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## Inventing Tests, Destabilizing Systems

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# Inventing Tests, Destabilizing Systems

Kevin M. Clermont\* & Stephen C. Yeazell\*\*

*ABSTRACT: The U.S. Supreme Court revolutionized the law on pleading by its suggestive decision in Bell Atlantic Corp. v. Twombly and definitive decision in Ashcroft v. Iqbal. But these decisions did more than redefine the pleading rules: by inventing a foggy test for the threshold stage of every lawsuit, they have destabilized the entire system of civil litigation. This destabilization should rekindle a wide conversation about fundamental choices made in designing our legal system.*

*Those choices are debatable. Thus, the bone this Article picks with the Court is not that it took the wrong path for pleading, but that it blazed a new and unclear path alone and without adequate warning or thought. This Article argues that wherever you stand on pleading—whether you think the federal litigation system is wildly overburdened with frivolous suits, or whether you think the role of pleading should be further purified to eliminate its screening function entirely—you should find these recent decisions lamentable.*

*This Article describes the Court's choice to shift from minimal notice pleading to a robust gatekeeping regime, and next gives some reasons for thinking that the Court's course on this important matter may promise the worst of both worlds. Then, after some thoughts on the Court's possible motivation, it briefly offers some ways out of the bog.*

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The headline need no longer equivocate after two recent U.S. Supreme Court cases: Pleading Left Bleeding. The Court has revolutionized the law on pleading. Litigators (and procedure scholars) have taken note of the Court's fresh pair of decisions, the suggestive *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and the definitive *Ashcroft v. Iqbal*.<sup>2</sup> But these decisions do more than redefine pleading rules. By inventing a new and foggy test for the threshold stage of every lawsuit, they have destabilized the entire system of civil litigation.<sup>3</sup> Although we shall have to justify calling it a destabilization, the overall effect should cause even those without a special interest in pleading to take notice.<sup>4</sup>

These decisions should also reopen debate over the fundamental choices made during our legal system's design. Choices such as this one, how accessible to make the system of justice for complainants or, alternatively, how much process to inflict on their opponents, are of course debatable. Indeed, because the litigation system plays so central a role in governing our society, all interested persons should have the opportunity to debate the major choices before anyone makes large changes to the status quo. The bone this Article picks with the Court is not that it took the wrong path for pleading, but that by blazing a new and unclear path alone and without adequate warning or thought it left the pleading system in shambles.

This Article will conclude that wherever you stand on pleading—whether you think the federal litigation system is awash with frivolous suits, or whether you would purify the role of pleading by eliminating entirely its screening function—you should lament these recent decisions. To get there, we shall first describe the Court's choice to replace minimal notice pleading with a robust gatekeeping regime, and we next shall give some reasons for

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1. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). This decision surprised many observers despite a forewarning that lay, somewhat ambiguously, in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (dismissing a securities complaint as insufficient).

2. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). This decision clarified the intricate workings and broad applicability of *Twombly*.

3. For a judge's lament, see generally Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851 (2008).

4. By discombobulating a basic area of law, *Twombly* managed to generate an absolutely extraordinary 22,980 judicial citations in its first thirty-two months, as measured by a Westlaw KeyCite run on January 15, 2010. In its first seventy-two years, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), garnered only 13,546 citations! *Twombly's* ascension must represent the all-time fastest accelerating citation count for a new case, as it leaves the early years of the overall citation champs, *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett*, in the dust. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 86–88, 143–45 (2006) (compiling tables of most-cited cases). Of course, *Twombly* generated a mountain of commentary from academics too, much of which we shall cite herein. Although much of that commentary debated the mysteries of *Twombly*, some of which *Iqbal* resolved, a new round of tumult over the combined cases surely lies ahead, as the countless foothills of chatter on the blogs and listservs attest.

thinking that the Court's preference may promise the worst of both worlds. Then, after some thoughts on the Justices' possible motivations, we shall briefly sketch some routes for escaping the bog.

## I. WHAT THEY DID

Pleading serves as the gatekeeper for civil litigation. A lawsuit dismissed because the complaint fails to make the requisite allegations never reaches the stage at which the evidence supporting those allegations can emerge. This early demise produces great social benefit if, in the end, the facts would not have supported a judgment for the plaintiff. The same early demise inflicts considerable social harm if, in the end, the facts would have supported such a judgment, but for the claim foundering over a mere defect in the complaint.

### A. THE OLD DAYS

Acting under the authority of the Rules Enabling Act,<sup>5</sup> the Supreme Court promulgated the Federal Rules of Civil Procedure of 1938. One of those Rules, Rule 8, proclaimed a new day in pleading.<sup>6</sup> In the effort to end centuries of dispute over the words the plaintiff needed to say to start a lawsuit, the new Rule proclaimed that a complaint would suffice if it contained "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>7</sup>

The older view had held that pleadings must accomplish a great deal more, laying out the issues in dispute and stating the facts in considerable detail.<sup>8</sup> But the rulemakers felt that this view asked too much of the pleading stage, which consequently had become the center of legal attention, ended up mired down in battles over technicalities, and provided a vehicle for monumental abuse.<sup>9</sup> The accompanying Appendix of Forms illustrates just how serious the rulemakers were about simplifying pleading. Form 11 sets

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5. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-2074 (2006)).

6. Some have contended that the Court, in its longtime leading case on pleading, *Conley v. Gibson*, 355 U.S. 41 (1957), departed from the design of the original Rules, so these scholars date notice pleading from 1957 rather than 1938. See, e.g., Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685-86 (1998) (arguing that the original Rules maintained at least a modest gatekeeping function for pleading). All would agree that *Conley* at least settled the debate over notice pleading, creating a peace that lasted for decades. See Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 317-18 (Kevin M. Clermont ed., 2d ed. 2008) (describing the impact of *Conley*).

7. FED. R. CIV. P. 8(a)(2). The language remains the same in the current version of the Rule.

8. See RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1069-76, 1117-23 (10th ed. 2010) (describing the historic regime); STEPHEN C. YEAZELL, CIVIL PROCEDURE 333-44 (7th ed. 2008) (same).

9. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) (elaborating the motivation for the federal reform).

forth a vehicular-negligence claim in thirty-seven words, achieving this brevity in part by blessing the use of conclusory terms: “[T]he defendant negligently drove a motor vehicle . . . . As a result, the plaintiff was physically injured . . . .”<sup>10</sup>

Such conclusory brevity prevents expensive squabbling over the formulation of the grievance, but makes starting a lawsuit unsupported by evidence very easy. It may be that the defendant was not negligent, that he was negligent but his negligence did not cause the accident, that the plaintiff suffered no injury, or even that there was no accident at all and so the claim was fabricated. How can a defendant meet such unjustified claims? Under the rulemakers’ system, the answer lay in mechanisms for forced uncovering of evidence and for ending the case short of trial if the evidence uncovered would not support a judgment for the plaintiff. The motivating theory was that the stages subsequent to pleading—disclosure, discovery, pretrial conferences, summary judgment, and trial—could more efficiently and fairly handle functions such as narrowing issues and revealing facts, and, thus, the whole system could better deliver a proper decision on the merits.

Under the Rules, then, pleading was a pervious gate. Its main task was to give fair notice of the pleader’s basic contentions to the adversary (and the court and the public). It passed most of the screening function from the threshold to later stages of litigation.

This postponement of screening constituted a fundamental choice in procedural design, a choice that is surely debatable. Some of the persistent opposition to such permissive pleading flowed from the costs of the later stages, to which the Rules had transferred the screening function. Uncovering evidence to demonstrate the weakness of the plaintiff’s claim entails expenses that the defendant cannot recoup from the plaintiff. In some cases—like *Twombly* and *Iqbal*—those costs may be great, either in financial outlay or in time and energy diverted from important public or private tasks. But until *Twombly* and *Iqbal*, the system of civil litigation remained on the chosen path, mainly performing the screening function not at the pleading stage but at the fact-development and fact-testing stages. Most observers retained the belief that this choice was a good one,<sup>11</sup> while

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10. FED. R. CIV. P. FORM 11. After an allegation of jurisdiction, the current version of Form 11 offers these two sentences: “On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$[amount].” *Id.* The original Form 9 provided basically the same form, with a little more detail.

