proposal that ultimately was rejected by the Court. *Twombly*, 550 U.S. at 593 (Stevens, J., dissenting). At oral argument, counsel for the plaintiff made it clear that the first phase of discovery would be limited to the conspiracy claim, which would be followed by a summary judgment motion that would establish the claim's plausibility or terminate the case. Transcript of Oral Argument at 54, *Twombly*, 550 U.S. 554 (No. 05-1126) (statement of Mr. Richards), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1126.pdf.

develop a case of any complexity before instituting litigation. This often requires the retention of experts and investigators. Expenses mount as plaintiffs must fend off sequential complicated pretrial motions, including some that could terminate the case or necessitate an interlocutory appeal.[266] These financial realities, which relatively few plaintiffs' firms can surmount, plus judicial scrutiny and the deterrent effect of possible sanctions, strongly discourage them from undertaking a sizable matter lacking a significant factual or legal underpinning.[267]

The efforts of contingent-fee lawyers are not free goods; they have value and must be husbanded. For the reasons just noted, rational plaintiffs' attorneys are very cost- and time-conscious. To avoid expenditures that may never be reimbursed and to prevent the loss of potentially more attractive alternative professional opportunities, they generally avoid marginal motions and screen potential cases using their own version of plausibility before taking on matters. Nor do contingent-fee lawyers want to conduct unnecessary depositions or be inundated with documents or e-discovery to hunt for the proverbial "smoking gun." These restraints have become increasingly important as summary judgment has been invoked and granted more freely; they will become even more pronounced with the added burdens of *Twombly* and *Iqbal* and a growing awareness of the high dismissal rate in many substantive contexts. As a result, it will be harder for plaintiffs to find representation, even for potentially meritorious claims. Additionally, prospective plaintiffs and their attorneys will have to expend greater resources investigating claims prior to filing in the hope of being able to plead enough to survive

266. *See* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1422 (1992) (discussing the difficulties for "attorneys and litigants who possess less money, time, and information").

267. Two academic writers have argued that the unavailability of effective legal services, which they believe has been magnified by *Twombly* and *Iqbal*, falls most heavily on what one calls "social out-groups," *see* A. Benjamin Spencer, Essay, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 361–62, 366–70 (2010), and the other refers to as "the vanishing plaintiff," by which she means those who have been marginalized by various social and economic factors, *see* Brooke D. Coleman, *Vanishing Plaintiff* 1 (2010) (unpublished manuscript) (on file with the *Duke Law Journal*). *See generally* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1312–22 (2005) ("The more likely explanation rests in . . . symbolic differences in the nature and organization of the legal representation of individual and organizational litigants.").

under the higher standard. This again means that some meritorious claims never will be brought, leaving certain injured plaintiffs uncompensated, because prospective litigants or their counsel may not have—or be willing to risk—the resources needed to investigate sufficiently prior to institution to survive a motion to dismiss. Consequently, they will never gain access to critical information held by possible defendants or third persons.[268]

In some instances, what this means is that contingent-fee lawyers may bear a larger burden of unreimbursed costs as they investigate more grievances but then decide that the risks appear too great to institute cases that they fear will then be dismissed on the complaint. All of this must be viewed against the palpable disparity in the legal services available to individual plaintiffs and institutional defendants. As a practical matter the Supreme Court simply has transferred some of the expenses typically borne on the right side of the "v." to the left side in the form of imposing higher costs for entering and surviving in the system. And the question remains unanswered: to what extent does this inhibit individuals from asserting their rights and cause collateral damage to various other system values?

Whereas the *Twombly* Court refers to the possibility that plaintiffs can extort settlements from defendants through threats of expensive discovery,[269] there is no recognition in the opinion that the combination of economic costs of a more demanding pleading regime, increased grants of motions to dismiss, and summary judgment barriers may skew downward plaintiffs' valuations of their claims. A plaintiff's pretrial bargaining position is related directly to the probability of gaining access to merit discovery and making the threat of trial realistic. Both are diminished by the post-*Twombly* and *Iqbal* magnification of pretrial disposition opportunities for defendants,[270]

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268. *See* Stephen J. Choi, *The Evidence in Securities Class Actions*, 57 VAND. L. REV. 1465, 1472–73, 1499 (2003) (discussing the chilling effect of discovery reforms on meritorious litigation). Finding "confidential witnesses" and "whistleblowers" is now part of a plaintiff attorney's preinstitution job description.

269. *Twombly*, 550 U.S. at 558–59. This and related theses are debunked in Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

270. "Similarly, the denial of a defendant's motion for summary judgment may give the defendant an incentive to make a reasonable settlement offer, rather than face the risk and expense of going to trial." EDWARD J. BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 325–26 (2d ed. 2000); *see also* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("More important, the nature of our civil

potentially obliging plaintiffs to settle earlier and for less than the merits of their cases otherwise might dictate. If settlements are procured because the system can be employed to wear one side down, that is its own form of extortion.

If research and analysis is to address litigation cost and delay intelligently, the totality of party expenses, consumption of system resources, and diminution of societal benefits must be understood. Again questions abound. Realistically, which private and public costs can be ameliorated? By what procedural approach—heightened pleading, dispositive Rule 12(b)(6) or Rule 56 motions, effective judicial case management, or some combination of them—might these costs be reduced? And which techniques better serve the "just, speedy, and inexpensive" triad of objectives set out in Federal Rule 1?

Appraising the system overall, it is unclear that aggressive Rule 12(b)(6) and Rule 56 filtration will reduce costs in the segment of cases that use discovery extensively. The savings achieved by early termination may not offset the increased costs likely to be incurred as a result of more extensive preinstitution activities and fact-based pleading, the increased number of dismissal and summary judgment motions, and, potentially, the increased number of appeals from judgments following early terminations. Increased pretrial dispositions generate their own time and resource expenditures that have not been measured. One can assume that not only will the two motions be made with greater frequency but that adversarial combat over them will intensify, ultimately consuming more litigant and court time than in the past. Expanding on that theme, when a Rule 12(b)(6) motion is granted, the plaintiff is likely to seek leave to replead,[271] and the resulting skirmishes about that and collateral Rule 15 amendment matters will generate their own expenditures. Should judgment be entered following a denial of leave to replead or following a final dismissal of the amended pleading when leave has been granted,

process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate.").

271. *See* 5A WRIGHT & MILLER, *supra* note 3, § 1357 ("Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected.").

appeals also will generate expenses.[272] Similar questions have been raised about the supposed savings from the Supreme Court's three 1986 decisions enhancing the summary judgment motion.[273]

Calculating party, systemic, and societal costs is not an easy task, but a thoughtful analysis that takes account of all the litigation players and expense elements—as well as the consumption and allocation of judicial and other public resources—is necessary to reach a reasoned conclusion about the heft of the cost and delay problems. The research efforts undertaken by the Federal Judicial Center are to be applauded, and one hopes they will be continued with a much more embracive field of vision so that even more sophisticated data is generated and other inquiries undertaken to understand these matters. Without these efforts, dramatic changes in federal practice will continue to be made in an information vacuum that obscures the true costs of litigation and the net gain—or loss—produced by elevated-pleading and pretrial-motion practice.

Beyond the difficulty of capturing the necessary data, it is even harder to monetize the soft, qualitative values of citizen access to the federal courts, merits adjudication, and the multifarious benefits of private enforcement of public policies. Again, for example, no one knows how to put a dollar figure on the societal loss when a meritorious discrimination, consumer-fraud, or antitrust case is terminated prematurely or never is instituted because of the deterrent effect of today's more stringent pleading and motion regime. And, of course, no one knows how many cases fitting those descriptions exist.

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272. Some commentators have suggested that the *Twombly-Iqbal* plausibility standard will consume more time and expense and lead to more appeals. *See* McMahon, *supra* note 76, at 868 ("The Supreme Court may have thought it was providing relief to the federal docket by making it easier to dismiss complaints, but that will not be the result. Instead, district courts will have to entertain more motions to dismiss from defendants emboldened by *Twombly*, and they will spend more time deciding those motions."); *see also* Jason Bartlet, *Into the Wild: The Uneven and Self-Defeating Effects of* Bell Atlantic v. Twombly, 24 ST. JOHN'S J. LEGAL COMMENT. 73, 109 (2009) (discussing how dismissals with prejudice under the *Twombly* pleading standard may increase cost and delay in contravention of its intended purpose).

273. For a discussion of the need to investigate the claims of cost savings resulting from a more powerful summary judgment motion, see Miller, *supra* note 32, and see also Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875 (2006). *See generally* Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39 (2008) (applying an economic framework to the choice between pleading and summary judgment as points at which a claim can be dismissed).

What is known is that these matters have not been accorded meaningful attention. Given the current state of procedural flux and its direction, a wide-angle evaluation of the pretrial process must replace today's telescopic focus on the burdens on defendants. That seems a necessary precursor for developing balanced and workable solutions. In light of the faulty premises of *Twombly* and *Iqbal*, perhaps the implementation of those cases and further procedural change should wait until far more knowledge is acquired and analyzed.[274]

C. The Importance of Access to the Courts, Deterrence, and the Private Enforcement of Public Policies

The Court's establishment of plausibility pleading, with its emphasis on the need for factual allegations, has a direct impact on the accessibility of the federal courts to the citizenry in all categories of cases. To a degree not yet determined, it will chill a potential plaintiff's or lawyer's willingness to institute an action. And even if one is started, it will result in some possibly meritorious cases being terminated under Rule 12(b)(6), thereby reducing citizens' ability to employ the nation's courts in a meaningful fashion. Even though some federal judges may have deviated from notice pleading in the years preceding *Twombly*, those cases do not reflect the design of the pleading-and-motion structure promulgated in 1938, or the one described by the Supreme Court in *Conley* and the several other Supreme Court cases that followed it, or the one applied by most federal courts for decades after the *Conley* decision. And insisting on more pleading detail—on pain of dismissal—is not consistent with the view of American courts as democratic institutions committed to the resolution of civil disputes on their merits in an egalitarian, transparent fashion. Nor are pleading barriers consistent with the view that the federal courts are instruments for the private enforcement of public law and policy, an objective that appears to have been in eclipse—or at least in the shadows—in recent years.[275] What seems to be increasingly overlooked is that the modes of civil

274. At this juncture a moratorium of this type probably requires congressional intervention. *See* discussion *infra* Part III.C.

275. *See* Robert J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1531–32 (2008).

procedure are the mechanisms for operating an important societal regulatory system.

Many of the cases on federal court dockets involve purely private matters that do not affect anyone other than the actual parties—the simple automobile fender-bender or breach of contract dispute being paradigms. But many of these cases have stare decisis value. Very significantly, many also have important deterrent implications, as in the product-defect and pharmaceutical fields. An excellent illustration of this therapeutic effect is provided by a report based on responses from the risk managers of 232 major American corporations regarding their litigation and legal cost experience:

> As a management function, product liability remains a part-time responsibility in most of the responding firms. Where product liability has had a notable impact—where it has most significantly affected management decisionmaking—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.[276]

In this category of purely private litigation, *Twombly* and *Iqbal* probably have had a negative impact on citizen access and the deterrent value of enforcing the substantive law effectively. These effects of the two decisions in private cases were not acknowledged by the Court; indeed, the expressions of concern in the majority opinions about costs, extortionate settlements, and burdens placed on governmental officials suggest these matters did not weigh heavily in the thinking of those Justices who joined in them. The Court's preoccupation with the supposed deleterious effects of litigation on defendants may well reflect or be a by-product of the early-termination mentality of significant segments of the federal judiciary that has developed in the last quarter century.

Standing on a different footing are the myriad federal cases that have wider application because of either the range of persons directly or indirectly affected, or the nature of the underlying conduct at issue. These include a significant array of matters—such as actions involving constitutional, federalism, and other core systemic principles; federal

276. Nathan Weber, *Product Liability: The Corporate Response* (Conf. Bd., Rep. No. 893, 1987), *as reprinted in* 133 CONG. REC. 20,169 (1986). *See generally* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (reviewing empirical studies of tort law efficacy).

statutes; governmental conduct; and judicially created private rights of action—that can have significant public consequences. Many class and mass actions fall into this category. Indeed, in some respects these cases represent a very significant aspect of the contemporary civil workload of the federal courts. This category is not limited to disputes arising under federal law. On the diversity-of-citizenship side of federal court dockets,[277] or sometimes as a result of the availability of supplemental subject matter jurisdiction,[278] there are numerous state law claims—often substantively parallel to federal claims—raising important public policy issues of state law that are heard in the federal courts.

If *Twombly* and *Iqbal* inhibit the assertion or prematurely dispose of claims of this character, then the new pleading-and-motion regime operates at cross-purposes with the enforcement of policies the federal court system is intended to support. To be sure, in the context of judicially created public and private rights and remedies, federal courts have considerable latitude in defining and redefining their contours and the conditions for their assertion. But even in these categories, it seems inappropriate for the Court to have restricted the effective assertion of those rights by altering the pleading burden and the motion to dismiss in the name of protecting defendants from hypothesized litigation costs and possible settlement pressures without any acknowledgement of the impact that restriction might have on the policy objectives at issue in the litigation.[279]

The cases that warrant the greatest concern and consideration after *Twombly* and *Iqbal* are those that advance a statutorily authorized, private compensatory regime and those that are designed to have a regulatory effect by rectifying or stopping activity proscribed by a federal statute or federal common law.[280] These

277. *See* 28 U.S.C. § 1332 (2006). The scope of these actions was enhanced by the federalization of the bulk of class actions by the Class Action Fairness Act of 2005. *Id.* §§ 1332(d), 1453.

278. *Id.* § 1367.

279. The policy objectives were antitrust enforcement in *Twombly* and remediation of possible constitutional violations by high-ranking government officials in *Iqbal*.

280. The private enforcement of public policy seems to have its roots in the legislative recognition of *qui tam* actions. False Claims Act, 31 U.S.C. § 3730 (2006). The development of a public-interest bar seeking social change through litigation was traced to the Supreme Court's seminal desegregation decision, *Brown v. Board of Education*, 247 U.S. 483 (1954), in Stephen C. Yeazell, Brown*, The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977–84 (2004). The author goes on to argue that *Brown* also motivated the

provisions often represent a constitutional or congressional determination that private civil actions are necessary for one or more well-understood reasons—for example, securing deterrence; providing compensation for injured citizens; and addressing concerns that the relevant regulators lack sufficient resources, or may have come under the influence of those they are supposed to regulate, or have fallen into a period of inattention, desuetude, or worse.[281] The private enforcers—appropriately dubbed private attorneys general[282]—are effectuating public policy. In a sense, it is a form of privatized regulation of commercial and governmental conduct. Congress intended that these plaintiffs and the issues they raise be given a meaningful day in federal court.

The private enforcement model is not without its critics. Encouraging self-interested clients and their lawyers to pursue the public interest risks promoting bounty hunting. And the propriety of leaving the formation of public policy to private litigants and episodic judicial decisionmaking, rather than to public regulatory agencies,

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deregulation of the bar, for example, by recognizing a lawyer's constitutional right to advertise, which then led to what he sees as the "reconstitution of the plaintiffs' bar" and the growth of a cadre of lawyers seeking a more profitable practice by "combin[ing] strands of self- and public interest." *Id.* at 1988; *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that adjudication and civil procedure can usefully be analyzed as elements of a larger system of public regulation); Funk, McGarity, Shapiro & Goodwin, *supra* note 262, at 8–9 (describing *Twombly*'s impact on plaintiffs harmed by unregulated products and activities).

281. Consider the report that a number of SEC officials spent hours watching and downloading pornography on government computers before and during the financial system's recent crisis. *See, e.g.*, Nico Hines, *Wall St Regulators Spent Hours Watching Porn Instead of Monitoring Crisis*, TIMES ONLINE (Apr. 23, 2010), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7106889.ece. Even more recently there has been a strong suggestion that the ecological disaster caused by an oil release in the Gulf of Mexico can be traced to various forms of inattention and misconduct by personnel of the federal Minerals Management Service of the Department of the Interior. Thus, there are proposals to reorganize that agency "to end a decades-old relationship between industry and government that has proved highly profitable—and some say too cozy—for both." John M. Broder, *U.S. to Split Up Agency Policing the Oil Industry*, N.Y. TIMES, May 12, 2010, at A1.

282. The designation appears to have its origin in *Associated Industries of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). *See generally* Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511 (2001) (highlighting the predictive effect of private attorneys general); Richard B. Stewart & Cass A. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (discussing the role of private citizens to hold government entities accountable).

may be questionable.[283] But for several reasons, heightened pleading rules applicable to all cases are not an appropriate solution to possible private-enforcement hyperactivity. First, the points raised by the critics have limited or no relevance to the public interest bar. Second, in many, if not most, instances the plaintiff and his or her lawyer are acting out of a complex mixture of public and private motivations that are hard to quantify or separate, but their efforts have a social value.[284] Third, federal judges, through case management, control of attorneys' fees, and their obligation to evaluate settlements in many situations can sand off the rough edges of the practice. And, fourth, in many contexts the loss of private enforcement will result in little or no enforcement of important public policies.

The characteristics of many of these private enforcement regimes are prescribed by Congress or state legislatures, often in terms of the perceived importance of the policies to be protected and often to incentivize private actors and their lawyers to invest in the litigation process. Thus, special rules of standing, evidence, burdens of proof, and limitations periods may be formulated and defenses eliminated to facilitate an enforcement action.[285] For example, to make utilization of certain statutory rights of action economically feasible, Congress often provides fee awards for—and occasionally offers multiple damages to—a successful plaintiff, in order to encourage contingent-fee attorneys and the public interest bar to take up the cudgels.[286]

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283. *See generally* John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983) (discussing incentive problems within the private–attorney general system); Bryant Garth, Ilene N. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 CALIF. L. REV. 353 (1988) (reviewing empirical data concerning private attorneys general); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005) (analyzing constitutional questions associated with suits by private attorneys general).

284. *See generally* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129 (2004) (recognizing a spectrum of private attorneys general, each of which mixes public and private functions in particular ways).

285. *See generally* Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 828 (2008) (providing examples of structural accommodation of policy attempts to address larger problems through citizen suits).

286. *See id. See generally* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 223 (2001) (noting that the 1976 Antitrust Improvements Act authorized treble damages to plaintiffs and included a fee-shifting provision); Frances Kahn Zemans, *Fee Shifting and the*

Conversely, Congress occasionally imposes restraints on private actions to prevent excessive activity by the private bar, as it did in enacting the Private Securities Litigation Reform Act in 1995.

Although several of these private rights of action are long standing,[287] such as the qui tam aspects of the False Claims Act of 1863,[288] they blossomed and multiplied in the second half of the twentieth century in response to the civil rights movement and a number of the other pressures of that period, many of which were designed to further social and economic equality and fairness. Each of them is an expression by Congress of its intent to promote the private enforcement of national policies.[289] A great number of these statutes were enacted against the backdrop of the liberal ethos of the Federal Rules—especially their simplified notice pleading as prescribed by Rule 8(a)(2) and the Supreme Court's construction of it in *Conley*, limited grants of motions to dismiss, relatively uninhibited discovery, and highly restrained summary judgment practice. The willingness of citizens to mobilize to enforce their legal rights obviously depends upon the receptivity of the process available for doing so. Congress presumably well understood that. But the last quarter century has radically changed the landscape. As Judge Patrick E. Higginbotham has observed,

> Recent events have laid bare the consequences of under-enforcement of federal regulatory schemes. It seems odd to now impede their efficacy. Rather, control of access to discovery as a step back from the underpinnings of the 1938 rules must be balanced to serve the role of private attorneys general litigation. That is, a gate must be able to screen by merit. Perhaps we could move toward an

Implementation of Public Policy, 47 LAW & CONTEMP. PROBS. 187, 195–96 (Winter 1984) (noting that fee shifting is mandatory under the Interstate Commerce Act and the Clayton Act, and that courts have regularly exercised their discretion to implement fee shifting under Title II and Title VII of the Civil Rights Act of 1964).

287. *See, e.g.*, Clayton Antitrust Act of 1914, 15 U.S.C. § 15 (2006); Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).

288. False Claims Act (Lincoln Law), 31 U.S.C. §§ 3729–3733 (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

289. An excellent illustration is the Civil Rights Attorneys' Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2006)). The Act was Congress's reaction to the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which reaffirmed the American rule, leaving litigation costs where they fall absent a congressional authorization to shift fees in a private attorney general context. *See* S. REP. No. 94–1011, at 1, 4–6 (1979), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911–13.

> initial opening to limited discovery followed by a look at likely merit for greater or full access.[290]

The inhibiting effect of *Twombly* and *Iqbal*, combined with the economic realities discussed in the preceding Section, significantly reduce the pool of potential enforcers of federal public policies through civil litigation seeking personal compensation.[291]

Although it must be recognized that the federal procedural system is, as it must be, constantly evolving and that the federal judiciary, including the Justices of the Supreme Court, are entrusted with the interpretation and application of the Federal Rules, the shortfall of *Twombly* and *Iqbal* is the Court's failure to acknowledge the potential those decisions have to impair meaningful access to the federal courts. This is especially worrisome in cases involving important issues—such as constitutional values and the private enforcement of federally and state-created rights—and the concomitant shift in the allocation of the litigation-resource burden from defendants to plaintiffs these two decisions produce. The result is likely to operate in derogation of effectuating rights and policy norms established by Congress and state legislatures.[292] As Judge Higginbotham intimates, the problem today may well be under-enforcement not over-enforcement.

D. The Need for Further Research and Definition

Given the various competing values at stake, and accepting the need for some form of continuing judicial gatekeeping or filtration, a question remains: what is the best mechanism for achieving that objective—pleadings, motion practice, summary judgment, or case

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290. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. (forthcoming Dec. 2010) (manuscript at 6–7) (on file with the *Duke Law Journal*).

291. One author argues persuasively that these inhibiting factors fall most heavily on various groups of marginalized Americans, whose claims—if they could be addressed—would be most suited to perform the regulatory function of civil litigation. She believes that the new restrictive procedural ethos, particularly with regard to pleading, deprives society of the social utility of those claims. Coleman, *supra* note 267, at 1.

292. The significant drop in employment discrimination cases and the high rate of dismissal of civil rights cases noted by some must, to some degree, reflect the chilling effect of the procedural restrictions in recent years. *See, e.g.*, *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, *supra* note 53; Schneider, *supra* note 44, at 531 (pointing out that the Court changed the pleading standards without any action from Congress); Mary Pat Gallagher, *Where Have all the Employment Cases Gone?*, NAT'L L.J., Oct. 6, 2008, at S19.

management? No one knows, and the question cannot be answered rationally—let alone with confidence—without a great deal of study. And even after that is done, reactions to the subject and any resultant changes may be the product of intuition, philosophy, or self-interest as much as they may be the result of research. But the latter is essential.

The Court's dramatic shift in attitude regarding judicial management in *Twombly* reflects the current divergence in philosophy on how district courts can best handle the pretrial process. With *Twombly*, the Court wiped the slate clean, starting anew with plausibility pleading as the system's initial gatekeeper, rather than building on the existing tools of case management and the more vigorous post-1986 summary judgment motion. But change of that magnitude should have been based on a much greater understanding of the implications of the tectonic shift that has occurred in the character of federal civil litigation and procedural practices in recent decades, and on much more clarity about the utility of pleading practice and the actual quality of pretrial management. Data of a highly sophisticated character need to be gathered and analyzed to determine what the deficiencies of these techniques are, and what they are not.[293] Who was closer to the mark, Justice Souter in *Twombly* or Justice Breyer dissenting in *Iqbal*?

Despite the Rules Committee's, the Supreme Court's, and Congress's pre-*Twombly* endorsement of case management as an appropriate method to contain cost and delay, a few commentators have argued that case management is doomed to fail on both theoretical and practical grounds.[294] Practical objections reflect the

293. Asking for impressions about whether litigation is "too expensive" or "takes too long" is of little value, because few, if any, attorneys would say the process is "inexpensive" or "not long enough." *See, e.g.*, AM. BAR ASS'N SECTION OF LITIG., *supra* note 56; AM. COLL. OF TRIAL LAWYERS, *supra* note 54, at 17. For sharp criticism of the conclusions and principles drawn from the second of the cited surveys, calling them not supported by the survey results, see J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL, Nov. 2009, at 52.

294. *See* Bone, *supra* note 52, at 900–01 (suggesting that *Twombly*'s skepticism about case management might be justified). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (arguing that case management was not proven to be effective and that it may harm the standards of impartial adjudication and hinder constitutional rights such as due-process safeguards). In JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996), the authors reported little effect on time and cost but did

view that judicial resources are limited and assert that some district judges spend little time managing cases or are insufficiently energetic in maintaining the district court's involvement.[295] Indeed, management is said to be left largely in the hands of magistrate judges in many instances.[296] Philosophical objections range from a view that the function of judges is to adjudicate, not manage, to a concern about a loss of judicial impartiality and the possible deleterious effects judicial management may have on aspects of the adversarial system.[297] Despite these criticisms, the managerial role of federal judges has been reaffirmed and expanded over the years and judicial involvement is deemed useful—if not essential—by practicing litigators.[298]

Judge Easterbrook's 1989 article—the basis for Justice Souter's rejection of judicial management in favor of plausibility pleading in *Twombly*—contended that it would be impossible for judges to separate abusive discovery from extensive and "impositional"[299]

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conclude that certain management procedures could reduce time to disposition by 30 percent with no adverse effects.

295. *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96–97 (2009) ("The Rules permit, but do not require[,] that judges take an active role in case management, and judges and litigants have economic and social incentives to minimize judicial participation. As a result, courts tend to involve themselves only infrequently in the day-to-day administration of cases.").

296. *See* Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) ("Abuse there is, but it is more likely to occur in a case supervised by a district judge, whose primary responsibilities lie in trying cases and managing—somehow—a huge docket, than in a case supervised by a magistrate, whose most challenging and responsible task is, precisely, to manage discovery in big civil cases.").

297. *See, e.g.*, Resnik, *supra* note 294, at 376–78 ("[T]he restraints that formally circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review."); *see also* Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297, at *10 (7th Cir. July 30, 2010) (Posner, J., dissenting in part) (discussing the difficulty of managing discovery when much of the process is delegated to magistrate judges who "can have only an imperfect sense of how widely the district judge would want the factual inquiry . . . to roam"). *See generally* Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137 (1994) (arguing that unwise case management harms the adversarial process).

298. See *supra* notes 205–43 and accompanying text.

299. *See* Easterbrook, *supra* note 226, at 637–38 ("Stated differently, an impositional request is one justified by the costs it imposes on one's adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process.").

discovery requests made by attorneys practicing in good faith.[300] He concluded that "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."[301]

Although some contemporary critics of case management continue to cite Judge Easterbrook's theoretical assumptions,[302] there has been little research conducted that confirms his conclusions, let alone research that systematically measures the amount or consequences of any management shortfall.[303] Even less effort has been devoted to exploring and explaining how today's judicial management practices might be enhanced. Moreover, the article is now more than twenty years old. Its publication preceded the effects of the revolution in summary judgment practice, the narrowing amendments to the discovery rules, the district court expense-and-delay plans, the local management rules that have emerged following the Civil Justice Reform Act, the great growth in consciousness about case management throughout the profession, the extensive control over discovery now commonly exercised by district judges, and the traction and sophistication the art of management has achieved under the 1983 and 1993 amendments of Rule 16 and the sequential editions of the *Manual*.[304] It also preceded the growth in extremely complex litigation involving numerous new technologies and scientific developments, as well as electronic discovery. These phenomena seem to call for more—and better—judicial management, not less. Justice Souter's reliance on that article simply is not persuasive,

300. *Id.* at 641 ("Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish. . . . Indeed, many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other, and both are in the interests of the lawyer's client.").

301. *Id.* at 638. Note that this is the same passage cited in *Twombly* to justify the disparagement of case management.

302. *See, e.g.*, Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 602 (2001) ("Even were it feasible to prevent all abusive discovery costs—an all-but-impossible task—the costs inherent in discovery would be inescapable." (citing Easterbrook, *supra* note 226, at 642)); Stancil, *supra* note 295, at 97–100.

303. The articles cited in the preceding notes do not refer to any empirical data that validates Judge Easterbrook's conclusion. Moreover, the only evidence cited in his article concludes that discovery abuse may be a problem. This data do not seem relevant to a discussion that already has concluded that assumption is true.

304. For some indication of the widespread use of case management, see LEE & WILLGING, *supra* note 203, at 11–12.

especially since the new pleading standard established in *Twombly* and *Iqbal* is not limited to discovery-rich cases.[305]

Absent any real evidence, both the supporters and critics of case management rely heavily on ideology, which colors their views about how to improve the civil justice system's pretrial process. Little has been done to research the efficacy of judicial management through sophisticated studies of what district courts actually do, what works, and what does not.[306] Anecdotal evidence, assumptions, and theory are not enough to validate the drastic changes that have been made to the process of determining the sufficiency of a complaint and related motions; they do not make credible what the Court wrote in *Twombly* and *Iqbal*. This subject should be evaluated in light of comprehensive, intelligent, and dispassionate information regarding the costs and challenges of civil litigation. This exploration must go well beyond simply surveying the impressions and attitudes of participants if the rulemakers are to achieve a satisfactory balance of efficiency, access, and quality. Fortunately, considerable progress on the research front is being made.[307]

In addition to analyzing discovery and management, which clearly are inseparable from pleading and motion practice, it would be desirable, if possible, to reach a common understanding of what is meant by "abusive" or "excessive" discovery and "frivolous" litigation.[308] These words are uttered in a mantra-like fashion in litigation cost and delay discussions. Yet despite their abundant recitation, it is unclear what they embrace. Does abusive discovery refer to almost all discovery, as the Easterbrook article may have

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305. *See* discussion *supra* notes 115–17.

306. One commentator has asserted that there is no "reliable" empirical data about the ability of trial judges to curb discovery problems. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1989 (2007).

307. In addition to the studies by the Federal Judicial Center, the American Bar Association Section of Litigation, the New York State Bar Association, and the American College of Trial Lawyers referred to in the notes in this article, numerous other studies by the Center, state organizations, other bar association groups, and academics are underway. For examples of these studies, see *supra* note 67.

308. These and related words were used repeatedly by speakers at the Duke Conference with no attempt to articulate a frame of reference or define their meaning. *See generally* Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633 (2010) (concluding that references to "frivolous cases" distract from effective discussion of costs and rights).

suggested?[309] If so, then the term basically is meaningless. Or is it abusive only when the plaintiff uses the discovery procedures as a "fishing expedition" or requests irrelevant information merely to pressure the defendant and extort a settlement? Are frivolous cases those "with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence?'"[310] Or is the category broader than that? And what about the infrequently mentioned frivolous or abusive behavior on the defense side—dilatory motions, harassing discovery demands, or noncompliance with legitimate discovery requests—designed to delay progress toward trial and to consume the typically limited resources of contingent-fee plaintiffs' lawyers? Attrition is all too often a strategy of choice.[311] And why isn't all of this a matter for the sanction structure, the discovery regime, or more effective judicial oversight rather than a burden on the pleading and related motion rules? The answer proffered by *Twombly* and *Iqbal* seems to reflect a policy of early termination *über alles*.

I spent a great deal of time during the first six months of my tenure as Reporter for the Advisory Committee on Civil Rules participating in bar association meetings and judicial conferences, asking attendees what they thought constituted abusive discovery and frivolous litigation—phenomena I had been informed were at the heart of the litigation cost and delay problem that the Committee was trying to counteract. At times I felt like Diogenes with a lamp looking for an honest opinion. Although no single, generally agreed-upon standard emerged from these discussions, there were two nearly universal themes in the various explanations and examples I heard. First, frivolous litigation is the lawsuit the other side brings against one's client; second, abuse is whatever the opposing counsel does.

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309. *See supra* notes 299–01 and accompanying text. It is interesting to look at the sentence Justice Souter wrote in *Twombly* to reject the case-management approach. His opinion seems to imply that costly discovery and discovery abuse are one and the same:

> It is no answer to say that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007). They are not.

310. *Twombly*, 550 U.S. at 559 (alteration in original) (citation omitted) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 337 (2005)). Experienced litigators usually have had the epiphany of being in cases that initially appeared to be sows' ears but that proved to be silk purses.

311. The tobacco litigation is but one example of a campaign of attrition by an industry and its lawyers, as is well described in Cabraser, *supra* note 127, at 18–33.

My research methods admittedly were unscientific and the foregoing summary of my "findings" somewhat glib. But despite the passage of more than thirty years and personal involvement in countless federal cases, I have yet to find a more specific or illuminating definition of these terms. Although in some instances one knows inappropriate litigation behavior when one sees it, wide-angle consensus on what these terms mean and when they apply may well be unobtainable.[312] The line between zealous advocacy and litigation misbehavior is obscure at best, and we really have no idea as to the frequency—or infrequency—of abuse and excessive motion and discovery activity.[313] Yet cosmic anecdotes flood the Rialto, and urban legends constantly are being generated. This is troublesome; the alleged phenomena that have driven pretrial policy decisions over the past few decades remain largely subjective, unquantified, and anecdotal.

By leaving the notions of abusive discovery and meritless litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor concerns about them into their Rule 12(b)(6) decisions, the Court has authorized judges to let their own views and attitudes regarding these phenomena influence their decisionmaking. This virtually unbridled discretion is inappropriate. It compounds the subjectivity inherent in the plausibility inquiry. And when exercised at the threshold of a case, it may undermine historic norms and debilitate the private enforcement of important substantive policies, as well as constitutional due process and jury-trial rights.[314] Moreover, it may lead to greater inconsistencies in the application of federal law, diminish the predictability of outcomes that is critical to an effective civil-dispute-resolution system and the confidence people have in it, and increase forum and judge shopping.

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312. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) ("We know remarkably little about frivolous litigation. Reliable empirical data is extremely limited, and casual anecdotal evidence highly unreliable.").

313. *See* AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 227 (2009) (characterizing the notion that there is "widespread frivolous antitrust litigation" as a "myth").

314. *See* Resnik, *supra* note 294, at 427–28 ("Therefore, management becomes a fertile field for the growth of personal bias. . . . Nevertheless, neither the Supreme Court, the lower federal courts, nor Congress has considered the effect of judicial management on impartiality."). Since the Rule 12(b)(6) motion now acts as a gatekeeper, the greater discretion afforded the district judge gives him increased influence over the availability of a meaningful day in court.

These are potential consequences—and system costs—that must be considered in evaluating the present and future utility of case management and its relation to the current state of pleading and pretrial motion practice. In short, there is much to be examined.

III. THE FUTURE OF RULEMAKING AND THE FEDERAL RULES

The Supreme Court's legislative-like decisions in *Twombly* and *Iqbal* and the 1986 trilogy have caused many to question the continuing role of the rulemaking process and its current statutory structure. Congress' delegation to the Court of authority to promulgate rules of practice and procedure for the nation's courts through the Rules Enabling Act[315] long has been understood to have established two principles: first, as the Supreme Court frequently has noted, only the rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule;[316] second, the Federal Rules must be general and transsubstantive—they must apply in the same way to all types of federal court actions. *Twombly* and *Iqbal* cast doubt on both of these foundational assumptions. These principles, their future, and the role of Congress require some exploration.