11. See, e.g., CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 54–57, 240–45 (2d ed. 1947) (extolling simplified pleading); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–62 (1942) (same). Whether or not Judge Clark favored “notice pleading,” he certainly supported simple pleading. See Sherwin, *supra* note 6, at 299–303 (discussing Clark’s view and its critics).

the groups charged with revising the Rules rejected any major alterations to the Rules after hearing from bench and bar.<sup>12</sup>

### B. THE RECENT CASES

*Twombly* and *Iqbal* changed everything, or at least appeared to do so. The two cases shifted a significant portion of the screening function back to the pleading stage.

#### 1. *Bell Atlantic Corp. v. Twombly*

In *Bell Atlantic Corp. v. Twombly*, telephone and Internet subscribers brought a class action against various telecommunications giants, claiming an illegal conspiracy in restraint of trade.<sup>13</sup> Under antitrust law, however, parallel and even consciously identical conduct unfavorable to competition is not illegal if it comprises only independent acts by competitors without any agreement.<sup>14</sup> The complaint alleged parallel conduct in great detail, explaining how each company sought to inhibit upstarts in its own region and refrained from entering the other major companies' regions. But the complaint alleged an agreement in conclusory terms based upon information and belief because the plaintiffs had no proof yet in hand.<sup>15</sup>

The obvious concern in this big, complex case was that the claims opened the door to expensive discovery. Therefore, the Court upheld dismissal on a pre-answer motion. According to the Court, the complaint had to show an agreement among competitors.<sup>16</sup> The defendants' behavior was what each company would naturally have done in pursuit of its own interests.<sup>17</sup> The plaintiffs needed to give factual detail to make their complaint plausible, yet they "mentioned no specific time, place, or person involved in the alleged conspiracies."<sup>18</sup> The plaintiffs, who "have not nudged their claims across the line from conceivable to plausible,"<sup>19</sup> had their complaint dismissed.

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12. See ADVISORY COMM. ON THE RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955) (explaining reasons for not amending FED. R. CIV. P. 8(a)(2)), reprinted in 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE app. F, at 644-45 (2009); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751-52 & n.18 (1998) (describing the decision in 1993-1995 not to amend FED. R. CIV. P. 8(a)(2)).

13. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549-50 (2007).

14. *Id.* at 553-54.

15. See *id.* at 550-51 (summarizing the plaintiffs' complaint).

16. *Id.* at 564.

17. See *id.* at 564-69 (explaining why the defendants' conduct fell short of conspiracy).

18. *Twombly*, 550 U.S. at 565 n.10.

19. *Id.* at 570. The case died after the Court's decision, with the district court's file closing later in 2007.

In so ruling, the Court imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading's convincingness. Thus, in this case, Justice Souter for the Court ignored the conclusory allegation of agreement.<sup>20</sup> It had to accept as true the allegations of parallel conduct, but could still treat them as an inadequate "showing" of entitlement to relief because they did not make plausible the existence of an actual agreement.<sup>21</sup>

Justice Stevens, joined in relevant part by Justice Ginsburg, dissented. He noted: "Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."<sup>22</sup>

## 2. *Ashcroft v. Iqbal*

Two years later, the Court answered Justice Stevens's question. On interlocutory appeal in *Ashcroft v. Iqbal*, the Court ruled that *Twombly* applied to all federal complaints and then overturned the lower courts' approval of the complaint before it.<sup>23</sup> Here, the civil-rights plaintiff, a Pakistani Muslim arrested post-9/11 in the United States, sued high federal officials upon allegations of "harsh conditions of confinement on account of his race, religion, or national origin."<sup>24</sup> The Court ignored conclusory allegations regarding the cause of action's elements, including that the defendants knowingly condoned a discriminatory policy.<sup>25</sup> The Court then said the remaining allegations did not suffice to make plausible that the Attorney General and the FBI Director subjected the plaintiff to harsh confinement *because of* his race, religion, or national origin.<sup>26</sup> Such a determination of plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,"<sup>27</sup> with the issue being

20. See *id.* at 555, 564 & n.9 (stating that because "more than labels and conclusions" are required in pleadings, the plaintiffs could not meet the standard with "mere[] legal conclusions resting on the prior allegations").

21. *Id.* at 570.

22. *Id.* at 596 (Stevens, J., dissenting).

23. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953–54 (2009) (stating that while the pleading standard covers all civil actions, the case before the Court "fail[ed] to plead sufficient facts to state a claim").

24. *Id.* at 1942.

25. See *id.* at 1951 (stating that "the allegations are conclusory and not entitled to be assumed true" because "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

26. See *id.* at 1951–52 ("To prevail [on the constitutional discrimination claim], the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin.").

27. *Id.* at 1950.



whether the content of the nonconclusory factual allegations “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>28</sup> Now, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, was in dissent.

One can easily imagine a reason to convert pleading back into a more vigorous gatekeeper. As already noted, *Twombly* represented the kind of case likely to prove expensive to litigate if it survived the pleading stage: expensive because it would call for broad and deep discovery into the defendants’ actions as the plaintiffs sought to uncover either an explicit agreement or some behavior that ordinary market incentives could not explain, and, further, expensive because it would call for considerable judicial supervision in ruling on the numerous discovery disputes likely to arise in the process. By requiring the plaintiffs to uncover evidence—without the benefit of compelled discovery—the Court eliminated a messy suit in which the plaintiff was fishing for evidence of unlawful behavior. *If* all the avoided private-and-public expenditures would have ended without a finding of unlawful anticompetitive behavior, *then* everyone benefited from the swift and early death of the lawsuit.

The reason is even closer to the surface in *Iqbal*. Again, substantive law provides the handle. On the one hand, the Court has authorized civil-rights claims against public officials based directly on the Constitution.<sup>29</sup> On the other hand, recognizing that these claims risk paralyzing public officials who could spend many of their waking hours in depositions and also risk demoralizing those considering public service, the Court has, over the years, erected various substantive<sup>30</sup> and procedural<sup>31</sup> barriers to civil-rights claims.

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28. *Iqbal*, 129 S. Ct. at 1949. On remand, the Second Circuit sent the case back to the district court for a decision on whether to grant leave to amend, *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009), and:

Since then, *Iqbal*’s lawyer, Alex Reinert, said he has been in settlement talks with the government. But if the case is not settled, Reinert said he plans to amend the pleadings to include facts that the Court said were missing—facts he obtained during a period of discovery before the high court ruled. “We think we can meet the new standard,” said Reinert, who teaches at Yeshiva University Benjamin N. Cardozo School of Law. “We absolutely still could win.”

Tony Mauro, *Groups Unite to Keep Cases on Docket: Plaintiffs’ Lawyers Seek to Stop Dismissals After Iqbal Decision*, NAT’L L.J., Sept. 21, 2009, at 1, 32, available at <http://www.law.com/jsp/article.jsp?id=1202433931370>.

In a very similar case, with slightly more specific allegations, the Ninth Circuit approved the complaint. *al-Kidd v. Ashcroft*, 580 F.3d 949, 973–77 (9th Cir. 2009). *But see* *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (dismissing complaint).

29. *See generally* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a civil-rights claim against public officials based on the Fourth Amendment).

30. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (establishing qualified immunity).

Because none of these barriers was going to head off Javaid Iqbal soon enough, the Court felt it had to intercede.

Iqbal named personally two high officials and made allegations against them that, if true, clearly crossed the line into unlawful behavior. He alleged that Attorney General Ashcroft and FBI Director Mueller had acted “on account of [plaintiff’s] race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution” in confining him.<sup>32</sup> Defending these cases would very likely have involved many hours of depositions of high public officials with possibly discouraging effects on future public servants. It might also require the United States to lay bare substantial amounts of information about the early, and perhaps panicked, behavior in the months immediately following September 11. So the Court again reached into its pleading toolkit and once again pulled out its new wrench. The complaint failed, said the majority, because:

To survive a motion to dismiss, a complaint must contain sufficient [nonconclusory] factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”<sup>33</sup>

### C. THE CURRENT CRITERIA

To summarize, the Court in these two cases added a requirement for claimants<sup>34</sup> that goes above and beyond having to give notice. From Rule

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31. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985) (authorizing collateral-order review); *Nixon v. Fitzgerald*, 457 U.S. 731, 731–32 (1982) (same).