A. The Value of the Rulemaking Process

The Supreme Court repeatedly has expressed its faith in the rulemaking process for the better part of a century.[317] Forty years ago, the Court said, "We have no power to rewrite the Rules by Judicial

315. 28 U.S.C. § 2072 (2006).

316. *See* Burbank, *supra* note 143, at 536.

317. *See* Swierkiewicz v. Sorema N.A, 534 U.S. 506, 515 (2002) (refusing to establish a heightened pleading standard for employment discrimination suits by judicial interpretation); Crawford-El v. Britton, 523 U.S. 574, 595 (1998) (emphasizing that the Court has consistently declined to revise established pleading rules); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."); *see also* Miller, *supra* note 32, at 1010–11 (summarizing the Court's refusal to establish heightened pleading standards in *Leatherman*, *Crawford-El*, and *Swierkiewicz*).

interpretations."[318] Less than a decade prior to *Twombly*, the Court noted that "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are resolved most frequently and most effectively either by the rulemaking process or the legislative process."[319] These sentiments were repeated five years before *Twombly*.[320] Then, just five months before *Twombly*, the Court in its unanimous opinion in *Jones v. Bock*[321] stated,

> We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from hay stacks. We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.[322]

Critics argue that, with *Twombly* and *Iqbal*, the Court may have forsaken its long-held commitment to the rulemaking process by reformulating the Rules' pleading and motion-to-dismiss standards by judicial fiat.[323] These assertions echo much of the criticism directed at the Court following its 1986 summary judgment trilogy, when scholars complained that the Justices had amended Rule 56 without employing the Enabling Act's procedure.[324] Today, even those who defend the Court's "pragmatic" shift away from notice pleading

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318. Harris v. Nelson, 394 U.S. 286, 298 (1969) (noting that the discovery provisions of the Federal Rules do not apply to habeas proceedings); *see also* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside of the process Congress ordered . . . .").

319. *Crawford-El*, 523 U.S. at 595.

320. *Swierkiewicz*, 534 U.S. at 515.

321. Jones v. Bock, 549 U.S. 199 (2007).

322. *Id.* at 224.

323. *See, e.g.*, Burbank, *supra* note 52, at 110, 113–14; Schneider, *supra* note 44, at 531.

324. *See* Miller, *supra* note 32, at 1029; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99, 181–87 (1988) (arguing that changes wrought by the trilogy should have been instituted by the Advisory Committee through the amendment process, because that process is more public and results in better and more substantial information for the profession than unilateral Supreme Court action); *see also* Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 329–30, 360–62 (1989) (discussing changes in the standards for summary judgment as one example of courts inserting caseload concerns into the formulation of jurisdictional doctrines and, by doing so, treading on the legislature's territory).

acknowledge that *Twombly* and *Iqbal* have redefined Rule 8(a)(2) and Rule 12(b)(6). The contesting viewpoints are hard to evaluate because the boundary between judicially changing a Federal Rule and simply interpreting and applying it is one of degree.[325]

A significant drawback of amendment by judicial dictate is the Supreme Court's lack of democratic accountability. Whereas the rulemakers generally conduct open meetings[326] and follow an extensive notice-and-comment procedure that allows anyone interested some (albeit limited) form of participation,[327] the Court's *Twombly-Iqbal* methodology grants five Justices the power to bypass the statutorily established process and "legislate" on important procedural matters, often in ways that determine whether litigants ultimately will be able to have a meaningful day in court and whether important constitutional and congressional mandates and public policies are enforced. In addition to its comparatively democratic pedigree, the existing rulemaking process provides other advantages, such as the Advisory Committee's superior access to academic studies and statistical research. As Professor Stephen B. Burbank points out, the Supreme Court is "ill-equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings."[328] The Justices do not have the time, trial-court experience, or on-the-

325. Although the cases can be distinguished, it might be argued, for example, that the Court "amended" the Rules in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (Rule 23), and *Schiavone v. Fortune*, 477 U.S. 21 (1986) (Rule 15).

326. 28 U.S.C. § 2073(c)(1) (2006). Meetings were closed during my tenure as Reporter; they became open while I was a member of the Committee. The history of that transition has been described by my successor as Reporter. *See* Carrington, *supra* note 43, at 22–25.

327. *See* Bone, *supra* note 99, at 884. The rulemaking machinery is in the hands of people appointed by the Chief Justice. It has been suggested that opening the Advisory Committee's deliberations has allowed lobbying for various interests to infiltrate and perhaps influence the process, raising questions about the extent to which rulemaking is truly democratic. *See supra* note 43.

328. Burbank, *supra* note 143, at 537; *see also* Bone, *supra* note 99, at 883–85 (describing the comparative advantages of rulemaking by the Advisory Committee); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958) (proposing a balance of power in rulemaking between courts and legislatures); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1133–36 (2002) (describing the comparative advantages of rulemaking by the Advisory Committee); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L REV. 905, 908 (1976) (same).

ground information to evaluate the consequences that procedural changes may have on private enforcement of substantive law or what alternative enforcement mechanisms should be established if litigation pathways are impaired.

Considering the Court's current ideological makeup and the continuing trend toward increasingly early case disposition, rulemaking by judicial mandate does not bode well for many of those policies that are furthered by private enforcement and the access principle. The members of the Advisory Committee therefore must determine whether they will reassert their role as independent architects of the Federal Rules, accept that an aspect of their responsibility now may be to codify the Court's Federal Rule decisions, or simply remain silent and defer to case development.

This question becomes especially important in light of the difficulties that arise when the Court announces piecemeal procedural revisions in the context of a case's particular facts, rather than on the basis of a holistic appraisal of the effects that changes in a Rule's interpretation might have on the application of other Rules and on the tremendous array of variegated matters that appear on federal court dockets. One commentator, for example, has described how plausibility pleading conflicts with several other Rules, most notably Rules 8(f), 9(b), 11(b), and 12(e).[329] And perhaps other parts of Rule 8, Rule 15(a), and the Forms should have been added to the list.

This is an important point: at least in certain respects, the Court's *Twombly* and *Iqbal* holdings may have eclipsed the established operation of one or more of these Rules, some of which have provided safeguards for ensuring that plaintiffs are given an opportunity to plead or replead potentially meritorious claims. The two decisions raise concerns that, instead of enabling plaintiffs to correct their pleadings when deemed factually insufficient—for example, by amendment under Rule 15, by pleading alternatively or inconsistently as permitted by Rule 8(d),[330] or by pleading on information and belief within the boundaries of Rule 11(b)—the

329. *See* Spencer, *supra* note 108, at 469–72.

330. *See* Btesh v. City of Maitland, Fla., No. 6:10-cv-71-Orl-19DAB, 2010 WL 2639562, at *5 n.4 (M.D. Fla. June 29, 2010) (holding that for pleading in the alternative, only one alleged theory need be plausible to survive a motion to dismiss).

motion to dismiss may be employed to dispose of claims the court believes should be disfavored.[331]

Under the *Twombly-Iqbal* pleading standard, the role that other pretrial Rules will play in future cases is uncertain. For instance, although the Court denied creating a heightened pleading standard for substantive areas not mentioned in the first sentence of Rule 9(b),[332] it is difficult to understand how that proposition will operate in practice; the distinction between the demand for "particularity" in Rule 9(b)—an express heightened pleading provision—and the Court's insistence on a "showing" of "factual sufficiency" under *Twombly* seems imperceptible.[333] Moreover, even though the second sentence of Rule 9(b) allows conditions of mind, including knowledge and intent, to be alleged "generally," *Twombly* and *Iqbal* required specific factual allegations on issues of precisely this character—namely, conspiracy[334] and purposeful discrimination.[335]

And it is unclear how the forgiving and "justice"-seeking amendment policy of Rules 15(a) and 15(b) will function in a plausibility-pleading environment. It seems unlikely that the Court intended to diminish the force of Rule 15; the Supreme Court's decisions do not speak to the subject. There is reason to believe that most district courts will continue to give the Rule 15(a)(2) words "the court should freely give leave when justice so requires" the liberal

331. *See* Miller, *supra* note 32, at 1016 ("Surveys confirm that judges view prompt rulings on summary judgment and Rule 12(b)(6) motions as the most effective procedural devices for filtering out frivolous litigation." (citing Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, *The Federal Judicial Center's Study of Rule 11*, FJC DIRECTIONS, Nov. 1991, at 3, 20 tbl.11)).

332. Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007).

333. *See* SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010) (clarifying that Rule 9(b) requires, beyond Rule 8, the pleading of "time, place, and content . . . with specificity"). It is unclear how this interpretation of Rule 9 differs from the requirements for Rule 8 set forth in *Twombly*. The *Twombly* majority, in addition to affirming the validity of what is now Form 11's specification of places, dates, and times, suggested the antitrust conspiracy complaint in that case did not provide adequate notice because it "mentioned no specific time, place or person involved in the alleged conspiracies." *Twombly*, 550 U.S. at 565 n.10; *see also* 5 WRIGHT & MILLER, *supra* note 3, § 1216. However, in *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), the court suggested that facts related to time, place, or the specific individuals involved are necessary to satisfy Rule 8 only if the other factual allegations do not provide notice. *Id.* at 325; *see also* Hollander v. Etymotic Research, Inc., No. 10-526, 2010 WL 2813015, at *6 (E.D. Pa. July 14, 2010) (finding allegations might meet Rule 8 standards, but not Rule 9(b)).

334. *Twombly*, 550 U.S. at 555–56.

335. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1947–54 (2009).

application those courts have accorded that language in the past and not interpret *Twombly* and *Iqbal* as requiring a tightened application of that passage.[336] Once again, sounding a pragmatic note, there are potential litigation cost and delay consequences to these amendment questions. If Rule 15 does survive unscathed, the growing number of dismissal-motion grants will generate additional amendment requests and grants of leave to replead, and in many instances a second motion to dismiss following that repleading. On the other hand, if the application of Rule 15 is narrowed, more judgments following Rule 12(b)(6) dismissals will be entered and additional appeals from denials of dismissals and leave to replead are likely to result.

In sum, if the principles articulated in *Twombly* and *Iqbal* are to be retained, either with or without formal Rule amendment, the remaining Rules will have to be canvassed—including Rule 84, as well as the supposedly sufficient practice Forms that Rule authorizes[337]—to determine whether corrective textual steps are necessary to restore the overall coherence of the pleading and pretrial motion rules. But before either engaging in that process or codifying the Court's two decisions, which might not prove to be a simple task, one should step back and seriously assess the Rules' fundamental principles and objectives. The subject's importance warrants that.

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336. Preliminary research has shown that several courts have continued to grant leave to replead liberally after *Twombly-Iqbal*. *E.g.*, Lewis-Burke Assocs. LLC v. Widder, No. 09-302 (JMF), 2010 WL 2926161, at *6–7 (D.D.C. July 28, 2010); Dupris v. McDonald, Nos. 08-8132-PCT-PGR, 08-8133-PCT-PGR, 2010 WL 231548, at *6 (D. Ariz. Jan. 13, 2010); *see also* Krainski v. Nevada *ex rel.* Bd. of Regents, No. 08-17523, 2010 WL 2991397, at *8 (9th Cir. Dec. 3, 2010) (Fletcher, J., concurring in part and dissenting in part) (disagreeing with the majority's finding that the plaintiff could not produce any new facts to save the complaint and, therefore, the district court's denial of leave to amend was an abuse of discretion). This does not contradict—and if anything, it supports—the potential cost consequences referred to previously. *See supra* notes 121–22 and accompanying text. Cases have appeared, however, in which the court has denied leave to replead on the ground that doing so would be "futile." *See, e.g.*, Cieniawa v. White, No.1:09-CV-2130, 2010 WL 2766170, at *5 (M.D. Pa. July 13, 2010); *In re* Young, 428 B.R. 804, 827 (Bankr. N.D. Ind. Jan. 21, 2010). Similar questions arise as to the future of Rule 11(b)(3), which allows court papers to be signed on the basis that "factual contentions" will have support "after a reasonable opportunity for further investigation or discovery." *See generally* 5A WRIGHT & MILLER, *supra* note 3, § 1335 (noting the elements and application of the standard of certification under Rule 11).

337. *See* Elan Microelecs. Corp. v. Apple, Inc., No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) (noting the difficulty of "reconcil[ing]" Form 18 with *Twombly* and *Iqbal*); *see also supra* notes 154–57 and accompanying text.

B. The End of Transsubstantivity?

In addition to establishing the rulemaking process, the Rules Enabling Act's provision for "prescrib[ing] general rules of practice and procedure"[338] means that the Federal Rules should be "uniformly applicable in all federal district courts [and] uniformly applicable in all types of cases."[339] The concept is based on the principle that the Federal Rules should operate evenhandedly across the substantive universe, be framed in uncomplicated, general terms, and be applied in the same fashion for all litigants. This philosophy was consistent with the desire to keep the original Federal Rules textually simple and value neutral as much as possible.[340] Because the mission of procedural rulemaking has been thought to be to help execute the policy choices made by others, the theory is that substance-specific rules should be generated by those other institutions and processes.

Under the tenets of transsubstantivity, the general application of Rule 8's pleading principles and the motion rules should not vary with the substantive law controlling a particular claim.[341] Thus, Rule 9 governs the only contexts in which pleading principles different from those prescribed by Rule 8 can be applied;[342] it stands as a formal exception to the transsubstantivity rule. Accordingly, in *Swierkiewicz*, the Supreme Court rejected heightened pleading standards in

338. 28 U.S.C. § 2072 (2006).

339. Burbank, *supra* note 143, at 536. For a discussion of the 1935 Advisory Committee's commitment to the transsubstantive quality of the Federal Rules, see *id.* at 541–42. *See generally* Robert G. Bone, *Making Effective Rules: The Need for Procedural Theory*, 61 OKLA. L. REV. 319, 324 (2008) (discussing transsubstantivity as underlying the Federal Rules of Civil Procedure's "distinctive features"); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 719 (1975) (describing the early English-law principle of transsubstantive rules); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989) (describing the social benefit of transsubstantivity); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Procedure*, 59 DEPAUL L. REV. 371, 375 (2010) (arguing that only legislatures should engage in substance-specific rulemaking).

340. *See generally* 4 WRIGHT & MILLER, *supra* note 3, § 1029 (3d ed. 2002) (describing the purpose and construction of the Federal Rules).

341. *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067–69 (1989); Spencer, *supra* note 108, at 457.

342. *See generally* 5A WRIGHT & MILLER, *supra* note 3, §§ 1291–1315 (describing the details and application of Rule 9). Aside from Rule 9, the notion of heightened pleading for actions thought to be "disfavored" presumably would have been anathema to the drafters of the original Rules.

employment discrimination cases and reaffirmed the status of the Federal Rules as general rules.[343] And the same standards theoretically apply to all motions to dismiss and to all motions for summary judgment.[344]

With *Twombly* and *Iqbal*, it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules.[345] True, the Court did state that the enhanced pleading standard will govern all civil actions, and the cases therefore can be thought of as establishing a "general" rule. But the Court also indicated that the principle is to be applied contextually. Thus far, it has applied plausibility pleading only to two atypical actions in substantive contexts in which several lower courts previously had advanced heightened pleading—antitrust and governmental discrimination claims.[346] By way of counterpoint, as noted earlier, the Court insisted in *Twombly* that Form 9—now Form 11—would continue to suffice for negligence pleading.[347] If that holds true, plausibility may be transsubstantive in name only. In practice, some form of the preexisting notice pleading may survive for simpler, run-of-the-mine actions. But a universe of different applications of plausibility pleading may emerge in other substantive and complexity environments. This distinction in the standard's application based on context, a note sounded by Justice Kennedy in the *Iqbal* opinion,[348] would mean that although the transsubstantivity concept would be preserved as a generic or overarching principle,[349] divergent

343. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). As previously discussed, at least one panel of the Third Circuit has concluded that *Swierkiewicz* is a victim of *Twombly* and *Iqbal*, although other courts have expressed a different view. *See supra* notes 113–17 and accompanying text.

344. *See supra* notes 30–31, 59–60 and accompanying text.

345. *See* Burbank, *supra* note 143, at 555–56.

346. It appears that the Court may have sanctioned the establishment of a hierarchy of actions, with a bias toward fairly stringent gatekeeping in three types of cases: disfavored actions, like libel or slander; actions that threaten to disrupt government functioning; and "mega cases" that impose large financial burdens on defendants. *See supra* note 52.

347. Bell Atl. Corp. v. Twombly, 550 U.S. 554, 565 n.10 (2007); *see also* Xpoint Techs., Inc. v. Microsoft Corp., Civ. No. 09-628-SLR, 2010 WL 3187025, at *3 (D. Del. Aug. 12, 2010) (finding the complaint for patent infringement was sufficient because it mimicked Form 18).

348. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953–54 (2009).

349. *See* Bone, *supra* note 52, at 890–91 (arguing that *Twombly*'s plausibility standard is in line with the rule drafters' "pragmatic commitment to making procedure an efficient means to enforce the substantive law accurately"); *see also Iqbal*, 129 S. Ct. at 1950. *See generally* Epstein, *supra* note 52, at 62 (defending *Twombly* as a mini-summary judgment).

applications would be tolerated in different situations.[350] But that is a curious form of preservation and ultimately might lead to the development of special pleading rules for various substantive areas.