32. *Iqbal*, 129 S. Ct. at 1944.

33. *Id.* at 1949 (citations to *Twombly* omitted).

34. The Court was construing the word “showing” in Rule 8(a)(2) governing claims, which does not appear in Rule 8(b) or (c) on answers, and was establishing a gatekeeping test for people trying to get into court, which does not bear on the opposing party. Nevertheless, in the current confusion, some lower courts are applying the new test to defenses as well. See, e.g., *Kaufmann v. Prudential Ins. Co. of Am.*, No. 09-10239-RGS, 2009 WL 2449872, at \*1 (D. Mass. Aug. 6, 2009) (dictum) (“Assuming, without deciding, that sauce for the goose is sauce for the gander, the court is inclined to think that a defendant has the same Rule 8 obligations . . . as does a plaintiff.”); *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*5 (E.D. Mich. Apr. 21, 2009) (finding the affirmative defense insufficiently pled under *Twombly*). Likewise, lower courts are magnifying the destabilization by confusingly applying the new test to issues beyond the merits, such as jurisdiction, see, for example, *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (applying *Twombly* to personal jurisdiction, but using

8(a)(2)'s required "short and plain statement of the claim showing that the pleader is entitled to relief" and, more particularly, from its required "showing," the Court unearthed the requirement that at the pleading stage the plaintiff has the burden of establishing, by nonconclusory allegations, the complaint's plausibility as to liability on the merits.<sup>35</sup> Although much puzzlement persists, pleading apparently now works in the following way.

First, as to legal sufficiency, the judge decides any pure issues of law in the traditional way for a Rule 12(b)(6) motion.<sup>36</sup> This test asks whether *any* legal claim exists that would be consistent with the words of the complaint. That is, the complaint must encompass a legal claim without including allegations that would defeat it. Practically, however, the plaintiff must now do more to identify the complaint's legal theories, doing so well enough for the judge to weigh their factual sufficiency.

Second, as to factual sufficiency, the plaintiff practically must plead facts and even some evidence. The plaintiff should give a particularized mention of the factual circumstances of each element of the claim. The degree of particularization should be sufficient to make plausible an inference of liability. The judge does not test the plausibility of each fact, but only of ultimate liability. The judge performs the decisional task by ignoring any conclusory allegation, such as a bald assertion that an element exists, and then, after accepting the remaining allegations as true, by weighing the plausibility of the liability inference in light of his judicial experience and common sense as applied to the case's particular context. The plaintiff who needs discovery to learn the required factual particulars is the person whom the Court has newly put in jeopardy.<sup>37</sup>

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it to uphold jurisdiction), or class allegations, *see, e.g.*, *Hodczak v. Latrobe Specialty Steel Co.*, No. 08-649, 2009 WL 911311, at \*8 (W.D. Pa. Mar. 31, 2009) (finding class allegations too speculative under *Twombly*).

35. *See Iqbal*, 129 S. Ct. at 1950 ("[T]he complaint has alleged—but it has not 'show[n]—' that the pleader is entitled to relief." (quoting FED. R. CIV. P. 8(a)(2))).

36. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 242–43 (5th ed. 2001) (explaining that the judge is to resolve legal questions in the ordinary fashion to determine whether the law recognizes the alleged claim).

37. The text here is a distillation of our best reading of the Court's opinions, and the rest of this Article will flesh it out. Previously, some struggled to make sense of *Twombly* by reading it narrowly, *e.g.*, Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 935–36 (2009) [hereinafter Bone, *Pleading Rules*] (arguing that what he saw as the Court's "thin plausibility" standard could be justifiable, if adopted by the proper statute or rule process). But *Iqbal* undid them. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1467799> [hereinafter Bone, *Plausibility Pleading Revisited*] (criticizing "thick" screening). Now, others are taking up the same task, *e.g.*, Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1442786> (reconciling *Twombly* and *Iqbal* with pre-*Twombly* authority by developing a new paradigm of "plain pleading"). Only time will tell whether their efforts to get lower courts to confine these cases will warrant an evaluation like that of Samuel Johnson on second marriages:

## II. WHY IT MATTERS

“In my view, the [*Iqbal*] Court’s majority messed up the Federal Rules,” Justice Ginsburg has since reflected publicly.<sup>38</sup> We agree that the Court’s route to *Iqbal*’s result, built on *Twombly*’s trail, will mess up the civil litigation system. The Court’s approach will impact the 270,000 civil cases filed annually in the federal courts, which are bound by the Supreme Court’s interpretation of the Federal Rules of Civil Procedure.<sup>39</sup> It may affect the thirty or so states that have adopted the Federal Rules as their pleading model,<sup>40</sup> but only if the courts of those states find *Twombly* and *Iqbal* persuasive.<sup>41</sup> The baleful effects, whose seriousness justifies using the term

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“[T]he triumph of hope over experience.” JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, LL.D. 450 (1791).

38. Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., Remarks for Second Circuit Judicial Conference (June 12, 2009), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_06-12-09.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_06-12-09.html); see Adam Liptak, *From Case About 9/11, Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10, available at <http://www.nytimes.com/2009/07/21/us/21bar.html> (“But something much deeper and broader was going on in the [*Iqbal*] decision, something that may unsettle how civil litigation is conducted in the United States.”). Professor Arthur R. Miller similarly opined: “I have spent my whole life with the federal rules, and this is one of the biggest deals I have ever seen.” Mauro, *supra* note 28, at 31. In a congressional hearing, Miller called *Twombly* and *Iqbal* “a philosophical sea change in American civil litigation.” *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. 6 (2009) (testimony of Arthur R. Miller), available at [http://judiciary.house.gov/hearings/printers/111th/111-36\\_53090.PDF](http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF).

39. See generally ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR (2008), available at <http://www.uscourts.gov/library/annualreports/2008/2008AnnualReport.pdf> (giving federal-court data).

40. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1428 (1986) (giving the number as twenty-nine states, plus the District of Columbia); cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 578 n.5 (2007) (Stevens, J., dissenting) (listing twenty-six states, plus the District of Columbia, that use the *Conley* standard); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 379–83 (2001) (suggesting that uniformity of practice can be somewhat greater than sometimes assumed on the basis of written rules). See generally John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003) (updating his earlier article by studying state adoption of recent federal amendments).

41. Neither case has any constitutional dimensions, we believe. Both are common-law glosses on an existing Rule, and so have only persuasive force outside the federal system. See, e.g., *Crum v. Johns Manville, Inc.*, 19 So. 3d 208, 212 n.2 (Ala. Civ. App. 2009) (rejecting *Twombly* in a Federal Rules state); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (adopting *Twombly* in a Federal Rules state); cf. *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 476–77 (Cal. 2009) (asserting anew in a code state that “we may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible legal theory”). See generally Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1470 (2008) (“The *Twombly* decision presents *Conley* states with perhaps the most critical civil procedure decision since they chose to adopt the Federal Rules.”). The best counterargument is that *Twombly* and *Iqbal* are pioneering a due process principle that the plaintiff must make some showing on the merits before the

“destabilization,” flow from three connected problems: the Court not only fixed on a *novel* and *unpredictable* test that applies to every case, but it also followed a *disruptive* legal process in so altering a defining feature of the litigation system.

#### A. A NOVEL TEST

The two cases profoundly changed the law of pleading by adopting a procedural mechanism without precedent in the law. No prior model exists to help us understand how to test factual sufficiency now. Indeed, there is more than mere novelty involved. The new approach does not comfortably mesh, but rather clashes, with the prior procedural system, which of course magnifies the destabilizing effect that comes from cutting a procedural system from its moorings.