Viewed realistically, the substance behind the catechism of transsubstantivity actually may have been discarded in all but name long before *Twombly* and *Iqbal*; its continued existence certainly has been a subject of academic debate.[351] In practice, many lower courts applied heightened factual pleading requirements in a variety of substantive areas—such as antitrust, discrimination, securities law, and suits against governmental officials—despite the Court's repeated references to *Conley* and notice pleading.[352] A system that accepts a three-page complaint for a negligence claim and effectively requires a one-hundred-page complaint for an antitrust suit hardly can be described as applying a uniform pleading standard, even if the articulated formula is the same. Moreover, the vast reservoir of judicial discretion in the application of the Federal Rules, coupled with the restraints on appellate review imposed by the final-judgment rule,[353] probably undermines the transsubstantivity principle.

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350. *See* Apps Commc'ns, Inc. v. S2000, Corp., No. 10 C 1618, 2010 WL 3034189, at *1 (N.D. Ill. Aug. 3, 2010) (stating that courts should "take into consideration the complexity of the case when addressing whether a complaint alleges sufficient facts"). *Compare* Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797, 803 (7th Cir. 2008) ("In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary . . . ."), *with* Wiek v. Keane, No. 09 CV 920, 2010 WL 1976870, at *4 (N.D. Ill. May 12, 2010) (holding that because the Fourth Amendment case was not as factually complex as *Twombly* or *Iqbal*, the pleading standard was not as high).

351. Mullenix, *supra* note 43, at 829 n.176 (citing Carrington, *supra* note 341, at 2067–69 nn.1–7; Cover, *supra* note 339, at 732–40); Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85, 92 (1991). *See generally* Marcus, *supra* note 339 (discussing the history and current adherence to transsubstantivity); Schneider, *supra* note 44 (describing the disparate application of plausibility pleading to employment discrimination and civil rights cases); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH & LEE L. REV. 1501 (1992) (recounting several statutory exceptions to transsubstantivity).

352. *See, e.g.*, E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1 (1st Cir. 2004) (antitrust); Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003) (suit against the INS); *see also* Fairman, *supra* note 37, at 1110–58 (observing heightened pleading standards for several other types of cases); Fairman, *supra* note 1, at 617–19 (same); Marcus, *supra* note 37, at 482 (criticizing trial judges who would decide dismissals on instinct); Tobias, *supra* note 351, at 1502 (citing environmental suits as a statutory exception to transsubstantivity).

353. 28 U.S.C. § 1291 (2006). *See generally* 15A–B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3905–3919.10 (2d ed. 1992) (discussing the history and application of the final-judgment rule).

There is additional evidence that the bloom is off the transsubstantivity rose. Rule 6(b), for example, authorizes the extension of time for doing an act in most situations but not in certain others, and Rule 16 provides judges with extensive discretion to manage cases on a differential basis depending on, among other factors, the complexity of the issues involved.[354] In the discovery arena, Rule 26(a)(1)(B) exempts certain classes of cases from the mandatory disclosure requirements.[355] And there are the two special pleading provisions in Rule 9(b) as well as elsewhere in Rule 9.[356] In a related—although legislative—vein, the Civil Justice Reform Act of 1990 produced a plethora of different district court expense and delay plans that are inconsistent in many respects and depart from the Federal Rules and with each other in various ways.[357] Similarly, local rules and many individual judges' standing orders magnify the procedural differences from case to case, judge to judge, and district to district. Thus it seems obvious that not all cases are treated alike by the federal courts, despite any ongoing aspirational devotion to transsubstantivity. At this point, therefore, it may be necessary to decide whether to reaffirm the principle, transmogrify it, or expressly abandon it. If the time has come to retire transsubstantivity, the

354. For example, Rule 16(c)(2)(L) encourages courts to consider "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." FED. R. CIV. P. 16(c)(2)(L). Some local rules call for "systematic differential case management" tailored to each individual case based on "complexity, time required to prepare a case for trial, and availability of judicial and other resources." N.D.N.Y. R. 16.1. Congress clearly disregarded the notion of transsubstantivity in creating super-heightened pleading and sanction rules under the PSLRA for private securities fraud litigation; that legislation, of course, is not governed by the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

355. For a number of years, Rule 26(a)(1)(B) empowered each district to decide whether to apply the provision. Many opted out of mandatory disclosure, creating a substantial inconsistency of application. For a discussion of the history of the mandatory disclosure requirement, see *infra* note 433.

356. *See* FED. R. CIV. P. 9(c), (g). Several of the Court's pre-*Twombly* decisions intimate that differential pleading standards could be established through the rulemaking process, a notion that is inconsistent with the assumed meaning of the Enabling Act's reference to "general rules." *See, e.g.*, Jones v. Bock, 549 U.S. 199, 224 (2007); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993).

357. *See generally* Tobias, *supra* note 266 (noting the divergent district court procedures following the Civil Justice Reform Act); *supra* notes 216–17 and accompanying text.

possibilities for doing so are obvious—it can be done judicially, legislatively, or by benign neglect.[358] More of that below.[359]

C. Dealing With Twombly *and* Iqbal*: A Return to the Rulemaking Process or Resort to Legislation?*

The Supreme Court's bypass of the rulemaking process in *Twombly* raises the question: what is the purpose of today's elaborate statutory process, given the Court's willingness to revise important aspects of the Rules on its own rather than follow its existing precedents? If *Twombly* and *Iqbal* take us toward an era in which the role of formal rulemaking is reduced in part to deciding whether to codify the Court's Rule-related decisions, it would be an unfortunate turn of events. Given the Justices' dependence on the small number of procedural issues that reach the Court, they necessarily function reactively and their rulemaking inevitably is interstitial. Moreover, Court intervention would deprive the rulemaking process of the special competencies and experience bases typically found on the Advisory Committee and at other stages of Rule revision.[360] The membership of these groups has been distinguished and dedicated over the years. The better approach, I think, would be for the Advisory Committee to take a "business-as-usual" approach. Although atypical pleading contexts were before the Court in both *Twombly* and *Iqbal*, the latter said plausibility applied to all cases. Thus, perhaps the two opinions should be read as an informal signal to the rulemaking bodies that a reexamination of pleading and pretrial-motion practice is in order. That would enable the rulemaking committees to proceed pursuant to their usual procedures, paying heed, of course, to the concerns the Court expressed.

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358. *See generally* Cover, *supra* note 339, at 738–40 (arguing that allowing courts to have the ability to modify existing rules would not "destroy the Federal Rules of Civil Procedure nor violate some notion of separation of powers"). Given the significant deviations from transsubstantivity noted in text, that principle offers no justification for *Iqbal*'s extension of *Twombly* to all civil actions. There was no consensus at the Duke Conference on the question of whether transsubstantivity should be preserved.

359. *See infra* notes 448–78 and accompanying text.

360. The Committee is composed of federal trial and appellate judges; experienced federal practitioners; and an occasional academic, state court judge, or Department of Justice representative. A law professor who specializes in federal procedure serves as the Reporter. When effectively composed, the members have a wide range of viewpoints and professional backgrounds and might be thought of as an all-star team of seasoned proceduralists.

The Advisory Committee understandably has difficulty second-guessing the Court's decisions, let alone turning away from them, especially when they reflect a particular judicial mindset.[361] Yet it is important to remember that Committee members are expected to exercise independent judgment, that they have the power to depart from existing Rule-related precedents in making proposals, and that the Court ultimately may accept the rulemakers' decisions. Further study and inquiry into the validity of the assumptions underlying *Twombly* and *Iqbal*, as well as a full exploration of all the relevant but potentially countervailing policies, may arm the Committee and the Judicial Conference with a perspective and knowledge base that were unavailable to the Court. Given the importance of the issues under discussion, a lesser effort would be unfortunate.

There are several avenues that can be taken. The Advisory Committee may codify *Twombly* and *Iqbal* and rewrite Rule 8(a)(2), in which event corresponding amendments to the other pretrial rules affected by the decisions might be necessary.[362] Or the rulemakers may wish to await judicial developments and the emergence of a

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361. An attempt to revise Rule 56 to take account of the Supreme Court's 1986 summary judgment trilogy eventually went nowhere. According to the then-Reporter,

> the argument that seemed to prevail in the Standing Committee against the revision of Rule 56 was that it would be inappropriate for our committees to be trespassing on a lawmaking role that the high Court had appropriated for itself. I was not the only person present who was resistant to a notion that seemed to be misplaced modesty and deference by those to whom Congress had assigned the role of disinterested drafting of procedural law for its non-partisan approval.

Carrington, *supra* note 43, at 62. This reluctance to depart from Supreme Court decisions is understandable since sitting federal judges comprise a significant portion of the membership of the relevant committees and the entirety of the Judicial Conference. 28 U.S.C. § 331 (2006). *See generally* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 292–96 (2009) (discussing the structure and composition of the civil-rulemaking process and proposing changes).

362. In a white paper submitted to the Duke Conference, a group of organizations representing defense interests purport to "codify" *Twombly* and *Iqbal* by proposing that Rule 8(a)(2) require "a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim, creating a reasonable inference that the pleader is plausibly entitled to relief." Lawyers for Civil Justice, DRI—The Voice of the Def. Bar, Fed'n of Def. & Corporate Counsel & Int'l Ass'n of Def. Counsel, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure, at x (May 2, 2010) (unpublished white paper) (emphasis omitted), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%21st%20Century.pdf?OpenElement. In reality, that language is far more demanding than the Supreme Court's decisions and the language advanced in other proposals. Indeed, the proposal amounts to a reversion to code, if not common law, pleading.

corpus of experience at the trial and appellate levels while commissioning the several empirical analyses that are needed.[363] The latter approach might be criticized by some as an abdication of the Committee's responsibility or creating a risk that events will overtake revision efforts that should be undertaken now. Finally, the rulemakers can bring *Conley*'s pure-notice-pleading philosophy out of "retirement," with—but probably without—the hyperbolic "no-set-of-facts" formulation.[364] There is support for that approach in several quarters.[365]

An imponderable in appraising these possibilities is the extent to which Congress will participate in the formation of policy on this subject. The legislative pot has been stirred. Shortly after *Iqbal* was decided, various interest groups—including civil rights and consumer advocates—began pressing for congressional action.[366] Amidst these efforts came the proposed Notice Pleading Restoration Act of 2009,[367] introduced in the Senate by Senator Arlen Specter. The bill seeks to accomplish exactly what its title suggests. Formal hearings were held by the Committee on the Judiciary on December 2, 2009,[368] and various constituencies provided input in the following months.[369] In March 2010, Senator Sheldon Whitehouse circulated for discussion a potential substitute bill that enumerates a number of congressional findings, emphasizes that the proposed substitute legislation presumes

363. The Duke Conference focused on many of the problems under discussion. That conference, plus several studies undertaken by the Federal Judicial Center, were designed to expand the Advisory Committee's knowledge base and identify areas of possible consensus. None was reached at the Conference regarding *Twombly* and *Iqbal*

364. For further discussion of *Conley*, see *supra* notes 3–5, 59–62 and accompanying text.

365. *See, e.g.*, Burbank, *supra* note 143, at 547–53 ("In such garden-variety cases, I suggest, a pleading that provides sufficient notice to survive a Federal Rule 12(e) motion should also survive a motion under Federal Rule 12(b)(6) if its nonconclusory allegations, taken as true, and any inferences reasonably drawn from them, tell a plausible . . . story of liability."); Clermont & Yeazell, *supra* note 52, at 856–59 (discussing methods of bringing back notice pleading through either an amendment to the Federal Rules or through congressional action).

366. *See* Tony Mauro, *Groups Unite to Keep Cases on Docket: Plaintiff's Lawyers Seek to Stop Dismissals After* Iqbal *Decision*, NAT'L L.J., Sept. 21, 2009, at 1 (noting that civil rights groups, consumer groups, and trial lawyers attempted to fight the *Iqbal* decision).

367. S. 1504, 111th Cong. (2009). Several law professors have been providing assistance to the Senate staff.

368. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41.

369. From conversations with congressional staff, my understanding is that a third bill is being drafted as well. A New York State Bar Association committee calls for the pleading of all "nonconclusory" matters. *See infra* note 375. For the defense bar's proposal, see *supra* note 362.

subsequent action by the Advisory Committee, and ties restoration to the Supreme Court's jurisprudence as it existed before *Twombly*.[370] As of this writing, therefore, the Senate bill is still a work in progress.

The House of Representatives has been active as well. On October 27, 2009, a hearing entitled *Access to Justice Denied:* Ashcroft v. Iqbal was held by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, although no formal bill was before it.[371] Following that hearing, the subcommittee's chairman, Congressman Jerrold Nadler, introduced the Open Access to Courts Act of 2009,[372] which would preserve *Conley*'s "no set of facts" language.[373] Both the House and the Senate proposals—as well as others advanced by bar associations, circulated on the Internet, or emanating from other sources[374]—purport to be respectful of the rulemaking process and assume the Advisory Committee would either approach the subject from a pre-*Twombly* base point or formulate a new Rule 8(a)(2) standard.[375]

Not surprisingly, there is substantial opposition to any legislation that might undermine the Supreme Court decisions. Defense interests opposed to any legislation on this subject have been mobilized, led by the Chamber of Commerce.[376] *Twombly* and *Iqbal* serve them quite well. Legislation also is disfavored by those who are philosophically

370. The draft is still not public. With Senator Specter's departure from the Senate, Senator Whitehouse appears to have assumed a leadership position on this subject.

371. *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, *supra* note 53.

372. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

373. *Id.* § 2.

374. Many law professors have chimed in with proposals. *E.g.*, Michael C. Dorf, *An Alternative to Senator Specter's Notice Pleading Bill* (July 29, 2009, 3:13 AM), http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice_28.html. Professors have circulated other proposals on FINDLAW, http://writ.news.findlaw.com (last visited Aug. 27, 2010), and on the University of Notre Dame Law School's Civil Procedure listserv, civ.pro@listserv.nd.edu.

375. In a report of the New York State Bar Association, it is suggested that Rule 8(a)(2) require "a short and plain non-conclusory statement of grounds sufficient to provide notice of the claim and the relief sought," which demands less than *Iqbal* but will lead to litigation over the meaning of "non-conclusory." N.Y. STATE BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S SPECIAL COMMITTEE ON STANDARDS FOR PLEADING IN FEDERAL LITIGATION 1 (2004).

376. See, for example, the multi-industry letter presented on the Chamber's stationery opposing Senate Bill 1504. Letter from Multiple Industries to Senator Leahy, Chairman, Senate Comm. on the Judiciary (Dec. 1, 2009), *available at* http://www.uschamber.com/issues/letters/2009/091201s1504.htm.

committed to the rulemaking process as it has developed for more than seventy years and do not wish to see any reallocation of authority over the Federal Rules. Nor is legislation favored by those who fear that the subject will be ill-handled if it is subjected to the political forces at work in Congress.[377] The fate of the proposals is unclear as of this writing. Any action before the November 2010 election is extremely unlikely.

Legislation simply purporting to roll back the clock to restore the pleading standard to its pre-*Twombly* position has the virtue of minimal intrusion on the rulemaking process in contrast to Congress' enactment of a specific pleading standard to replace Rule 8(a)(2), but it might not be politically feasible to achieve. Moreover, a rollback might not achieve the intended result because it would not necessarily resurrect the type of notice pleading that the original rulemakers and *Conley* sought to establish. As already noted,[378] in the two decades prior to *Twombly* and *Iqbal*, many lower-court decisions had departed from *Conley*'s directive and established variegated versions of notice pleading, or fact pleading, or some combination of the two. What existed was a bit of a crazy quilt, which unfortunately could well be resurrected if the legislation simply returned things to what they were the day before *Twombly* was decided. The proposal circulated by Senator Whitehouse might obviate this problem by tying the rollback to adherence to the pre-*Twombly* Supreme Court jurisprudence, namely cases such as *Leatherman* and *Swierkiewicz*.[379] Another approach would be to define a pleader's obligations in terms of the requirements of legal sufficiency and notice-giving, the functions intended in 1938.[380]

So, if there is to be legislation, should it reestablish the pre-2007 Supreme Court precedents, the mixture of notice and fact pleading that characterized federal court practice in the years preceding the two cases, or the purer notice pleading that dominated the decades

377. *See, e.g.*, Bone, *supra* note 99, at 883–85; *see also* Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 457 (1935). A somewhat curious argument against any legislation, clearly designed to appeal to certain members of Congress, is that any relaxation of *Twombly* and *Iqbal* would facilitate lawsuits by people claiming injury as a result of governmental conduct in the War Against Terrorism.

378. *See supra* text accompanying notes 37, 61–62.

379. *See supra* notes 220–21, 224 and accompanying text.

380. *See* N.Y. STATE BAR ASS'N, *supra* note 375, at 42–43. This approach might be viewed as too great an incursion on the rulemaking process.

following the promulgation of the Federal Rules? A return to *Conley*'s "no-set-of-facts" formulation is quite unlikely and probably undesirable. Its literal application seems unworkable. Whatever the shortcomings of a particular legislative draft might be, congressional intervention to restore pleading to its status prior to *Twombly* and *Iqbal* might be an attractive way to establish a cooling-off or stop-and-think period, allowing the rulemaking process to study the situation on a wide-angle basis and to propose a solution for what seems to be an imbalance in the post-*Twombly*-*Iqbal* operation of the pretrial Rules.[381] Under any of the proposed legislative scenarios, Congress' intercession would reduce premature dismissals in the interim and encourage federal courts to alleviate the current information-asymmetry problem, as well as provide the Advisory Committee with considerable motivation to come to grips with the subject. Corrective action seems especially desirable in light of the dubious assumptions underlying *Twombly* and *Iqbal*.[382]

Establishing a pre-*Twombly* point of reference for the Advisory Committee is quite important, because it provides an appropriate backdrop against which its members can work. The rulemaking

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381. At the same time, congressional intervention raises the concern that the cure may be worse than the disease. In 1938, when speaking of the rulemaking power under the Enabling Act, Judge Oscar R. Luhring remarked, "[t]he courts have been given the power to make their own rules without interference by Congress. It is up to us to justify that confidence, and if we don't make good the Congressional goblin will get us!" AM. BAR ASS'N, *supra* note 6, at 216. Professor Fairman also noted concerns among the judiciary that congressional interference in procedural rules "avoids the scrutiny of comment by the bench, bar, and public inherent in the formal rulemaking process." Fairman, *supra* note 1, at 615 (citing *Year 2000 Readiness and Responsibility Act: Hearing on H.R. 775 Before the H. Comm. on the Judiciary*, 106th Cong. 126–28 (1999) (statement of Walter K. Stapleton, J., U.S. Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the U.S.)). Congressional intervention has proven unfortunate from a drafting perspective on occasion. That was true of the 1983 legislation amending Rule 4, which required remedial rule amendments in 1993. *See* 4A WRIGHT & MILLER, *supra* note 3, § 1092.1 (3d ed. 2002) (describing the request for waiver of formal service of summons under Rule 4); Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 733 (1988) (noting that Congress materially departed from the recommendation of the Supreme Court).