In seeking restabilizing guidance, one naturally looks to procedural experience for some help. But prior pleading provisions serve no such purpose here because the Court’s approach is thoroughly new. Most significantly, the Court did not reimpose a heightened-pleading requirement of the sort called fact pleading. That hoary requirement demanded factual detail as an end in itself, not as a means to convey plausibility. Whether or not desirable, readoption of fact pleading as a general requirement would not destabilize the system, in part because the courts have over a century of experience interpreting similar rules.<sup>42</sup> But readoption was not the course chosen. The two new cases expressly preserved prior cases as still-good law insofar as they had killed off any heightened-fact-pleading standard absent a special Rule or statutory provision.<sup>43</sup> Instead, for the first time, pleadings must undergo a test not for

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defendant has an obligation to participate. *See* DTD Enters., Inc. v. Wells, 130 S. Ct. 7, 7 (Kennedy, J., joined by Roberts, C.J. & Sotomayor, J., in a separate statement upon denial of certiorari) (suggesting that due process requires, in state court, some consideration of the merits before imposing class-action notice costs on the defendant).

Although *Erie* does not carry state pleading law into federal court, sometimes federal pleading law will preempt state law in state court. *See* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 38–41 (2006) (treating cases like *Brown v. W. Ry.*, 338 U.S. 294 (1949)). Usually, however, state pleading law applies in state court, and federal pleading law applies in federal court. The resulting disparity between lenient state pleading and robust federal gatekeeping will increase the considerable incentive to remove. *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1922–27 (2009) [hereinafter Clermont, *Litigation Realities Redux*] (providing data that show a huge increase in the removal rate over the last twenty years).

42. *See* CLARK, *supra* note 11, at 225–40 (treating code pleading); 5A WRIGHT & MILLER, *supra* note 9, §§ 1296–1301.1 (treating FED. R. CIV. P. 9(b) and securities fraud).

43. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (stating that the simplified pleading standards established by FED. R. CIV. P. 8(a) apply to all civil actions with limited exceptions); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (finding that a “heightened pleading standard” was “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules”); Joseph A. Seiner,

factual detail, but for factual convincingness. In *Twombly*, the Court closed by proclaiming that “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>44</sup> Because plausibility requires the plaintiff to plead particularized facts and maybe even some evidence, the federal pleading product will usually not look much different from a complaint in a heightened-fact-pleading regime. Nevertheless, detail in factual allegations and convincingness as to the ultimate inference of liability are fundamentally different requirements.

Nor does any prior model ground the new test for convincingness. The two new cases ask whether inferring liability is “plausible” in light of the facts nonconclusorily pled—that is, whether liability is a “reasonable inference.”<sup>45</sup> This unavoidably probabilistic standard<sup>46</sup> appears equivalent to the standard of decision for summary judgment (under which the movant must show that no reasonable factfinder could find for the opponent).<sup>47</sup> Both motions ask

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After *Iqbal*, 45 WAKE FOREST L. REV. (forthcoming 2010) (manuscript at 16–19), available at <http://ssrn.com/abstract=1477519> (arguing that these older cases survived *Twombly* and *Iqbal*).

44. *Twombly*, 550 U.S. at 570.

45. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); see *infra* text accompanying notes 77–87, 111–14 (trying further to define “plausibility”). By contrast, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323–24 (2007), the Court construed “strong inference” in the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2006), to mean that the plaintiff’s allegations must make the inference of scienter more than merely plausible or reasonable, and instead make it cogent and at least as compelling as any opposing inference of nonfraudulent intent. Cf. Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507, 532 (arguing that the statute has made the motion to dismiss in securities cases a hybrid falling somewhere between Rule 12(b)(6) and Rule 56).

46. In *Twombly*, 550 U.S. at 556, the Court said: “Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” In *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556), the Court said: “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” But these statements did not disavow a probabilistic standard—only a standard as high as more-likely-than-not.

47. The standards of decision under Rules 12(b)(6) and 56 for issues of pure law are identical. As to facts, the Court’s articulation and application of the new test in *Twombly* and *Iqbal* may appear to require a stronger claim than does summary judgment, but that relationship would be nonsensical. It would instead make policy sense to require a weaker claim at the pleading stage, but (1) there is a limited number of choices among decisional standards, (2) any standard less demanding than summary judgment’s reasonable-possibility test would equate to the old scintilla or slightest-possibility standard, and (3) nothing in *Twombly* or *Iqbal* suggests that the Court meant such a low standard. See Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1122 & n.36, 1127 n.54 (1987) (distinguishing the slightest-possibility test from the reasonable-possibility test). The Court rejected a Rule 12(b)(6) test that would knock out only “allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). More convincingly, *Twombly* and *Iqbal* were not adopting a scintilla test because it would not serve the Justices’ gatekeeping purpose. See *infra* note 57 and accompanying text (discussing the frivolity test). So, unless the Court has relaxed the traditional summary-judgment standard by its decision in *Scott v. Harris*, 550 U.S. 372 (2007), and relaxed only that

whether a factual assertion is reasonably possible.<sup>48</sup> However, a fundamental difference exists in that the new test for Rule 12(b)(6) applies without Rule 56's factual development and procedural protections, which ensure the plaintiff a full opportunity to assemble and present the case.<sup>49</sup> Indeed, the most startling aspect of *Twombly* and *Iqbal* is that they call for a judge to weigh likelihood without any evidential basis and with scant procedural protections, effectively creating a civil procedure hitherto foreign to our fundamental procedural principles, at least in the absence of emergency. Insisting on nonconclusory statements and then testing for a reasonable inference constitutes a method not unknown at law, but doing so based on a bare pleading is revolutionary.

### 1. Application by Supreme Court

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.<sup>50</sup> Consider in particular the following passage from the *Iqbal* opinion, when

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standard, the *Twombly-Iqbal* Courts seem to have collapsed the Rule 12(b)(6) and Rule 56 standards of convincingness into one. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly* 11–13, 19 (Ill. Pub. Law, Research Paper No. 09-16, 2009), available at <http://ssrn.com/abstract=1494683> (arguing that the same reasonable-possibility test applies under Rules 12(b)(6) and 56).

48. We are speaking here of the equivalence of the standards of decision, expressed in terms of convincingness, not of the frequency of granting the two kinds of motions in practice. As to frequency, *Twombly-Iqbal* tests the plausibility of only the overall inference of liability, while summary judgment can burrow down to the fact-by-fact level. Moreover, the motions are available in different circumstances that are unequally common: *Twombly-Iqbal* will have bite where the plaintiff cannot or will not plead detail, while Rule 56 will be applicable wherever the evidence imbalance is stark. In a case where both motions are available, it is hard to predict which motion in practice would more easily succeed if it were the only one made. On the one hand, fear of prematurely interceding and triggering an appeal, and of deciding without airing the evidence, will discourage the judge from granting a Rule 12(b)(6) motion. On the other hand, granting an early pleading motion will better serve the movant's interests and the court's docket than granting a later summary judgment, so the judge may look at the complaint by itself and see conclusoriness or implausibility. That is, the incentives seem to offset each other.

49. A less fundamental distinction is that the burden of persuasion for summary judgment is on the movant, but under *Twombly-Iqbal* it appears to fall on the plaintiff to show a reasonable inference. Indeed, putting an initial burden on the plaintiff distinguishes *Twombly-Iqbal* from all other pleading motions. Nevertheless, this difference is not really important. First, the burden of production can shift to the opponent on summary judgment pursuant to FED. R. CIV. P. 56(e)(2). Second, whether the defendant must show that the plaintiff cannot create a reasonable question or whether the plaintiff must show that a reasonable question exists is a paper-thin distinction, especially given that on a Rule 12(b)(6) motion there is no evidence to present.

50. See *Iqbal*, 129 S. Ct. at 1943–44 (describing and quoting the complaint); *Twombly*, 550 U.S. at 550–51 (same). The *Iqbal* complaint is available at 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004). The *Twombly* complaint is available at 2003 WL 25629874 (S.D.N.Y. Apr. 14, 2003).

the majority finally applied its new test to the complaint by navigating, in two paragraphs, the two steps of “nonconclusoriness” and “plausibility”:

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners “knew of, condoned, and willfully and maliciously agreed to subject [him]” to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” Complaint ¶96. The complaint alleges that Ashcroft was the “principal architect” of this invidious policy, *id.*, ¶10, and that Mueller was “instrumental” in adopting and executing it, *id.*, ¶11. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim, namely, that petitioners adopted a policy “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” [*Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).] As such, the allegations are conclusory and not entitled to be assumed true. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs’ express allegation of a “contract, combination or conspiracy to prevent competitive entry” because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent’s complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.” Complaint ¶47. It further claims that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” *Id.*, ¶69. Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees “of high interest” because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.<sup>51</sup>

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51. *Iqbal*, 129 S. Ct. at 1951 (citations to *Twombly* omitted).



One can easily agree with the two majorities that the allegations in both complaints were conclusory. But the system of civil litigation created by the Federal Rules had always credited conclusory allegations.<sup>52</sup> Anyone who read the Rules, the Appendix of Forms, and the preceding fifty years of case law would have thought that a conclusory allegation sufficed. In addition to Form 11's vehicular-negligence claim quoted above,<sup>53</sup> almost all of the sample complaints in the Rules' Appendix of Forms consist of conclusory allegations.<sup>54</sup> Whether or not Form 11 is distinguishable from *Twombly* and *Iqbal*, the other Forms permit conclusory allegations even in notoriously complex cases. For example, patent cases are likely to entail extensive discovery and cause experienced judges to shudder. But Form 18 tells us that one can properly plead a patent claim in four sentences, of which the critical one reads: "The defendant has infringed and is still infringing the Letters Patent by making, selling and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court."<sup>55</sup>

As to the *Twombly* and *Iqbal* complaints being implausible, the call is more difficult. In *Twombly*, the implausibility of an agreement not to compete was hardly self-evident. In *Iqbal*, implausibility did not flow from the allegations being "unrealistic," "nonsensical," "chimerical," or "extravagantly fanciful," said the Court.<sup>56</sup> Dismissing a complaint composed of frivolous allegations would not have been controversial.<sup>57</sup> Rather, the implausibility of

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52. See 5 WRIGHT & MILLER, *supra* note 9, § 1218, at 267 ("It should be clear from an examination of the Official Forms that the federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties.").

53. See *supra* note 10 (providing the Form's text).

54. Complaints seeking recovery of debts or mistaken payments (FED. R. CIV. P. FORMS 10, 21), specific performance of a contract to convey land (FED. R. CIV. P. FORM 17), or interpleader (FED. R. CIV. P. FORM 20), and complaints alleging negligence under the Federal Employers' Liability Act (FED. R. CIV. P. FORM 13), conversion of property (FED. R. CIV. P. FORM 15), or patent or copyright infringement (FED. R. CIV. P. FORMS 18-19), all consist of terse, undetailed, conclusory language.

55. FED. R. CIV. P. FORM 18. Only occasionally does one encounter an instruction like that in Form 14 (Complaint for Damages Under the Merchant Marine Act) requiring the plaintiff to "[d]escribe the weather and the [allegedly unseaworthy] condition of the vessel." FED. R. CIV. P. FORM 14.

56. *Iqbal*, 129 S. Ct. at 1951.

57. A court will disregard an allegation in a pleading that contradicts a proposition judicially noticed. The court reads the attacked pleading as if such untenable allegations were omitted, so that a demurrer or motion to dismiss does not admit any allegation in the attacked pleading running counter to the court's judicial knowledge. The classic illustrative case at common law was *Cole v. Maunder*, (1635) 2 Rolle's Abr. 548 (K.B.), in JAMES BARR AMES, A SELECTION OF CASES ON PLEADING AT COMMON LAW 2, 2 (Cambridge, Mass., John Wilson & Son 1875) (translating the case from Law French to English), where an allegation that stones were thrown "*molliter et molli manu*" ("gently and with a gentle hand") was held not to be admitted by demurrer, "for the judges say that one cannot throw stones *molliter*." *Id.* In *Southern Ry. Co. v. Covenia*, 29 S.E. 219, 220 (Ga. 1896), the court took judicial notice that a child under two years

Iqbal's complaint arose because there was another, more likely explanation lying in a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that 'obvious alternative explanation' . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion."<sup>58</sup> One can ask "why not?"<sup>59</sup> Meanwhile, one should worry that the Court was improperly intruding on the factfinder's domain.<sup>60</sup> In any event, *none* of those Forms requires a plaintiff to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>61</sup> *None* of those Forms expects the court considering a Rule

of age was unable to have any earning capacity and held on demurrer that an allegation that such a child performed valuable services did not stand as admitted.

A complaint that judicial notice perceives as frivolous will not survive a pleading challenge. *Cf.* *Clinton v. Jones*, 520 U.S. 681, 708 (1997) ("Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. *See* Fed. Rules Civ. Proc. 12, 56."). On the variety of other frivolity tests, see Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1411803>. A particularly instructive context is the frivolity test under 28 U.S.C. § 1915 (2006) for proceeding *in forma pauperis*, a test that comes early and with no procedural protections, and can even come sua sponte before answer. In *Denton v. Hernandez*, 504 U.S. 25 (1992), the Court explained:

As we stated in *Neitzke v. Williams*, 490 U.S. 319 (1989)], a court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," 490 U.S., at 327, a category encompassing allegations that are "fanciful," *id.*, at 325, "fantastic," *id.*, at 328, and "delusional," *ibid.* As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible . . . .

*Id.* at 32–33. Thus, the § 1915 standard is demanding on the defendant, like a scintilla test. *See generally* Milton Roberts, Annotation, *Standards for Determining Whether Proceedings In Forma Pauperis Are Frivolous and Thus Subject to Dismissal Under 28 U.S.C.A. § 1915(d)*, 52 A.L.R. FED. 679 (1981) (collecting cases in its supplement to §§ 5–6, 8–9); *cf.* *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 565 (E.D.N.Y. 1986) ("'Frivolous' is of the same order of magnitude as 'less than a scintilla.'"), *modified*, 821 F.2d 121 (2d Cir. 1987). *Twombly–Iqbal* gives the plaintiff similarly scant procedural protections, but requires the plaintiff to make the tangibly stronger showing of plausibility. *See supra* text accompanying note 47 (suggesting that plausibility means "reasonably possible").

58. *Iqbal*, 129 S. Ct. at 1951–52 (citation to *Twombly* omitted).

59. *See* Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 224–28 (2010) (arguing that only the Court's acceptance of a few-bad-apples narrative could lead it to think the allegations were implausible).

60. *See* 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, 838–42 (2009) (expressing a similar concern in connection with summary judgment); Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 759 (2009) (generalizing the concern); *cf. supra* note 47 and accompanying text (suggesting, optimistically, that "reasonable possibility" remains the test).

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

12(b) (6) motion “to draw on its judicial experience and common sense”<sup>62</sup> in deciding whether the complaint is plausible in its “context.” The design principles of the Rules did not contemplate probing the allegations at the pleading stage.<sup>63</sup> As the designers of the Rules (and the successive Justices who promulgated them) saw things, that probing should come later, especially during discovery and on motions for summary judgment.<sup>64</sup>

After *Iqbal*, then, a complaint hewing carefully to the standard reflected by the sample Forms should, in theory, succumb to a motion to dismiss for failure to state a claim.<sup>65</sup> Plaintiffs would need to state far more detail in their complaints in a nonconclusory fashion to establish plausibility. In addition to variations with substantive “context,” a complaint that survived challenge in one district court might fail in another because of variations in “judicial experience” and “common sense,” encouraging plaintiffs to include still more detail. Most important, plaintiffs would need to unearth their detail before filing suit and without compelled discovery. Such a regime would doubtless reduce whatever frequency of weakly founded suits that now exists. Such a regime would also doubtless reduce the frequency of well-founded suits that now require the assistance of discovery to make their merits clear. The new procedural regime would exchange our current false positives for an unknown number of false negatives. Today, defendants as a group shoulder the burden of false positives. In the hypothesized new regime, plaintiffs would shoulder the burden of false negatives.

## 2. Expected Retrenchment by Lower Courts

The Supreme Court’s insistence on nonconclusory statements and testing for a reasonable inference combine to create a novel test. Indeed, it is so novel that if it prevails, we will have a procedural revolution on our hands. If the lower courts really began to enforce this brave new procedural world—dismissing all the complaints that complied with the spirit of the Appendix of Forms but failed the *Twombly-Iqbal* test—a conversation about its desirability would surely occur. That conversation would occur because those whose oxen were gored would make themselves heard loudly. The implicit design of the Rules and Forms lies open to challenge. There is much to be said for both sides of the divide. If a judicial reformer, in the

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62. *Id.* at 1950.