382. Those opposed to any legislation argue that Congress would be invading the rulemaking process. A wag might respond that it was the Court that initially invaded the rulemaking process, so turnabout is fair play. My successor as Reporter recently has written, "[g]iven the role of the Court in the rulemaking legislative process as established by the 1934 Act, there is simply not much that the Advisory Committee or the Judicial Conference can reasonably be expected to do." Carrington, *supra* note 43, at 87. Then, seemingly frustrated by the Supreme Court's intervention and sounding a note of caution, he expressed support for congressional action on *Twombly* and *Iqbal*. *Id.* at 59–60.

process is appropriately deliberate and can take at least two to three years, even when time is thought to be of the essence.[383] Moreover, if the discussions and papers presented at the Duke Conference are indicative,[384] there is little support for rule revision now within the rulemaking establishment or among the many corporate and defense lawyers in attendance. A number of speakers urged "waiting and seeing" how the lower federal courts actually apply the two cases. That pathway means there would not be any effort at rule revision in the near future; even if there is, an actual change is not likely to materialize for four or five years. Because cases currently are being dismissed with significant frequency as a result of the Supreme Court decisions, congressional action would be desirable to avoid further hyperactivity under Rule 12(b)(6) until the rulemaking process has run its course.[385] In an analogous vein, putting rule revision on hold and waiting for Congress's reaction to a procedural phenomenon has its antecedents. For many years, including those that embraced my tour of duty as Reporter, the Civil Rules Committee maintained a moratorium on amending Rule 23, expecting that the political process would yield legislation on controversial aspects of class-action practice.

Even if the Advisory Committee chooses to wait and see, or to codify plausibility pleading or some variant thereof, it will have to ensure that other pretrial rules are made consistent with it[386] and consider other changes to Rule 8 in particular, so as to reestablish a balance in the parties' pleading obligations. For instance, given the Court's focus in *Twombly* on the precise language of Rule 8(a)[387] and the Court's conclusion that plaintiffs must provide a "showing" of

383. A proposed amendment typically goes through several drafts—which are considered at multiple Committee meetings—and a public comment period. It then must pass through the Standing Committee on Practice and Procedure of the Judicial Conference, and then the Judicial Conference itself, before it proceeds to the Supreme Court. After Court approval, the amendment must await congressional inaction for seven months before it is effective. 28 U.S.C. § 2074 (2006).

384. For a sampling of the pieces presented, see Symposium, *2010 Civil Procedure Conference*, 60 DUKE L.J. (forthcoming Dec. 2010).

385. The Committee apparently will engage in "continual study" and pursue a "deliberate, thorough approach." Memorandum from Judge Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Judge Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure 3, 4 (Dec. 8, 2009).

386. *See supra* notes 329–37 and accompanying text.

387. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546, 556 (2007).

factual sufficiency to support their claims,[388] it follows that the plausibility standard similarly should apply to counterclaims, cross-claims, and third-party claims. And the text of the relevant rules amply supports that conclusion.[389]

Somewhat uncertain, however, are *Twombly*'s and *Iqbal*'s applicability to denials and affirmative defenses. Neither Rule 8(b) nor Rule 8(c) contains the magic word "showing," and both modes of defensive pleading typically are alleged in a formulary, conclusory, and uninformative fashion along the style illustrated in Form 30.[390] Thus far, the cases are divided on the point.[391] Equally uncertain is the applicability of *Twombly* and *Iqbal* to pleading the "grounds" for a district court's subject matter jurisdiction under Rule 8(a)(1) or a demand for relief under Rule 8(a)(3). Neither provision calls for a "showing," but that is not conclusive.[392] Thus, for example, does the simple diversity jurisdiction allegation, "Defendant Jones is a citizen

388. *Id.* at 563, 580.

389. *See, e.g.*, Carpenters Health & Welfare Fund of Phila. v. Kia Enters., No. 09-116, 2009 WL 2152276, at *1 (E.D. Pa. July 15, 2009) (holding that defendant's counterclaim failed to meet the *Twombly* standard); Sun Microsystems, Inc. v. Versata Enters., 630 F. Supp. 2d 395, 404 (D. Del. 2009) (reviewing defendant's counterclaim using the *Twombly* standard); Nesselrotte v. Allegheny Energy, Inc., No. 06-01390, 2007 WL 3147038, at *2, *6 (W.D. Pa. Oct. 25, 2007) (same).

390. Often, one suspects, these defenses are alleged without any prior significant investigation into the facts.

391. The main factor in determining whether a particular district court judge applies the plausibility standard to affirmative defenses appears to be his or her interpretation of *Twombly* and *Iqbal*. Courts that read the decisions as a clarification of what information is necessary to provide fair notice to the other party extend the plausibility standard to the pleading of affirmative defenses. *See, e.g.*, Barnes v. AT&T Pension Ben. Plan-Nonbargained Program, No. C 08-04058, 2010 WL 2507769, at *4 (N.D. Cal. June 22, 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649–51 (D. Kan. 2009) (Rushfelt, Mag.); Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at *2–5 (E.D. Mich. Apr. 21, 2009); Holtzman v. B/E Aerospace, Inc., No. 07-80551, 2008 WL 2225668, at *2 (S.D. Fla. May 29, 2008); United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007). Courts that interpret *Twombly* and *Iqbal* as a strict reading of Rule 8(a)(2)'s requirement of "showing" the grounds on which the claim rests do not extend the new standard beyond that domain. *See, e.g.*, Charleswell v. Chase Manhattan Bank, N.A., No. 01-119, 2009 WL 4981730, at *6 (D.V.I. Dec. 8, 2009); Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009); First Nat'l Ins. Co. of Am. v. Camps Servs., LLC, No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009). Ironically, some courts have excused defendants from compliance with *Twombly* and *Iqbal* because of the need for discovery. *See* Stoffels v. SBC Commc'ns., Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *2 n.3 (W.D. Tex. Sept. 22, 2008); Voeks v. Wal-Mart Stores, Inc., No. 07-C-0030, 2008 WL 89434, at *6 (E.D. Wis. Jan. 7, 2008).

392. Rule 8(a)(1) requires "a short and plain statement of the grounds for the court's jurisdiction"; Rule 8(a)(3) only calls for "a demand for the relief sought."

of New York and Plaintiff Smith is a citizen of North Carolina," which is the style of Form 7, suffice under Rule 8(a)(1)? Perhaps that will be viewed as a conclusion that need not be accepted as true. Does it satisfy plausibility on its face or is more factual detail necessary? One hopes the former is the case.[393] Should the pleading burden be made more demanding when the jurisdiction issue is one of corporate citizenship or party standing, on the ground that the naked assertion of either is more easily seen as a legal conclusion?[394] Even more complex, some standing questions present difficult issues of causation, effectively merging questions of jurisdiction and substance.[395]

If, in fact, plausibility pleading is retained and held to turn strictly on the language of Rule 8(a)(2), federal courts might not extend it to Rules 8(a)(1), 8(a)(3), 8(b), and 8(c). If that proves to be true, the Advisory Committee would have to consider whether to revise Rule 8 in order to correct this pleading burden imbalance in deference to the quest for the metaphorical level litigation playing field. What's good for the goose should be good for the gander. Conversely, if the new pleading structure is applied to all pleading elements by judicial decision or Rule revision, then in theory defensive allegations could be challenged by a Rule 12(f) motion to strike for insufficiency as a corollary to Rule 12(b)(6), although the former now speaks of an "insufficient defense" and the latter of a "failure to state a claim." In reality, any increase in the burden of pleading jurisdiction the demand for relief, or the plausibility of

393. Some courts have required plaintiffs to plead facts to show that there is a claim arising under a statute that warrants subject matter jurisdiction. *See* Riser v. United States, 93 Fed. Cl. 212, 216–17 (2010) (applying the plausibility standard to the pleading of facts supporting subject matter jurisdiction under the Tucker Act); Stanislaus Custodial Deputy Sheriff's Ass'n v. Deputy Sheriff's Ass'n, No. CVF09-1988 LJO SMS, 2010 WL 2218813, at *5 (E.D. Cal. June 1, 2010) (holding Lanham Act jurisdiction requires plaintiff to allege facts that plausibly assert the use of a trademark in interstate commerce). Courts have demonstrated confusion over the application of plausibility pleading under provisions other than Rule 8(a)(2). *See* Tripoli Mgmt., LLC v. Waste Connections of Kan., Inc., No. 09-CV-0167-CMA-KLM, 2010 WL 845927 (D. Colo. Mar. 9, 2010) (considering, but ultimately rejecting, the application of *Twombly* and *Iqbal* to a Rule 12(b)(2) motion, which is proper since plaintiffs are not required to plead personal jurisdiction).

394. *See* Laufen Int'l, Inc. v. Larry J. Lint Floor & Wall Covering, Co., No. 2:10-cv-199, 2010 WL 1444869, at *3 (W.D. Pa. April 9, 2010) (holding that Rule 8 does not require the plaintiff to plead facts to describe the ways in which a corporation conducts its activities at the location allegedly constituting its principal place of business).

395. *See, e.g.*, Mayor of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. 2010) (analyzing a complaint alleging the housing foreclosure crisis caused economic harm to Baltimore).

denials and affirmative defenses, also would cause cost and delay consequences that would have to be considered in determining whether efficiency and cost savings actually were being realized from the shift to plausibility pleading.[396]

Even if the newly announced plausibility requirement governed all facets of every pleading, its application would not be fair or evenhanded. As Justice Stevens noted in dissent in *Twombly*, the defendants in that case never were required to answer the plaintiffs' claims despite years of litigation.[397] That typically will be the case. Even if the plausibility standard includes—and applies uniformly to—all types of defensive pleadings, plaintiffs still will bear a disparate pleading burden as a practical matter because defendants only need to move to dismiss following the complaint rather than interpose an answer.[398] In a sense, the defendants have been given a free pleading pass by the Supreme Court. As the preceding discussion suggests, there are a number of textual and policy issues confronting the rulemakers even if they decide to leave *Twombly* and *Iqbal* untouched or simply to codify them.

IV. REBALANCING THE FEDERAL RULES: A FEW THOUGHTS ABOUT POSSIBILITIES

My thinking about the future begins with the observations about *Twombly* and *Iqbal* made earlier, none of them particularly positive. Some of the Court's justifications are little more than unverified assumptions about the litigation world that are not based on reliable evidence but simply repeat well-trodden clichés.[399] Most prominently, judicial management is more than a "modest" control technique, the claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend. Although I do not

396. Although affirmative defenses could be the subject of a Rule 12(f) motion to strike, plaintiffs rarely challenge them at the pleading stage. That could change, however.

397. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 571 (2007) (Stevens, J., dissenting) ("Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not 'plausible' provide a legally acceptable reason for dismissing the complaint? I think not.").

398. One wonders how "admitted" or "denied" can be subjected to the plausibility standard, however.

399. *See supra* Part II.

claim special knowledge on these matters, my judgment is that whatever deficiencies some of the Justices may have seen in the current pretrial system, the chosen solution seems inappropriate.

If federal pleading and motion-to-dismiss practice are not returned to their pre-*Twombly-Iqbal* state or something approximating it—and one assumes a continuation of the current approach—there is work to be done on the Rules. Therefore, a few suggestions seem appropriate at this point.[400] The rulemaking process has been a dynamic and creative one; now is the time for that spirit of innovation to come to the fore. Ultimately, the Advisory Committee will have to reconcile the continuing viability of the values of 1938 with the realities of 2010, and find a way to uphold the principle of access and the other policy objectives underlying the original Rules while adjusting to contemporary litigation conditions. It is unclear whether this will—or should—take the form of several textual modifications of the existing Rules or a wholesale revision of pretrial procedure.[401]

I do not pretend that any of the offerings described below are the best way forward, or imply that they encompass all the approaches that are potentially useful; at a minimum, however, I believe each deserves study and evaluation. The thoughts that follow are just that, and require considerable further elaboration. Some of them also overlap. Moreover, as a past Advisory Committee Reporter and member, I have no illusions about the difficulties of working out the details. Every Reporter knows that is where the devil resides.[402] Nor do I harbor any illusion about the ease of navigating through the political and ideological thickets that are likely to confront the members of the rulemaking process.

In considering these thoughts, the following questions seem basic—at least in my mind. Has litigation changed so much that the

400. Proposals similar to some of those I offer below have been suggested by others. *See, e.g.*, AM. COLL. OF TRIAL LAWYERS, *supra* note 54 (proposing ways to better the litigation system); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS (2009) (analyzing discrepancies in case disposition times).

401. There was no support for the latter at the Duke Conference.

402. This popular saying, employed by many, from architect Mies van der Rohe to Admiral Hyman Rickover, apparently is, in fact, an ironic variation of "God is in the details." Alden Whitman, *Expressed Industrial Spirit*, N.Y. TIMES, Aug. 19, 1969, at 1 (discussing the life of Mies van der Rohe); *see* GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 116 (2d ed. 2000).

ethos of access, private enforcement of public policies, merits adjudication, and equality of procedural treatment no longer can be served?[403] Must the rulemakers and the federal courts abandon the foundational principles of the Federal Rules to meet the pressures of the complexity and density of modern litigation? What quality of civil dispute resolution system do we want? Can it be designed to be neutral among the contending interests? And how much will it cost?

A. Providing Access to Information Needed to Satisfy the Plausibility Standard

Since the combined effect of *Twombly*, *Iqbal*, and the summary judgment trilogy is to require a plaintiff to have greater knowledge concerning his claim either before instituting an action or immediately thereafter, inequality of information access during those critical time frames poses a significant—if not the most significant—problem for many people seeking affirmative relief. This difficulty thus demands the most attention.[404] But realistically any solution is likely to add to the burdens and protraction of the pretrial process in some cases.[405] Perhaps that is a price that must be paid to achieve some of the citizen-access, private-enforcement, and fairness objectives of the American civil-justice system.

Consideration might be given, for example, to some form of limited preinstitution discovery to provide access to critical information.[406] The language of Rule 27 is much too restrictive to

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403. *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 . . . .").

404. The problem was widely recognized at the Duke Conference and no opposition was voiced to the need for solving the information-asymmetry problem.

405. For employment discrimination cases—which require plaintiffs to bring their grievances to the Equal Employment Opportunity Commission (EEOC) to assess whether there is probable cause to institute an action—changes to the regulatory process might help reduce information asymmetry without burdening the court. When presented with a complaint, the EEOC could conduct a more robust investigation directed at uncovering information that demonstrates the claim's plausibility. This change would require additional federal funding for the Commission. EEOC investigations would, however, limit judicial involvement at the pretrial stage, reduce the financial burden on individual plaintiffs, and restrict some of the back-and-forth motion practice between the parties regarding access to discovery.

406. *See, e.g.*, Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010) (exploring the role that state presuit discovery could play in rectifying the information imbalance caused by *Twombly* and *Iqbal*); Lonny S. Hoffman, *Using Presuit*

perform that function and would require amendment.[407] There are provisions authorizing preinstitution discovery currently in force in some states that could provide a model. One approach found in some states allows the pretrial preservation of evidence and the identification of witnesses.[408] But that technique is not sufficient, either. However, Texas Rule of Civil Procedure 202.1(b) is somewhat broader and empowers the court to order a deposition on the basis of a verified petition "to investigate a potential claim or suit."[409] Only a provision of the Texas character would be a meaningful response to the information-asymmetry problem. But such provisions would be opposed by defense interests and those who believe they would engender meritless litigation, abuse, and extortion.[410] These concerns could be ameliorated by requiring judicial authorization for presuit discovery on a demonstration of good faith and the applicant's need, which would include a showing that relevant information was solely in the possession or control of a potentially adverse party or third

Discovery to Overcome Barriers to the Courthouse, 34 LITIGATION 31 (2008) (examining the legal bases for presuit discovery).

407. Rule 27 is expressly limited to the perpetuation of testimony by deposition and requires a verified petition showing that the action presently cannot be brought, and listing the subject matter of the anticipated action, the facts the petitioner wishes to establish, details about the expected adverse parties, and the expected substance of the deponent's testimony. *See* Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961) (discussing Rule 27); *In re* Ford, 170 F.R.D. 504, 508 (M.D. Ala. 1997) (finding that Rule 27 does not allow pre-complaint discovery under Rule 11). *See generally* Nicholas A. Kronfeld, Note, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 GEO. L.J. 593, 594 (1990) (recommending courts interpret Rule 27 to help litigants preserve evidence and frame their complaints).

408. New York offers one example. N.Y. C.P.L.R § 3102(c) (McKinney 2010).

409. TEX. R. CIV. P. 202.1(b). For an analysis of the experience under the Texas rule, see Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 247–69 (2007). *Cf.* DEL. CODE ANN. tit. 8, § 220(b) (1953) (allowing investor inspection of books and records for possible corporate fraud); FLA. STAT. ANN. § 400.0023 (West 2001) (authorizing "informal discovery" for unsworn statements and documents); PA. R. CIV. P. 4003.8 (sanctioning pre-complaint discovery); *Ex parte* Anderson, 644 So. 2d 961, 965 (Ala. 1994) (permitting presuit inspection of written records without explicit state civil procedure rule authorization). Connecticut has an independent action for discovery in aid of an action that is about to be brought. *See* Berger v. Cuomo, 644 A.2d 333, 338 (Conn. 1994) (granting a bill of discovery).

410. Indeed, some of the post-*Twombly* surveys show a modicum of support for preinstitution discovery, but it is unclear what significance should be accorded to this because the issue has not been focused on. *See* AM. BAR ASS'N SECTION OF LITIG., *supra* note 260, at 8 (summarizing Federal Rules amendment proposals).

person.[411] There also could be provision for notice to potentially adverse parties, and narrow inquiry parameters as necessary ingredients of any expansion of Rule 27 or the development of a new provision. Other constraints on the procedure's availability might be considered.

Would it work, or would district judges require a showing by the applicant as demanding as that required for the complaint itself? Would an order for presuit discovery be enforced, especially with regard to documents and emails that company and governmental agency defendants typically are reluctant to produce in litigation? Would the permitted scope of inquiry be so limited, perhaps by justiciability or case and controversy requirements rooted in the Constitution,[412] that the prospective plaintiff might not gain access to the critical information needed to frame a complaint? Even if federal presuit discovery is not expanded, perhaps use might be made of state presuit discovery procedures in aid of potential federal litigation.[413]

A related possibility might be authorizing early, limited, and carefully sequenced discovery following the interposition of a motion to dismiss—so-called pinpoint or flashlight discovery.[414] Contained discovery before the motion's resolution could provide a fruitful middle ground for evaluating challenges to cases that lie between the traditional Rule 12(b)(6) motion based on the complaint's legal or notice-giving insufficiency and a motion based on the complaint's failure to meet the factual plausibility precepts of *Twombly* and *Iqbal*.

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411. *See* Jones v. AIG Risk Mgmt., Inc., No. C-10-1374 EMC, 2010 WL 2867334, at *5 (N.D. Cal. July 20, 2010) (noting that a court has the ability to grant limited discovery under *Twombly* and *Iqbal* when relevant evidence is solely within the province of defendants); *see also* Santiago v. Walls, 599 F.3d 749, 759 (7th Cir. 2010) ("[Plaintiff] cannot know for certain what [defendant] knew without discovery. Consequently, the district court should not have dismissed this count of the complaint."). "Need" also might include the absence of any alternative information source that was in the public domain.

412. U.S. CONST. art. III, § 2. The Supreme Court has permitted the resolution of certain nonmerit matters without a prior determination that federal subject matter jurisdiction exists. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578, 87–88 (1999) (holding that in certain situations a "court does not abuse its discretion by turning directly to personal jurisdiction").

413. For some of the possible limitations on presuit discovery, see Dodson, *supra* note 406, at 60–64. Most of the limitations that are discussed refer to the use of state presuit discovery. *Id.*

414. There is considerable support for this. *See, e.g.*, SPECIAL COMM., AM. BAR ASS'N SECTION OF LITIG., CIVIL PROCEDURE IN THE 21ST CENTURY—SOME PROPOSALS 8 (2010), *available at* http://www.abanet.org/litigation/docs/civil-procedure-proposals.pdf. Indeed, it is simply a form of staggered discovery, which frequently is employed as part of judicial case management.

It would not permit full-fledged discovery with its accompanying costs and delays before the action's legal viability and notice-giving functions were established. Indeed, in some instances the discovery might be achieved with little or no burden on the defendant. That would be true, for example, when the discovery involves documents already produced to the government, particularly in a related judicial or regulatory proceeding.[415]

The suggested procedure, by which the district court authorizes a modicum of factual exploration before taking definitive action on the request for dismissal, is philosophically analogous to the principles embedded in Rule 11(b)(3) and Rule 56(f). Those provisions allow a party to try to secure needed information not yet available to it.[416] The suggested procedure would provide the needed peek at the merits to avoid undesirable restraints on the institution of an action, reduce the premature termination of cases, and limit the impairment of the private enforcement of public policies.[417] Like preinstitution discovery, however, the proposed approach would require the attention of a district or magistrate judge to oversee the procedure's operation in an appropriately constrained fashion. But again, would it be effective?

Perhaps a formula could be crafted to permit this type of circumscribed post-institution and pre-motion-to-dismiss discovery under careful management protocols. Discovery would focus solely on what is necessary to meet the plausibility requirement, assuming it is retained, especially in contexts involving a defendant's mental state

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415. *See, e.g.*, *In re* Delphi Corp. Sec., Derivative & "Erisa" Litig., No. 05-md-1725, 2007 WL 518626, at *8 (E.D. Mich. Feb. 15, 2007); *In re* Plastics Additives Antitrust Litig., No. 03-2038, 2004 WL 2743591, at *10–12 (E.D. Pa. Nov. 29, 2004); *In re* LaBranche Sec. Litig., 333 F. Supp. 2d 178, 183–84 (S.D.N.Y. 2004); *In re* Firstenergy Corp. Sec. Litig., 220 F.R.D. 541, 544–45 (N.D. Ohio 2004).

416. In Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 51, 55 (2010) (Pa. State Univ. Dickinson Sch. of Law, Legal Stud. Research Paper No. 30-2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653962, the author proposes "bifurcating complaint pleading" to permit a "limited discovery phase . . . to allow knowledgeable pleading." Whether that goal, comparable to the one I am advocating in the text, requires further elaboration of the pleading stage is questionable.

417. It has been suggested that if the plaintiff alleges under Rule 11(b)(3) that certain matters are likely to have evidentiary support after a reasonable opportunity for discovery, the court may so order if convinced that the allegations are sound. *See* Edward A. Hartnett, *Responding to* Twombly *and* Iqbal*: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24, 33 (2010), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hartnett.pdf.

or motivation, and situations involving a private or government defendant or third party in sole possession of critical information.[418] This procedure would have to be constructed carefully to assuage those who would be concerned about anything that smacks of allowing the discovery camel's nose under the pleading tent. But it might bring some equilibrium to the burdens on the parties at the pleading and motion-to-dismiss phases of litigation.

The *Iqbal* Court indicated that the current structure of Rule 8 forbids any access to discovery if the plausibility standard has not been met.[419] That point is neither irrefutable nor immune from rule revision, and I understand that some district courts have since winked at it, although the Second, Third, and Seventh Circuits have repeated the Court's statement.[420] Nor is there any mandatory or automatic stay of discovery while a Rule 12(b)(6) motion is pending,[421] except in cases under the Private Securities Legislation Reform Act. The district court judge therefore could permit discovery—presumably, but not necessarily, limited to matters relating to the issue of plausibility—prior to or during the pendency of the motion to dismiss and could then consider anything relevant that emerged.[422] At least

418. When the district judge believes a complaint falls short of plausibility but additional information not reflected in the pleading is accessible to the plaintiffs, the district judge presumably will dismiss with leave to replead or simply hold the motion in abeyance and grant the plaintiff leave to provide an amended pleading.

419. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

420. *See, e.g.*, Mann v. Brenner, No. 09-2461, 2010 WL 1220963, at *5 (3d Cir. Mar. 30, 2010) (staying discovery pending resolution of the motions to dismiss); Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599, 602–03 (7th Cir. 2009) (noting that a claim must have facial plausibility to survive a Rule 12(b)(6) motion to dismiss); S. Cherry St., LLC v. Hennessee Grp. LLC, 573 F.3d 98, 113–14 (2d Cir. 2009) (dismissing defendant's claim as mere speculation); *see also* 520 S. Michigan Ave. Ass'n. v. Unite Here, Local 1, No. 10 C1422, 2010 WL 2836666, at *1 (N.D. Ill. July 15, 2010) (noting that factual allegations must raise a right to relief above the speculation level); Ghaster v. City of Rocky River, No. 1:09CV02080, 2010 WL 2802682, at *2 (N.D. Ohio July 13, 2010) (noting that the Supreme Court applied the plausibility standard to all civil actions in *Iqbal*).

421. *See, e.g.*, City of Aurora v. P.S. Sys., Inc., No. 07-cv-02371-WYD-BNB, 2008 WL 4377505, at *8 (D. Colo. Jan. 14, 2008); *see also* Swanson v. Citibank, N.A., No. 10-1122, 2010 WL 2977297, at *10 (7th Cir. July 30, 2010) (noting that a judge can allow discovery while deferring a ruling on a motion to dismiss); Coss v. Playtex Prods., LLC, No. 08 C 50222, 2009 WL 1455358, at *5 (N.D. Ill. May 21, 2009) (noting that limited discovery may be appropriate prior to a court ruling on a motion to dismiss).

422. This recommendation has support from at least two other members of the academic community. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 41, at 230 (statement of Suzette M. Malveaux,

one court has allowed limited discovery *after* dismissal of a claim when relevant information needed to meet the plausibility standard was in the sole province of the defendant.[423] A matter of this magnitude should not be left to the inclinations of individual judges, however. Whether or not the Supreme Court's proscription is taken literally, a significant revision of the pleading and motion rules appears to be necessary to create a more textured and balanced solution to the information-access problem.

In line with the foregoing, a rational approach would be to relax the pleading structure if a plaintiff alleges the inaccessibility of critical information and articulates a reasonable basis for the information's existence and the defendant's control over it. When that is demonstrated, it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate. If the plaintiff felt the defendant's production still did not make it possible to defend against the motion to dismiss, the court could authorize more discovery on a showing of good cause.[424] The defendant's discovery, however, should be stayed pending resolution of the motion to dismiss.

B. A New Procedure Relating to Ascertaining Plausibility

As an alternative to the suggestions in the preceding Section, consideration might be given to creating a new motion that would lie

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Associate Professor of Law, The Catholic University of America Columbus School of Law) (suggesting that courts should "be open, upon receipt of a Rule 12(b)(6) motion, to allowing plaintiffs some initial discovery focused on those discrete facts necessary to show a plausible claim" and that such limited discovery has been used in determining whether the requirements for class actions, qualified immunity, and jurisdiction have been met); *see also* Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 507–14 (2010) (noting that, except in cases of qualified immunity, district courts have broad discretion to allow discovery prior to a Rule 12(b)(6) decision); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 69 (2010) (noting that courts should permit limited "plausibility discovery" in civil rights cases upon receipt of a Rule 12(b)(6) motion).

423. *See* Jones v. AIG Risk Mgmt., Inc., No. C-10-1374 EMC, 2010 WL 2867334, *5 (N.D. Cal. July 20, 2010) (allowing limited discovery after dismissal of a breach of contract claim to determine whether amendment is possible).

424. In addition to ameliorating the problem of information inaccessibility, limited preliminary discovery also might be useful for providing information so that both parties might be better able to appraise their claims for purposes of possible settlement. *See generally* Nagareda, *supra* note 126, at 8–9, 43–44.

between those now provided in Rule 12(b)(6) and Rule 56, one that would provide a new management tool for district judges. As previously discussed,[425] the plausibility-pleading standard has destabilized the long-held assumption that the motion to dismiss only is addressed to a pleading's legal sufficiency and notice-pleading quality.[426] Rule 12(b)(6) motions under *Conley* served the legal filtering and notice functions well, but the plausibility requirement now authorizes additional factual assessments and judgmental evaluations. A new procedure might be useful to address the type of decisionmaking created by this shift.

One approach might be to enhance the Rule 12(e) motion for a more definite statement.[427] That Rule long has been considered a relatively weak procedure limited to assuring notice giving because of its restrictive language that, as a practical matter, only applies to the complaint and affirmative claims in other pleadings;[428] but this need not continue to be the case. By expanding the scope of Rule 12(e), the rulemakers may be able to custom-tailor a more effective procedure. It would be one that would be invoked by a defendant when the statement of the claim is legally sufficient and provides

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425. *See supra* notes 70–75 and accompanying text.

426. The summary judgment motion historically also has been thought to present a legal issue because it can be granted only when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Even after the Supreme Court's *Celotex* and *Liberty Lobby* decisions, which equated summary judgment with the directed verdict motion (now the motion for judgment as a matter of law), the Rule 56 motion remains—at least in theory—a matter-of-law motion. *See supra* notes 189–92 and accompanying text.

> The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. '[The] standard [for granting summary judgment] mirrors the standard for a directed verdict.'

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (alteration in original). "In essence, though, the inquiry under each [summary judgment and directed verdict] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986).

427. FED. R. CIV. P. 12(e) ("A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.").

428. The motion is available only when "a pleading . . . is so vague or ambiguous that the . . . [movant] cannot reasonably prepare a response." *Id. See generally* 5C WRIGHT & MILLER, *supra* note 3, §§ 1374–1379 (discussing the elements of a motion for a more definite statement under Rule 12).

adequate notice to enable a response, but the absence of facts makes the right to relief appear less than plausible. Whether responding parties would see any advantage to employing such a motion rather than one under Rule 12(b)(6), however, is questionable. Either one probably would be granted with leave to replead. Indeed, the net result simply might be the creation of yet another pretrial friction point.

Perhaps more promising, although not strikingly different from the post-institution discovery technique just discussed,[429] would be a new procedure that a plaintiff could invoke in response to a motion to dismiss, which would enable the district court to permit a modicum of discovery when plausibility, rather than pure legal or notice-giving sufficiency, was challenged.[430] It might be the subject of a separate Rule or a new Rule 12 subdivision, possibly denominated "Motion to Particularize a Claim for Relief."[431] It could be raised as a free-standing motion in anticipation of the defendant's motion to dismiss

429. *See supra* text accompanying notes 414–20.

430. Such a proposal seems to have some judicial support assuming the continued ability to plead on information and belief post-*Twombly*-*Iqbal*. In *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), the Second Circuit held that the plaintiff, alleging disparate treatment, did not need to allege examples of preferential treatment by defendant employees toward non-minority or male customers because the "names and records, if any, of persons who were not members of the protected classes and were more favorably treated . . . is information particularly within KeyBank's knowledge and control." *Id.* at 215. Without these facts, the plaintiff merely recited an element of the claim—that members outside the protected class were treated differently. In essence, the motion proposed in text, much like what happened in *Boykin* and *Arista Records LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010), would allow plaintiffs to plead on information and belief that facts needed to establish plausibility are within the defendant's possession and warrant a slight opening of the discovery door.

431. *See, e.g.*, AM. COLL. OF TRIAL LAWYERS, *supra* note 54, at 6 ("A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules."). A proposal in FED. COURTS COMM., ASS'N OF THE BAR OF THE CITY OF N.Y., PROPOSALS FOR THE 2010 DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE 4–7 (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071920-NYCBarProposalsforDuke Conference.pdf, suggests a summary adjudication motion primarily directed at determining issues rather than claims and calls for the exchange of enhanced initial disclosures following an answer and before summary judgment. The Association's proposal was rejected as inefficient and potentially productive of "unfair outcomes" by the Federal Courts Committee of the New York County Lawyers' Association. FED. COURTS COMM., N.Y. CNTY. LAWYERS' ASS'N, COMMENTS ON THE PROPOSALS FOR THE 2010 DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE BY THE FEDERAL COURTS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1–3 (2010).

or interposed as a cross-motion to a Rule 12(b)(6) motion, or both, and operate as something analogous to the pre–Federal Rule discovery device known as the bill of particulars.[432] Alternatively, the procedure might take the form of a request that the defendant provide something—perhaps a critical document or sworn statement—that bears on the viability of the plaintiff's claim.

Once the judicially authorized discovery is secured or the request responded to, a plaintiff could stand on the complaint or, when appropriate, seek to amend it. When and how the procedure might be employed; the extent of the discretion the district judge might have to grant, deny, or modify the request; how much limited discovery might be permitted; and what form that discovery would take pose difficult policy questions. To be sure, the complaint's possible deficiencies probably would have to be exposed by the motion or the request, but that is a reasonable trade-off for the plaintiff gaining access to important information that might stave off dismissal. Defendants, of course, might feel abused by having to come forward with potentially damaging material at this embryonic point in the case. Nonetheless, giving access to the inaccessible seems fair and the particularization would be limited to those matters. The effectiveness of this procedure would depend on the judicial officer's involvement in the process, which admittedly makes it a potentially resource-consumptive tool.

Another procedural route that might give the pleader access to information needed to meet a challenge to his complaint is to expand the concept of automatic disclosure. This could be accomplished by increasing the number of categories in the mandatory disclosure provision in Rule 26(a)(1),[433] or by empowering district judges to order specified disclosure on a case-by-case basis as part of the initial or an early Rule 16 conference. The former approach would require a consensus concerning what categories of information should be added to the Rule to solve information-asymmetry problems—a matter that is not self-evident. The latter approach is far more flexible and would

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432. *See* CLARK, *supra* note 74, § 54 (describing bills of particulars).

433. Mandatory disclosure was adopted despite the objection of virtually the entire bar. *See generally* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2053 (3d ed. 2010). A history of the process that led to the adoption of mandatory disclosure has been published by the Advisory Committee's then-Reporter. *See* Carrington, *supra* note 43, at 31–45. Although the present Rule 26(a)(1) had some supporters, the overwhelming commentary on its utility at the Duke Conference was indifferent to negative.

be very similar to the notion of authorizing factual plausibility discovery discussed in the preceding Section. But it imposes more of a work burden on the court. Whatever form an expanded Rule 26(a)(1) might take, one of its benefits is that it would provide the district court judge with the particularization needed for making a more informed judgment as to the sufficiency of a claim for relief. A procedure of this type would be effective only if it could be utilized before resolution of a Rule 12(b)(6) motion—or even before one is made—whether the motion is based on plausibility or legal-sufficiency grounds, or a combination of the two.