63. *See supra* text accompanying notes 5–12 (describing the original Rules reform).

64. *See* 5 WRIGHT & MILLER, *supra* note 9, §§ 1201–1202 (treating the history and purposes of federal pleading Rules).

65. *See Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.*, No. CIV. 09-245 WBS CMK, 2009 WL 2424608, at \*8 (E.D. Cal. Aug. 6, 2009) (“Now, however, even the official Federal Rules of Civil Procedure Forms . . . have been cast into doubt by *Iqbal*.”). A complaint literally tracking a Form would presumably survive. *See* FED. R. CIV. P. 84 (providing that “forms in the Appendix suffice under these rules”). But a complaint conforming to the spirit of the Forms, but on different facts, would be in jeopardy.

heat of the moment, had really changed the rules without entertaining debate, the arguments could not be ignored, but instead would need to be formulated and considered. The system's designers would then have to consider whether, on the whole, they preferred to impose litigation risks on the false-negative side or the false-positive side.

Accordingly, although we do predict that courts will become more active in scrutinizing complaints, we also predict, or at least we hope, that courts will not begin to dismiss every complaint that fails *Twombly*–*Iqbal*'s nonconclusory-and-plausible requirement—simply because the result would be too revolutionary.<sup>66</sup> In other words, we do not expect a flood of decisions resembling Professor David Shapiro's brilliant spoof opinion, which we include as an Appendix. Our prediction remains tentative, however, given that several civil procedure professors took the parody to be a real opinion after it appeared on the Civil Procedure Listserv.<sup>67</sup> Moreover, exactly how the lower courts will manage to stay their hand is not clear. *Iqbal* does not

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66. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (finding a significant increase in the rate of dismissal in a sample of Westlaw cases, especially for civil-rights cases); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029 (finding an insignificant increase in the rate of dismissal among a small sample of Title VII cases on Westlaw); Kendall W. Hannon, Note, *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, 1837 (2008) (examining Westlaw cases and finding that the courts do not seem to be dismissing cases at a significantly higher rate, except for civil-rights cases, where the rate of granting dismissal jumped by eleven percent). Even putting aside the selection-effect concerns of litigants' adjusting to the change in pleading law, these studies reveal only the district courts' perception of *Conley* and *Twombly* (or *Iqbal*), not the actual dismissal rate. The reason is that their methodology involves searching for citation to the perceivedly permissive *Conley* in the early cases and to the perceivedly restrictive *Twombly* in the later cases, which would seem to bias the sample in favor of overstating the increase in the actual dismissal rate after *Twombly*: in the early period a dismissing court might be less apt to cite *Conley* than a court denying dismissal in that same time period, while in the later period a dismissing court might be more apt to cite *Twombly* than a denying court. (The Hatamyar study added the conjunctive search term "no set of facts" for the early cases and "plausib!" for the *Twombly* cases, compounding the effect. Hatamyar, *supra*, at 585.) Also, limiting the study to cases reported on Westlaw, and ignoring all the unreported decisions on motions to dismiss, might accentuate this bias. However, if one were to compile all dismissal decisions, the effects of *Twombly* and *Iqbal* would be hard to measure because these precedents apply to only a restricted subset of motions to dismiss (and result in final dismissal for a much smaller subset). These studies acknowledge, however, that they were not measuring the effect on actual dismissal rate, and provide an interesting look at these Supreme Court decisions.

For more on the possibly varying substantive impact of *Twombly*–*Iqbal*, see Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 532–36 (2010). For a more general argument that procedural change inevitably alters substantive law, see Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1113916>.

67. Posting of David Shapiro, Professor, Harvard Law School, [dshapiro@law.harvard.edu](mailto:dshapiro@law.harvard.edu), to [civ-pro@listserv.nd.edu](mailto:civ-pro@listserv.nd.edu) (Oct. 8, 2009) (on file with the Iowa Law Review).

make it easy for a court that wants to limit the new test's scope. The opinion expressly states that *Twombly's* (and, by extension, *Iqbal's*) holdings are generalized interpretations of Rule 8,<sup>68</sup> not a good-for-this-trip-only reading for antitrust and *Bivens* cases, and not to be escaped by imposing discovery restrictions instead.<sup>69</sup>

Yet, even if the lower courts do somehow manage to retrench, we will still have a novel pleading test in place. Any such lower-court resistance will make the new regime even more unpredictably confusing than the one the Supreme Court tried to create.

### B. AN UNPREDICTABLE TEST

In merely describing the Supreme Court's new test, we all but established that its meaning is very unclear. At a minimum, the fogginess warns that any defendant's lawyer, faced with a complaint employing the minimalist pleading urged by Rule 8's wording and the appended Forms' content, commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*.<sup>70</sup> Rule 11 will not impede the defendant's lawyer, given that the complaint in theory is now insufficient. The plaintiff's response to the motion will provide a cheap form of discovery for the defendant. Judges will vary in finding nonconclusory allegations of a complaint implausible after considering the specific "context" of the case and applying "judicial experience and common sense."<sup>71</sup> Therefore, many plaintiffs will bear the expensive burden of these motions, even if the

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

69. *But see, e.g., Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J., dictum) (suggesting that *Twombly* and *Iqbal* were special cases involving complex litigation and qualified immunity, respectively); Transcript of Proceedings at 2, 8, *Madison v. City of Chicago*, No. 09 C 3629 (N.D. Ill. Aug. 10, 2009) (Shadur, J.) (declaring "you don't have to be a nuclear physicist to recognize that *Twombly* and *Iqbal* don't operate as a kind of universal 'get out of jail free' card" and refusing to apply them in an employment-discrimination case). For additional analysis, see also *supra* note 37 (citing optimistic readings of *Twombly* and *Iqbal*). For a more plausible but still optimistic outlook on constraining the new test, see Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 507 (2010) (suggesting, most interestingly, that discovery can proceed, even after *Iqbal*, while the motion to dismiss is pending).

70. An experienced litigator, Tom Goldstein, predicts that *Iqbal* will be "the basis for an attempt to dismiss more than 50 percent of all the complaints filed in federal court." Melinda Hanson, *Civil Cases: Iqbal, Ricci, Wyeth, NAMUDNO Tagged as Landmark Opinions of Term*, 78 U.S.L.W. 3025, 3026 (July 21, 2009). Even the defendants in the Duke lacrosse case are pushing *Twombly-Iqbal* arguments. See Durham-in-Wonderland, *The Players' Iqbal Briefs*, <http://durhamwonderland.blogspot.com/2009/07/players-iqbal-briefs.html> (July 20, 2009, 00:01 EDT) (discussing those motions specifically); see also Justia.com, *Evans et al. v. Durham, North Carolina, City of et al.*, <http://news.justia.com/cases/featured/north-carolina/ncmdce/1:2007cv00739/46882/> (last visited Feb. 28, 2010) (collecting all litigation documents in that case).

71. *Fowler v. Univ. of Pittsburgh Med. Ctr. Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949).

motions fail.<sup>72</sup> The plaintiffs who actually need discovery to show nonconclusory plausibility will suffer a worse fate.<sup>73</sup> In any event, the courts must put in the work to divine the meaning of the new test's two steps: first, ignore conclusory allegations, whether predominantly legal or factual, and second, weigh the plausibility of the liability inference in a contextual manner with a personal feel.

The first step of the new test presents its own mysteries. Conclusory allegations include a bare assertion that an element of the claim exists.<sup>74</sup> But perhaps they include other "deductions of fact" statements, as opposed to more purely factual assertions.<sup>75</sup> The likely bottom line is that the court should look mainly at what the plaintiff appears to be alleging actually happened (and then ask whether the elements of liability are a plausible inference from those allegations taken as true). Yet, even though conclusoriness may be unclear and will be subjective, deciding which allegations to ignore as conclusory will do much of the critical work. In fact, Justice Souter in his dissent argued that the majority in *Iqbal* wrongly defeated the complaint not by manipulating plausibility, but by sweeping out all sorts of good allegations as "conclusory."<sup>76</sup>

The second step of measuring plausibility seems even more obviously unclear.<sup>77</sup> This measure lies entirely in the mind of the beholder. And the

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72. See, e.g., *id.* (reversing the dismissal by finding that the plaintiff had stated a plausible discrimination complaint).