As was true of those in the preceding Section, the ideas offered in this Section would generate more pretrial-motion practice and inevitably cause some cost and delay,[434] consequences I have seen all too often over the years and deplore. Nonetheless, the emergence of a new procedural tool may be an inevitable byproduct of any attempt to ameliorate the deleterious consequences of an information imbalance. This approach still may be effective if it reduces the costs imposed by *Twombly* and *Iqbal*: more motions to dismiss, repleading, renewed motions to dismiss, and appeals, as well as impairing the value of private enforcement of important public policies. Perhaps this suggests a quest for pleading and motion formulae that lie between the "no set of facts" language of *Conley* and that of *Twombly-Iqbal*, abandoning the latter, or looking elsewhere in the pretrial process for solutions to the perceived systemic ills.

C. Improving Case Management

Evaluating the quality and utility of case management is inextricably interwoven with any consideration of pleading and motion practice. Is it completely defunct, in need of serious modification, or just awaiting some experience-based tweaking? I cannot see simply accepting as determinative Justice Souter's lightly supported dismissal in *Twombly* of judicial management's "modest" ability to shape and filter litigation efficiently. Even assuming that present-day case management does not offer an optimal set of tools for addressing the exigencies of contemporary litigation, it is extremely unlikely that it is—and has been for all these years—

434. Indeed, cost and delay may be an inevitable byproduct of any attempt to ameliorate the information-imbalance consequences of demanding fact-based pleading.

incapable of meeting at least some of the practical concerns expressed by the Court and others.[435]

Abandoning what has been developed over the years is not a rational option, and nothing in the Federal Judicial Center's empirical work referred to earlier[436] suggests it should be. A district or magistrate judge, through his or her control over scheduling and the discovery process, represents the best—if not the only—hope in the procedural arsenal for containing excessive litigation behavior and the type of attrition activity that breeds cost and delay, especially in large-scale cases. Indeed, this reality promotes strengthening the management process and being more insistent about judicial involvement in it. The complexities of contemporary litigation suggest we need that more than ever before.

Perhaps judges should be firmer in requiring compliance with scheduling and other management orders, particularly discovery orders, and make it clear that a case's movement toward trial is inexorable.[437] Some judges already are, but a widespread acceptance of this approach will entail more hands-on activity by them and a willingness to make the threat of sanctions, including preclusion orders, a more realistic deterrent.[438] One magistrate judge and his distinguished practicing-attorney coauthor firmly believe that neither the bench nor the bar is taking enough advantage of the existing

435. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007). The Court's statement stands in sharp contrast to the position voiced by numerous Duke Conference speakers that more management and direct judicial involvement was needed. For related discussion, see Epstein, *supra* note 172, at 18–19.

436. *See supra* notes 240–43 and accompanying text.

437. I fondly remember that when I was working as an informal reporter for the committee of district judges charged with developing the original *Manual*, the late Chief Judge of the Western District of Missouri, William H. Becker, who served as the group's chair, repeatedly declared that the best management tool he knew was the establishment of an immutable schedule for a case with trial on a day certain. He forcefully (and colorfully) expressed the view that if the district judge never let the case deviate from the schedule, it "would settle if it were capable of being settled." Some obviously believe this approach is too inflexible.

438. *See, e.g.*, *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1252–53 (9th Cir. 2007) (upholding the district court's dismissal of the case for failure to comply with case management orders); Nick v. Morgan's Foods, Inc., 270 F.3d 590, 597 (8th Cir. 2001) (imposing monetary sanctions against a party for lack of good-faith participation in alternative dispute resolution); *In re* FLSA Cases, No. 6:08-mc-49-Orl-31GJK, 2009 WL 129599 (M.D. Fla. Jan. 20, 2009) (imposing sanctions for noncompliance with show cause orders).

extensive procedural toolkit and that "the problem is an absence of will."[439]

With the benefit of further empirical research that takes account of all pretrial costs, the Advisory Committee, the Board of Editors of the *Manual*, and individual judges may be able to make more refined, dispassionate decisions about the utility and proper role of case management as it relates to the pleading and motion structure.[440] There may be procedural mechanisms and techniques, for example, that would compensate for the alleged defects in case management and meet legitimate concerns about cost, abuse, and delay, yet allow for the resurrection of some or all aspects of the pre-*Twombly-Iqbal* notice pleading and Rule 12(b)(6)-motion practice. Perhaps more emphasis should be placed on phasing or logically sequencing discovery, so that possible silver-bullet issues can be identified to promote the acceleration of a resolution on the merits.[441] In a related vein, differential case management, in the form of either individual case custom tailoring or "tracking" according to case characteristics,[442] has not been fully explored or developed, let alone exploited.[443] It should be. The highly circumscribed discovery suggested by plaintiffs' counsel in *Twombly* to determine the viability of the class's claims

439. Grimm & Cabraser, *supra* note 239, at 11. There was no dissent from this proposition at the Duke Conference. References occasionally are made to the relatively light use of the wide authority given district judges to limit the frequency and extent of discovery provided by a 1983 amendment now found in Rule 26(b)(2)(C). As the Reporter at that time, I regret that the "proportionality" concept embedded in the provision has not been seen as a more useful element of the "toolkit." *See generally* 8 WRIGHT, MILLER & MARCUS, *supra* note 433, § 2008.1.

440. *See supra* notes 269–74 and accompanying text.

441. *See* Epstein, *supra* note 172, at 18 (recommending staggered discovery with periodic reassessments as to whether the case should continue).

442. For a description of "tracking," see *infra* notes 451–56 and accompanying text.

443. Both techniques showed up in various expense-and-delay plans formulated under the Civil Justice Reform Act of 1990. *See supra* text accompanying notes 216–19. *Compare* FINAL REPORT & RECOMMENDATIONS: DIFFERENTIATED CASE MGMT. PLAN WITH SUGGESTED RULES & COMMENTARY, 1991 WL 525120, R. 8:2.1 (N.D. Ohio Nov. 27, 1991) (Civil Justice Reform Act Plan) (establishing a five-track system), *with* EXPENSE & DELAY REDUCTION PLAN, 1991 WL 525091, Art. 1 (D. Mass. Nov. 18, 1991) (Civil Justice Reform Act Plan) (delineating an individualized and case specific monitoring system). The RAND Institute's evaluation of experience under the Civil Justice Reform Act was rather lukewarm about the implementation of management policies under the district court plans but was quite positive about the utility of certain methodologies. *See* KAKALIK, DUNWORTH, HILL, MCCAFFREY, OSHIRO, PACE & VAIANA, *supra* note 294, at 47–50 (stating that even though cases at the ends of the spectrum of complexity would be easy to place into tracks, most of the cases would fall in the middle and be placed into a "standard" track, which might lead to the loss of many of the predicted benefits of tracking).

should not have been rejected by the Supreme Court.[444] The Justices should have had more faith in the ability of district judges to manage their cases. Indeed, similar procedures have been used in many other cases.[445] Framing this type of special-purpose discovery will require careful crafting by counsel and the court, depending on the needs in particular cases. It also will require more experimentation and evaluation.

Furthermore, other disciplines, such as information science, efficiency analysis, and business management, could help identify the best—or, at least, more-effective—practices for reducing litigation costs. Importing relevant skills and experiences from other fields, which might involve new forms of education for both district and magistrate judges, may illuminate ways to restructure the pretrial process to produce more flexibility, better management, and less Rambo-like lawyer conduct,[446] as well as to reduce disparities in the utilization of procedures to prevent under- or overuse. New ideas even might include reformulating the roles of magistrate judges and para-judicials in civil cases, or adjusting the pretrial workload distribution among courthouse personnel or the modes of skill-training that should be made available through the Federal Judicial Center.[447] Who is in the best position to do which pretrial tasks is not self-evident. Nor is what should be included in a catalogue of the best procedural practices. Educational programs also might be developed for the practicing bar regarding the effective use of and participation in meet-and-confer and pretrial conferences, cooperative discovery, and techniques for expense and time containment. It may be that recent thinking about management matters has been too static and that Rule 16 and the *Manual* are not yet sufficiently delineated and

444. The proposal by plaintiffs' counsel was noted in Justice Stevens's dissenting opinion, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 593–95 (2007) (Stevens, J., dissenting) (citing Respondents' brief), and has been confirmed in private conversation with the class's counsel. It was rejected by the Court's dismissal of "phased" discovery. *Id.* at 560 n.6 (majority opinion).

445. *See, e.g.*, Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008) (affirming the district court's order to limit discovery and dismiss the case).

446. This became the generic referent in the 1990's for litigation tactics that were hyper-active and overly aggressive, invoking the Sylvester Stallone character in three popular action movies: FIRST BLOOD (Orion Pictures 1982), RAMBO FIRST BLOOD: PART II (TriStar Pictures 1985), and RAMBO III (TriStar Pictures 1988).

447. The Center is the training and education arm of the federal judiciary as well as its research resource. *See* 28 U.S.C. § 620 (2006).

textured to meet the challenges of the more difficult aspects of contemporary litigation.

Whatever management pathways prove promising, variations in judicial practice born of habit, temperament, philosophy, and context inevitably will continue to exist. One must be mindful, however, that although judicial discretion is a necessity in the implementation of management techniques, it must be exercised in a realistic and even-handed manner that does not weaken substantive policies, reflect personal philosophical preferences, or counter-productively burden the pretrial process.

All of this raises the satellite questions of how much detail is appropriate for inclusion in Rule 16—which was lengthened considerably in 1983 and 1993 to elaborate and expand the pretrial conference process—and what the future status and content of the *Manual* should be. Many of the thoughts expressed in the preceding paragraphs are inappropriate for inclusion in the Rules; they really call upon the assistance of the Judicial Center, bar associations, and even law schools to assist the bench and bar in achieving what amounts to a cultural shift in the handling of pretrial matters in federal civil cases. All participants in federal litigation must be incentivized to make case management—to paraphrase the former army recruitment slogan—"be all it can be."

D. A Tracking System

Professor Lonny S. Hoffman has criticized some legal writers as "traditionalists"—those who are so wedded to the principles the original drafters championed that they overlook the practical deficiencies of notice pleading in light of contemporary litigation realities.[448] According to him, this relentless focus on the past leads many traditionalists to argue—unconvincingly, he believes—for the reinstatement of notions from a bygone era.[449] So, a personal *mea culpa* may be in order; in many respects I am a "traditionalist." I was brought up, educated, and trained in the heyday of the original conception of the Rules by people who believed in their liberal ethos of access, transsubstantivity, equality of treatment, private enforcement of public policies, and quality merit adjudication. But, as

448. *See* Hoffman, *supra* note 106, at 1236–37.

449. *See id.*

noted at the outset of this Article, the earth has moved. Procedure does not exist in a vacuum. It must reflect and effectuate the substantive law and serve the needs of the judicial system and those who participate in it. It may be, therefore, that the transsubstantivity principle may be nothing but a cherished relic.[450]

So, at the risk of being branded a heretic by certain fellow "old fogies," I find somewhat attractive the fact that several "modern" thinkers have proposed adopting a tracking system that has different procedural rules depending on a case's substantive underpinnings or dimensions.[451] This is a more radical notion than simply grouping cases according to certain characteristics for case- or discovery-management purposes and then applying the same procedural rules to all cases with those characteristics within the individual tracks. Although this and similar proposals have elicited strong resistance in the past, the concept bears scrutiny.

The aspirations of Federal Rules 1 and 2, which once seemed to be in harmony, have become irreconcilable in some respects. A recent survey conducted for the Federal Judicial Center, for example, bolsters this conclusion by showing sizable discontinuities in litigation costs.[452] A second document produced by the Center concluded that litigation cost variations resonate to such predictable factors as higher monetary stakes, longer processing times, electronic discovery, and greater case complexity.[453] Consequently, the general applicability of the Federal Rules to "one form of action"[454] may have come into

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450. *See supra* Part III.B.

451. *See Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 213 (1990) (statement of Stuart Gerson, Assistant Att'y Gen., Civil Division, U.S. Department of Justice); John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 560–62 (1999); *see also* Tobias, *supra* note 266, at 1398–99, 1418–19. *But see* Burbank, *supra* note 143, at 545 (noting the judiciary's consistent objections to statutory proposals to "fashion a particular procedural rule for a particular substantive context"). A number of speakers at the Duke Conference expressed support for tracking—at least in terms of differentiating between simple and complex cases.

452. The survey found that the median costs reported by defense attorneys was $20,000 in cases that employed at least one type of discovery. LEE & WILLGING, *supra* note 203, at 37. Yet the top-fifth-percentile group of cases reported $300,000 in costs. *Id.* Obviously, it is only in a relatively small percentage of cases that these substantial litigation expenditures are experienced.

453. *Id.* at 2.

454. FED. R. CIV. P. 2.

conflict with the "just, speedy, and inexpensive determination of every action and proceeding,"[455] especially for contemporary cases at either end of the complexity spectrum.[456] Tracking—at least in some form—is an idea whose time may have come.

I do not believe that the transsubstantivity philosophy of the Rules should be abandoned based on unproven assumptions about abusive practices, meritless lawsuits, and excessive costs and delays. Instead, movement toward differential procedural treatment must be based on an extensive exploration of the present situation to determine how best to approach different types of cases, ranging from the mundane to the burdensome, and how much discretion to give the judicial officer to individualize the treatment of cases. The task undoubtedly will be arduous and possibly contentious. In part it will be difficult to create a workable differential system based on substantive law or litigation dimensions because it is unclear how best to define groups of cases with common characteristics and then draft customized rules for each category. I remember when working with the judicial authors of the original *Manual for Complex and Multidistrict Litigation*—as it was then titled—that they thought long and hard about a possible definition for "complexity" to clarify the ambit of the document. In the end, those attempts proved frustrating and fruitless, and the authors decided to include only a highly generalized statement about the *Manual*'s coverage.[457]

Perhaps tracking by case dimension would be more promising and easier to administer than segmenting by case complexity or substantive context. The British have constructed such a system. It consists of three tracks: the small-disputes track, for claims up to £5,000; the fast track, for claims between £5,000 and £15,000; and the multi-track, which applies to cases of larger value, complexity, and

455. *Id.* 1.

456. *See* 5 WRIGHT & MILLER, *supra* note 3, § 1217 ("These rules fully reflect the basic philosophy of the federal rules expressed in Rule 1 that simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system.").

457. The original *Manual* defined complex litigation as follows:

> "Complex litigation," as used in this Manual, includes one case or two or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as "protracted" and "big."

MANUAL FOR COMPLEX LITIGATION (FIRST) § 0.10 (rev. ed. 1973).

importance.[458] Claims not based on monetary value are assigned to the most appropriate track. Because each track provides standardized procedural instructions meant to apply to all cases within its scope, most require little specialized judicial attention. Although there actually are multiple opportunities for judicial involvement under each track, small claims cases generally are handled with minimal supervision and technicality. The fast track provides litigants with an efficient means of bringing relatively simple cases to trial, with a focus on one-day hearings within thirty weeks of their assignment to that track. The multi-track offers the greatest variety in management, with procedures that can vary from simple standardized directions similar to the fast track, to regular, hands-on judicial involvement in complex matters.

Because British civil procedure does not have an elaborate discovery regime comparable to that found in Federal Rules 26 through 37, or the prospect of trial by jury with its attendant procedures, a tracking model of that type would have to undergo major revision to work in the federal courts, and any assignment by dollar amount would have to be different. The British small-claims track, with its modest cap on case value, for example, does not align with the federal courts' requirement of more than $75,000 in diversity-of-citizenship cases and the absence of any such requirement in federal question cases.[459] Also, the rules delimiting the tracks might be adjusted based on complexity level or each case's substantive context. Nonetheless, the British system's focus on standardized rules for each track and different levels of judicial involvement may provide a useful concept and experience base for a federal tracking experiment.

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458. *See generally* ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 482–500 (2d ed. 2006). A number of countries employ special procedures for different types of actions. *E.g.*, ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] §§ 592, 689 (Ger.), *reprinted in* ZIVILPROZESSORDNUNG (C.H. Beck ed., 57th ed. 1999) (delineating the German system of summary proceedings for actions seeking payment on a sum of money or the delivery of goods); *see also* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 425–28 (2004) (describing the German Code provision). Many civilian systems have specialized commercial courts or panels. *See, e.g.*, CODE DE COMMERCE [C. COM.] arts. L.721-1 to 724-7 (Fr.); GERICHTSVERFASSUNGSGESETZ [GVG] [Constitution of the Courts Act] § 105 (Ger.), *reprinted in* ZIVILPROZESSORDNUNG (Richard Zöller ed., 23rd rev. ed. 2002).

459. 28 U.S.C. § 1332(a) (2006).

Tracking is not alien to the existing federal system.[460] Rule 26(a)(1)(B) creates a modest track by allowing eight categories of cases to bypass the mandatory disclosure requirement.[461] The *Manual for Complex Litigation* provides something in the nature of ad hoc tracking for managing an important portion of the federal docket.[462] Interestingly, the promulgation of the mandatory disclosure rule followed an intramural debate within the rulemaking community in the early 1990s; some favored a provision for differential case management customized to the needs of particular cases based on both Congress' directive in the Civil Justice Reform Act of 1990[463] and a rule then in force in the Eastern District of Texas that established different discovery tracks ranging from no discovery to "[s]pecialized treatment."[464] Indeed, the subject was dealt with at length in a model civil-justice expense-and-delay-reduction plan developed by the Judicial Conference[465] pursuant to its reporting obligations under the 1990 Act.[466] In the end, the transsubstantive mandatory disclosure rule—with its exceptions—prevailed over the case-by-case standard and the tracking techniques.[467]

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460. For an early tracking suggestion, see Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984).

461. Similarly, some local rules enumerate certain categories of actions that are exempted from the scheduling and planning provisions of Rule 16(b). *E.g.*, LR, D. Mass. 16.2.

462. Early editions of the *Manual* recommended the use of "waves" of discovery as needed. *See* MANUAL FOR COMPLEX LITIGATION (SECOND) *supra* note 213, § 21.421. The current *Manual* speaks of "[p]hased, sequenced, or targeted discovery." MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 208, § 11.422.

463. The Act directed the consideration of "systematic, differential treatment" of civil cases. 28 U.S.C. § 473(a)(1). The response was said to be limited, *see* KAKALIK, DUNWORTH, HILL, MCCAFFREY, OSHIRO, PACE & VAIANA, *supra* note 294, at 25–27, although some districts had modest tracking systems before the Act and a number of the plans offered a multi-track model. *See generally* AM. BAR ASS'N SECTION OF LITIG., REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 6–7 (1992); Dunworth & Kakalik, *supra* note 216 (evaluating the RAND Corporation's review of the Civil Justice Reform Act of 1990).

464. Civil Justice Expense & Delay Reduction Plan Pursuant to the Civil Justice Reform Act of 1990, 1991 WL 525100 (E.D. Tex. Dec. 20, 1991).

465. *See* JUDICIAL CONFERENCE OF THE U.S., MODEL PLAN FOR REDUCTION OF EXPENSE AND DELAY IN CIVIL CASES, 7–15 (1992) (discussing differentiated case management disclosure requirements).

466. 28 U.S.C. § 477(a)(1) (2006).

467. *See* Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 782–85 (1995); Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1567 n.63 (1994).

In contrast to the mandatory disclosure provision, Rules 16(a)(1), 16(c)(2)(1), and 26(f)(2), as well as the *Manual*'s management guidelines for complex cases, naturally encourage greater judicial involvement and permit more case-by-case judicial tailoring for discovery than typically is seen in simpler cases, in order to minimize discovery costs and to reduce delay.[468] Similarly, the multidistrict litigation statute[469] and the Judicial Panel on Multidistrict Litigation[470] facilitate combining factually and legally related cases to coordinate the pretrial process and to avoid resource-consuming redundancy, effectively forming a track. The Civil Justice Reform Act of 1990 authorized the district courts to consider "differential treatment of civil cases" in formulating their expense-and-delay plans.[471] Local rules in some district courts have the same effect.[472] At the state level, New York[473] and California,[474] among many others, use various forms of tracking: they assign cases to courts or divisions thereof based on the amount in controversy, or they assign them to specialized tribunals by type of action, such as commercial matters or disputes with governmental entities, as deemed appropriate.[475]

Tracking may be a workable solution, particularly if a cost-benefit analysis shows that the Federal Rules' procedural gold standard has become too resource consumptive to be employed in all cases, but the judgment is that as a society we are not willing to give

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468. *See* Cavanagh, *supra* note 211, at 23–25.

469. 28 U.S.C. § 1407.

470. Created by Congress in 1968, the Judicial Panel on Multidistrict Litigation is composed of seven federal circuit and district court judges who determine whether similar cases instituted in separate districts should be combined in one district for coordinated pretrial proceedings. *See generally* 15 WRIGHT, MILLER & COOPER, *supra* note 353, §§ 3861–3868 (3d ed. 2007).

471. 28 U.S.C. § 473.

472. Local Rule 16.1(a)(3)(G) of the Western District of New York calls for a "meaningful" discussion of "the need for adopting special procedures for managing difficult actions involving complex issues, multiple parties or difficult legal questions."

473. New York has established a Commercial Division of its Supreme Court with monetary thresholds, designated categories of actions that can be heard in the Division, and a number of rules of practice. Uniform Rules for the New York State Trial Cts [22 NYCRR] § 202.70.

474. California calls for the coordination of complex actions, defined as any action "that requires exceptional judicial management" and lists a number of factors to be considered by the court in deciding whether to make that designation. Cal. Rules of Courts, rules 3.501–3.550. A number of procedural rules are provided that govern the coordination of complex cases. *Id.*

475. *See generally* Holly Bakke & Maureen Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17 (1990) (describing differential case management and local variations).

up our high-quality system entirely. If there is resistance to abandoning the transsubstantivity principle because of its longstanding character or the current language of the Rules Enabling Act, it may be necessary for Congress to recast the statute to modify the "general-rules" requirement to fit contemporary circumstances and to afford the rulemakers more flexibility.[476] Or it may be appropriate to reassess the existing understanding of the existing statutory words. For example, rules general to each track, similar to those in the British system, may be thought sufficiently "general" without requiring a legislative change in the Rules Enabling Act.

Perhaps what is needed is a more open recognition that the "one-size-fits-all" philosophy that prevailed in the 1930s no longer may be the most apt litigation model; there is considerable recognition of that.[477] Indeed, that was Congress' judgment in enacting the Civil Justice Reform Act of 1990. Similarly, the same realization that some variations in the Rules' application were necessary led the drafters of the original Rules to establish the heightened pleading requirement for fraud and mistake in the first sentence of Rule 9(b) and the lightened pleading requirement for "[m]alice, intent, knowledge, and other conditions of a person's mind" in the second sentence of that provision.[478] These deviations from the transsubstantivity principle might lead present and future rulemakers to draw corresponding distinctions for other litigation categories. It must be recognized, however, that opposition to abandoning transsubstantivity continues in some quarters.

Moreover, tracking is a pathway fraught with danger, involving the drawing of lines that are difficult—perhaps impossible—to see. Inevitably, attempting to establish distinctions will bring to the fore vast differences in philosophy, ideology, and self-interest that merge substantive predilections with procedure. Indeed, that may be the reality underlying *Twombly*, *Iqbal*, and the PSLRA, which in a sense are the contemporary analogues to the forces that led to the special pleading provisions found in Rule 9(b). Fashioning different pleading, motion, and discovery procedures to protect the ability of

476. *See supra* text accompanying note 358.

477. The Federal Judicial Center Preliminary Report shows support for conducting an experiment with a simplified procedure system in several districts by party consent. *See* LEE & WILLGING, *supra* note 203, at 52–54.

478. FED. R. CIV. P. 9(b).

government officials to function effectively or economic entities to compete not only requires the drafting skills of a Leonardo da Vinci but depends on what those who write the rules believe is needed either to protect governmental functionality and corporate America or to hold them accountable. Those who formulate court rules also must be mindful of the often competing interests of minority group members, consumers, investors, and any of us who breathe the air or drink the water or enjoy the environment—in short, all the people. Thus, the intellectual honesty and integrity of those who draft, approve, and apply tomorrow's procedures become central to the enterprise.

It may be that attempting to create a tracking system is a fool's errand: today's pressures and philosophical divisions may not allow the policymakers, rulemakers, and interest groups to leave their clients at the meeting-room door. Any sophisticated sea change from transsubstantivity to tracking will require multiple rule sets; involve arduous, difficult, and politically charged processes; and demand a considerable amount of time to formulate and execute. And who knows what the law of unanticipated consequences will bring? But the effort may be worth undertaking. Some lines might prove to be visible and may well command consensus. The initial effort might be relatively primitive—perhaps simply using the type of objective criteria exemplified by the British model or constructing an experiment in one or more districts. A potential downside is that even a simple approach would breed, at least at the outset, litigation over determinations of which track was appropriate for which cases.

E. Sanctions

I mention this subject with some trepidation given my prior involvement with the 1983 amendment of Rule 11 as an Advisory Committee Reporter and then Committee member.[479] But it seems worth observing that more-effective enforcement of the certification required by Rule 11 of each paper presented to a federal court[480] might be desirable, keeping in mind that since 1993 the Rule does have a "safe-harbor" provision and that subdivision (b)(3) contains

479. I am bemused by the fact that several participants at the Duke Conference bemoaned the fact that sanctions were few and far between.

480. *See generally* 5A WRIGHT & MILLER, *supra* note 3, § 1335 (describing the elements and application of Rule 11).

another safety valve permitting the signer to assert that the accuracy of the document's contents will likely be borne out by "further investigation or discovery."[481]

Consideration might be given to restoring some of the elements of the 1983 amendment to Rule 11 that were eliminated by the 1993 amendment.[482] This might include a partial reinstatement of compensation and punishment as legitimate objectives of the sanction process to promote efficiency and compliance, principles that continue to be applicable under Rule 16(f) and parts of Rule 37.[483] If it can be achieved, meaningful judicial deterrence seems desirable to curtail inappropriate pleading, motion, and discovery conduct and to maximize the effectiveness of judicial management. In addition, perhaps the sanction rules should be revisited to see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values.[484]

Opposition can be expected from various civil rights and public-interest groups who fear—with some justification—the disproportionate application of sanctions against them and the concomitant chilling effect.[485] Any changes in the sanction structure

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481. FED. R. CIV. P. 11(b)(3).

482. *See* 5A WRIGHT & MILLER, *supra* note 3, §§ 1331–1332. For example, the district court's discretion to deny sanctions might be limited and the range of sanctions restored.

483. Rule 16(f) authorizes the imposition of compensatory sanctions for certain types of noncompliance with pretrial management matters. FED. R. CIV. P. 16(f). The Private Securities Litigation Reform Act preserves the mandatory sanction character of the 1983 version of Rule 11. 15 U.S.C. § 77z-1(c) (2006).

484. Various legislative proposals to strengthen Rule 11 have been put forward in recent years. *See, e.g.*, Frivolous Lawsuit Prevention Act of 2009, S. 603, 111th Cong. § 2. Care must be taken to avoid the possible use of Rule 11 to undermine access through over-deterrence or to promote attrition tactics.

485. That concern was strenuously voiced about practice under the 1983 amendment. *See generally* Melissa L. Nelkin, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986) (discussing the potential chilling effects of Rule 11 sanctions and suggesting nonmandatory sanctions as a remedy for the problem); Georgene M. Vairo, Commentary, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991) (asserting that Rule 11 is being used to limit advocacy in federal courts). The issue has been relatively quiet under the 1993 amendment. *But see* Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 994 (1998) ("[B]oth the 1983 Amendment and the 1993 Amendment represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts." (footnote omitted)).

would have to be handled with considerable delicacy and applied evenhandedly, and in a way that avoided the motion cottage industry that arose under Rule 11 between 1983 and 1993.[486]

CONCLUSION: *DIOGUARDI* REDUX

Admittedly, contemporary litigation realities are strikingly different from the world that generated the original Federal Rules. Strong forces have moved case disposition earlier and earlier in an attempt to solve the perceived problems of discovery abuse, meritless lawsuits, and litigation expense and delay. Although rulemakers and courts must live in the present and plan for the future, it is important not to forget the important citizen-access and private-enforcement values and objectives at the heart of the 1938 Rules. The pendulum appears to have swung too far away from those values. In that vein, one wonders how *Dioguardi* would be decided today.[487]

John Dioguardi's complaint actually alleged a number of facts, but would those facts be sufficient today to support a plausible inference of wrongdoing? The allegations consisted of a series of disjointed statements, left holes in many key elements, and did not provide any articulated legal theory. Judge Clark's opinion identified a conversion claim, even though Dioguardi never stated that the Collector of Customs took his tonic, but merely alleged: "[I]t isn't so easy to do away with two cases of 37 bottles of one quart. Being protected, they can take this chance."[488] And any first-year law student can extrapolate—or intuit—a trespass claim and a number of other possible theories. Would the Second Circuit be as tolerant today?[489]

Now, unlike then, a federal judge is instructed to determine whether an inference of wrongdoing by the Collector was plausible. Judicial experience and common sense—matters beyond the

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486. *See* 5A WRIGHT & MILLER, *supra* note 3, § 1332; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631–32 (1987).

487. *See* Am. Compl., Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (No. 157), *reprinted in* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 561 (10th ed. 2009).

488. *Id.* ¶ 5.

489. It is interesting to note that the Second Circuit upheld the complaint's sufficiency in both *Twombly* and *Iqbal* and has interpreted the Supreme Court's decisions in those cases in a reasonably moderate fashion. *E.g.*, Starr v. Sony BMG Entm't, 592 F.3d 314, 323–27 (2d Cir. 2010).

complaint—might counsel a judge that property conversion or negligent damage to goods at a major customs facility was a realistic concern and thus plausible, depending, perhaps, on the reputation of the federal agency's workings. Is there a more likely alternative explanation? Perhaps it is just as plausible that Dioguardi did not follow the applicable procedures to receive his goods, leading to their sale at auction, or that they were improperly packaged when shipped, as it is that customs personnel were dishonest or careless. In light of *Iqbal*'s assumption that high-ranking government officials could not plausibly act toward Muslim Pakistanis with a discriminatory motive following 9/11, a claim of conversion or trespass against a government official might be regarded as implausible. Yet, ruminations about Dioguardi's and anyone else's conduct are sheer speculation. In truth, how is a district court judge, regardless of his judicial experience and common sense, supposed to know what is or is not plausible in these circumstances based solely on a complaint like Dioguardi's?[490]

The judge then might weigh the burdens of subjecting the Collector of Customs to discovery and trial. Perhaps Dioguardi's is one of the relatively modest, simple cases in which these rigors would be seen as limited. If a case-tracking system replaced transsubstantivity, his complaint might slide by under an easier pleading standard for small cases and be expedited. However, the Collector of Customs runs a large, complex operation that generates countless transactions and records each day. Discovery—especially e-discovery—to track the goods and identify the personnel who came in contact with them could be quite costly and might disrupt an important government agency's functioning. A federal court today might conclude that allowing Dioguardi to go beyond the complaint "just ain't worth it."[491]

Perhaps most striking is the difference in attitude between Judge Clark and the thrust of the Supreme Court's latest pleading decisions. Within the muddled complaint, Judge Clark found two claims and intimated there were more.[492] He even evinced a desire to see

490. Obviously, some would argue that this is the type of issue that should be determined by a jury, although in the legal context of *Dioguardi*—a suit against the government—one would not be available.

491. It is even conceivable that the judge might consider the litigation as intrusive on matters of national security or an interference with monitoring imports to deter terrorist activities.

492. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

Dioguardi's claim adjudicated on its merits rather than on a formalistic assessment of his statements' linguistic quality.[493] Judge Clark apparently valued Dioguardi's right to a day in court and a judgment on the merits more highly than minimizing the potential cost to the governmental defendant and the burden on the court system. After *Twombly* and *Iqbal*, a complaint whose sufficiency was as problematic as Dioguardi's might be dismissed based on concerns about judicial resources, potentially frivolous lawsuits, and the costs of discovery.[494] That seems myopic. It fails to recognize the democratic significance of litigation as a form of governance or oversight on bureaucratic activity, an enforcement mechanism, and a channel for citizens to express their grievances against their government or fellow citizens. And it fails to recognize the economic restraints on most plaintiffs and contingent-fee lawyers.

Of course, *Dioguardi* does not reflect the types of cases that probably motivated the procedural changes that have occurred in the last quarter century and that are jeopardized by today's quest for early disposition. Consider a contemporary version. Suppose that Dioguardi were the representative plaintiff in a class action on behalf of all importers who were of certain racial, ethnic, or religious backgrounds claiming systematic discriminatory behavior in the handling of their goods by the Collector of Customs in the Port of New York. What factual presentation would *Twombly* and *Iqbal* require for his complaint to meet the plausibility threshold and survive a Rule 12(b)(6) motion? Would the calculus have shifted because of the change in context? Would judicial discretion be so broad as to empower a district judge to brand the claim implausible and to dismiss on the basis of his judicial experience and common sense, even though the critical information about the government's

493. *Id.* ("In view of the plaintiff's limited ability to write and speak English, it will be difficult for the District Court to arrive at justice unless he consents to receive legal assistance . . . .").

494. Perhaps Dioguardi could survive under a plausibility standard on the ground that pleadings by pro se plaintiffs are to be construed liberally. *See* Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam) ("A document filed pro se is 'to be liberally construed'" (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))); *see also* Granda v. Schulman, No. 09-12564, 2010 WL 1337716, at *4 (11th Cir. Apr. 7, 2010) (construing the complaint liberally because the plaintiff was acting pro se, even though the complaint did not allege whether the defendant was acting under color of state law for a § 1983 claim); Cann v. Hayman, 346 F. App'x 822, 824 (3d Cir. 2009) (noting the principle that pleadings of pro se litigants are liberally construed). This, however, is an analytical approach that is of limited application.

behavior and motivation was in the sole possession of the defendant? And then how would a court of appeals effectively review that dismissal? And what would be the result? Putting the question of class certifiability aside, why should procedures not be available to assure that the hypothetical class members have access to enough information to provide an opportunity to present an intelligent, principled, and nonspeculative statement of their claim?

Returning to Rule 1, I close with several questions worthy of attention. Are we still serious about achieving "the just, speedy, and inexpensive determination of every action and proceeding"?[495] Can we afford to preserve a gold standard procedural system? Can we afford not to? Even assuming it is efficient, does the current treatment of pleadings and pretrial motions undermine important system values—meaningful citizen access, the quality of justice, governance and private enforcement, and the societal values of litigation? Should the rulemaking process be encouraged to construct a procedural system that properly balances all of these values? After all, embedded in Rule 1 there always has been a sense that the Federal Rules and their application should accommodate all three of the objectives it identifies.[496] "Speedy" and "inexpensive" should not be sought at the expense of what is "just." The latter is a short word, but it embraces societal objectives of enormous significance that should not be subordinated to the other two.

495. FED R. CIV. P. 1.

496. Admittedly these objectives are somewhat in tension with each other.