73. See, e.g., *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at \*2 (W.D. Va. Aug. 24, 2009) (dismissing a complaint, with leave to amend, in a slip-and-fall case). The court stated:

In this case, the Plaintiff has failed to allege any 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. . . . While consistent with the possibility of the Defendant's liability, the Plaintiff's conclusory allegations that the Defendant was negligent because there was liquid on the flood [sic], but that the Defendant failed to remove the liquid or warn her of its presence are insufficient to state a plausible claim for relief.

*Id.*

74. See Hartnett, *supra* note 69, at 491–93 (equating "conclusory" to alleging the claim's elements).

75. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009); see Steinman, *supra* note 37, at 39–45 (defining "conclusory" as the failure to identify the real-world acts or events that entitle the plaintiff to relief, that is, the failure to allege concretely what happened). *But cf.* Bone, *Plausibility Pleading Revisited*, *supra* note 37, at 21–23 (arguing that this first step is inherently incoherent and that courts should apply the plausibility test to the complaint as a whole).

76. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960–61 (2009) (Souter, J., dissenting) (identifying allegations that the majority, but not he, considered conclusory). By contrast, the Court found borderline allegations to be nonconclusory in *Erickson v. Pardus*, 551 U.S. 89 (2007), discussed *infra* note 107.

77. On the meaning of "plausibility," compare Charles B. Campbell, *A "Plausible" Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 2 (2008) (translating "plausible" to mean that

multitude of beholders, wearing judicial robes, has precious little interpretive guidance given the measure's novelty in the law. The oral argument in *Iqbal* itself suggested how deep the abyss of confusion might be, even within the Supreme Court.

### 1. Of Mice and Men at Oral Argument

Justice Breyer—who in the end dissented in *Iqbal*—saw the problem in broad terms and posed a revealing hypothetical:

How does—how does this work in an ordinary case? I should know the answer to this, but I don't. It's a very elementary question. Jones sues the president of Coca-Cola. His claim is the president personally put a mouse in the bottle. Now, he has no reason for thinking that. Then his lawyer says: Okay, I'm now going to take seven depositions of the president of Coca-Cola. The president of Coca-Cola says: You know, I don't have time for this; there is no basis. He's—I agree he's in good faith, but there is no basis. Okay, I don't want to go and spend the time to answer questions.

Where in the rules does it say he can go to the judge and say, judge, his lawyer will say, my client has nothing to do with this, there is no basis for it; don't make him answer the depositions, please? Where does it say that in the rules?<sup>78</sup>

The colloquy among the Court and counsel continued, using this mouse-in-the-bottle hypothetical as if it were the right analogy.<sup>79</sup> But the

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a complaint must “contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory” (quoting *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. 1981)), with Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1066 (2009) (translating “plausible” to mean “that the allegations in a plaintiff’s complaint must be logically coherent in the sense that, if accepted as true, they are necessary and sufficient to establish a cause of action”). The subsequent *Iqbal* decision implies that both were reading *Twombly* too narrowly. See *supra* text accompanying notes 45–49 and *infra* text accompanying notes 111–14 (trying further to define “plausibility”); cf. Elizabeth Chamblee Burch, *There’s a Pennoyer in My Foyer: Civil Procedure According to Dr. Seuss*, 13 GREEN BAG 2D 105, 116 (2009) (suggesting that plausibility might be defined as a “yopp”).

78. Transcript of Oral Argument at 13, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015), 2008 WL 5168391.

79. See, e.g., *id.* at 23 (offering Justice Kennedy’s support for Justice Breyer’s concerns). Justice Souter was much more skeptical of the hypothetical’s plausibility:

But in Justice Breyer’s case, the—that may be the case if the claim is that the president of Coke was personally putting mice in bottles. But the claim, it seems to me, that the Attorney General or the Director of the FBI was establishing a policy of no release until cleared or a policy that centered on people with the same characteristics as the hijackers does not have that kind of bizarre character to it and, I think, would not run afoul of the plausibility standard.

mouse hypothetical works better as a way of revealing the powerful virus within *Iqbal* that may spread through the civil-justice system.

The power of the hypothetical emerges if one first considers the ingredients of implausibility in Justice Breyer's hypothetical. The Coca-Cola CEO has every moral, legal, and financial incentive *not* to do what he is accused of doing—if detected, his act would, at the least, harm his company and cost him his job. It is thus objectively implausible—yes, the CEO might so act, but he would be doing so in defiance of all normal incentives.

Now contrast the ingredients of implausibility in *Iqbal*. The complaint did not imply irrationality on the part of the Attorney General and the FBI Director. Instead, urgency that approached panic affected many levels of government in the weeks following September 11. Unsure when another attack might occur, officials across the country took elaborate precautions, some of which might look excessive in retrospect.<sup>80</sup> Unlike Justice Breyer's CEO, government officials *had* incentives to take such precautions. Both their own safety and the safety of their constituents might be on the line, to say nothing of their jobs. Although high-ranking officials charged with national law enforcement may not in fact have brushed aside constitutional prohibitions at a moment of high national emergency, they surely had incentives temporarily to disregard constitutional constraints. Some, reflecting on past moments of national emergency, might have even thought they had a duty to disregard some constitutional provisions.<sup>81</sup> We have, of course, no idea whether such a post-9/11 scenario occurred. But neither did the Court. Our point is, rather, that the implausibility involved occupies a

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*Id.* at 15; see also *id.* at 39–40 (returning to the hypothetical). As an advocate, Solicitor General Gregory G. Garre saw the hypothetical in a way completely opposite to Justice Souter's, arguing in rebuttal that "the Attorney General is much different than the president of Coca Cola in that he is entitled to a presumption of regularity of his actions, so that—that standard itself ought to affect how one views the complaint." *Id.* at 58.

Chief Justice Roberts addressed the running hypothetical and got right to its heart: "[T]o follow up on Justice Souter's question, how are we supposed to judge whether we think it's more unlikely that the president of Coca Cola would take certain actions as opposed to the Attorney General of the United States?" *Id.* at 40. But he evaded the hypothetical by later switching the analogy to a situation in which "the allegation is that the president of Coca Cola is individually involved in a particular price fixing scheme," and then apparently concluding that his hypothetical and *Iqbal* both failed the *Twombly* test. *Id.* at 42–43. Justice Stevens adjusted the hypothetical similarly, but drew the opposite conclusion. *Id.* at 40–42.

80. See Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints* 12, 17–18 (Univ. of Oxford, Dep't of Econ., Discussion Paper No. 425, 2009), available at <http://ssrn.com/abstract=1374376> (finding an increase in human-rights violations in various countries after 9/11, but also finding that the existence of independent judicial review limited the increase).

81. For examples of cases discussing the effect of national emergencies on constitutional provisions, see *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (involving the Pentagon Papers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (involving the President's seizure of steel mills).



different existential plane than that of the hypothetically deranged CEO of Coca-Cola.

## 2. Doubted Clarification by Lower Courts

The Court's nimble willingness to jump the "plausibility gap"—the chasm between the mouse hypothetical and the *Iqbal* allegations, a chasm that the Court's followers will have more trouble gauging—may cause the test's destabilization to spread virally through the civil-justice system. It will be up to the lower courts to give the new test a predictable meaning. Good reasons exist to doubt that they are up to the task.

Initially, the test goes to the 675 authorized federal district judges,<sup>82</sup> before whom come motions to dismiss for failure to state a claim. Many motions will ask whether the nonconclusory allegations of the complaint seem implausible enough to call for either amendment or dismissal. Given the way in which the Court found the allegations in *Iqbal* implausible, it is difficult to predict what allegations any given judge may find similarly implausible: Did a public official fail to do her duty? Did a fiduciary prove unfaithful? Did a manufacturer endanger buyers of its product? In all of these situations, just as in *Iqbal*, the defendant's duty and long-term considerations point in one direction, but short-term considerations, and perhaps personal advantage, point in another. Until *Twombly*, no one thought that Rule 8 required convincing allegations concerning such matters. After *Iqbal*, it is difficult to say.<sup>83</sup>

Matters are not likely to clarify quickly. After six hundred or more judges apply their contextualized experience and common sense to the plausibility of various sets of nonconclusory allegations, they will find some complaints deficient under the new test and dismiss them. Some of those plaintiffs will appeal, giving three-judge panels of the nation's thirteen circuits their chance to review the rulings.<sup>84</sup> But because each complaint will

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82. See U.S. Courts, Summary of Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm> (last visited Feb. 28, 2010) (indicating that one hundred judicial vacancies currently exist); cf. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2008, at 38 tbl.12 (2008), <http://www.uscourts.gov/judbus2008/JudicialBus2008.pdf> (indicating that over three hundred senior district judges also exist).

83. See, e.g., *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (applying *Twombly-Iqbal* to dismiss a suit against the government by anti-Bush demonstrators, with leave to amend the complaint filed before the "significant change, with broad-reaching implications," of *Twombly-Iqbal*); Alison Frankel, *Two More 'Iqbal' Dismissals Emerge in Product Liability Cases*, LAW.COM, Aug. 4, 2009, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432738346> (opining that *Iqbal* "is quickly becoming the best thing to happen to the products liability defense bar since *Daubert*").

84. Ordinarily, a complaint that survives a Rule 12(b)(6) motion cannot immediately be appealed by a defendant who believes that it is implausible, because the denial is not a final decision. See 28 U.S.C. § 1291 (2006) (setting out the jurisdiction of courts of appeals). If the defendant declines to answer, the trial court will enter judgment for the plaintiff, and appeal will lie. If the defendant proceeds to answer, as is much more likely, the appellate court will

present a different factual configuration, it will likely take years before any given circuit settles on a view of plausibility applicable to a wide variety of common complaints.<sup>85</sup>

At some point, of course, circuit disagreements will arise, and the Supreme Court may choose to intervene, aiming to clarify its view of plausibility. Still, unless the Court takes the very unlikely step of reversing *Twombly* and *Iqbal* outright, its decision will inform us about the meaning of plausibility only in a particular family of claims. After all, although the Court extended *Twombly* (which many had predicted would remain confined to the exotic area of conscious parallelism in antitrust claims<sup>86</sup>) to a very different case involving allegations of unconstitutional behavior by high public officials, that extension did not illuminate the meaning of plausibility.<sup>87</sup> The

trial the point as waived and, upon final judgment, will not reexamine the action of the trial court in denying the motion to dismiss. *Cf. Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 426 (4th Cir. 2005) (holding that a pretrial denial of summary judgment was not reviewable on appeal after trial, even for a motion made on a purely legal ground). It is true that some of the same Rule 12(b)(6) questions may reappear in a different guise. For example, at trial the defendant might move for judgment as a matter of law, contending that the plaintiff's proof does not constitute a claim for relief; the trial court's denial of that motion can be preserved for review on appeal from the final judgment. Thus, the appellate court may in effect be passing on the same question of law that confronted the trial judge on the motion to dismiss the complaint, inasmuch as the question of legal sufficiency will be the same when the proof has established the allegations of the complaint and nothing more. Nevertheless, any plausibility testing of the pleading should not reappear in reviewable form. In any event, no rational court would overturn a proven claim on the ground that its pleading was implausible or conclusory.

85. See Anthony Martinez, Case Note, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763, 770 (2009) (concluding—nonempirically—that “[t]he new plausibility standard created in *Twombly* is not at all clear”).

86. See, e.g., Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 122 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/lrcoll2007n31Bradley.pdf> (“‘Plausibility’ is an element of a certain kind of antitrust conspiracy claim, not a standard for pleadings in general.”); Allan Ides, *Bell Atlantic 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, 631–36, 639 (2007) (approving, with reservations, *Twombly*'s application of pleading's substantive-sufficiency test to this antitrust case); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN'S L. REV. 849, 851 (2008) (taking a very narrow view of *Twombly*); cf. Smith, *supra* note 77, at 1083–85 (suggesting that *Twombly* applied only to complex cases involving significant discovery).

87. Just as for *Twombly* and *Iqbal*, differing substantive law will serve to distinguish the application of the pleading test. For example, the Fifth Circuit stated:

In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise. Brunig's complaint does not make plausible that either a legal enterprise or an association-in-fact existed. His complaint alleges that “Clark, the Trust, CPLI, Liedtke, BBC, and others, known and unknown, associated themselves in fact.” This is a conclusory statement, a recitation of the elements masquerading as facts. It does not make it any more or less probable that the listed parties have an existence separate and apart from the pattern of racketeering, are an ongoing organization, and function as a continuing unit as shown by a hierarchical or consensual decision making structure.

Court's fact- and context-specific approach guarantees that extrapolation to new cases will remain difficult despite successive decisions.

Thus, we can expect a long period, perhaps a decade or more, of sorting and jostling before we have even a slightly clearer idea about what allegations must appear in complaints. Persistent confusion on such a determinative feature contributes to major destabilization of civil litigation—destabilization created by the Court's invention of a new and jarring test, exaggerated by its unclear delivery, and intensified by the poor legal process the Court followed.

### C. A DISRUPTIVE TEST

*Twombly* and *Iqbal* destabilized the legal system in a third way: their incipient revolution came by a legal process that, as applied to the pleading problem, could possibly disrupt procedural design for years to come.<sup>88</sup>

Since the promulgation of the Federal Rules in 1938, courts and Congress have sought a consistent, predictable, and transparent process for procedural reform.<sup>89</sup> Courts tend not to be overly activist in reading the text of a Rule that emerged from the rulemaking process, and they should be especially deferential to *stare decisis* there.<sup>90</sup> Congress, of course, controls jurisdiction, and it has occasionally intervened with substantial procedural reforms.<sup>91</sup> For the most part, however, courts and Congress have left the design of process to the rulemaking machinery.<sup>92</sup> After statutory insistence

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Brunig v. Clark, 560 F.3d 292, 297 (5th Cir. 2009); *see also* Hartnett, *supra* note 69, at 496–97 (exploring the dependence of plausibility on substantive law).

88. Ironically, *Conley v. Gibson*, 355 U.S. 41 (1957), and its version of notice pleading came about through a similarly flawed legal process. *See* Sherwin, *supra* note 6, at 317 (describing *Conley* as an accidental precedent). But being not so novel or unpredictable, *Conley* induced calm rather than disruption.

89. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 955 (1999) (justifying rulemaking as akin to common-law reasoning, as long as rulemaking centers on “inferring general principles from existing practice and choosing rules that implement those principles well in light of practice realities”). *See generally* Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) (defending the rulemaking process against factionalism).

90. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1147–52 (2002) (defending judicial restraint in reading the Federal Rules). *But see* Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 640–45 (2008) (approving *Twombly*'s test as a transsubstantive rule implicit in Rule 12(b)(6)'s requirement that the pleader show entitlement to relief).

91. For examples of such congressional intervention, *see generally* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089, 5089 (codified at 28 U.S.C. §§ 471–482 (2006)).

92. *See* 28 U.S.C. §§ 2072–2074 (2006) (comprising the current version of the Rules Enabling Act).

on increased transparency,<sup>93</sup> this process now guarantees that notice, comment, and a good deal of consultation among bench and bar will precede significant (and even insignificant) procedural change. Although such consultation has its own costs, and scholars have criticized the resulting process as creaky and sometimes unimaginative or worse,<sup>94</sup> it does head off ill-considered quick fixes.

Such was the relatively peaceful process picture until *Twombly* and *Iqbal*. The Court, interpreting Rule 8 in that pair of cases, substantially altered a systemic design choice. We regret the Court's move—again, not because we are certain that we lived under the ideal pleading regime, but because we are certain that a design change of this magnitude should occur only after a thorough airing of the choices.<sup>95</sup>

### 1. The Road Taken: Adjudication

Such an airing did not accompany *Twombly* or even *Iqbal*. The Court had given no forewarning adequate to generate public discussion. The complicated issues were not sufficiently developed by lower-court percolation, by academic or empirical studies, or even by parties' position-taking.

There were amicus briefs in both cases,<sup>96</sup> but such briefs did not and could not, in a neutral manner, consider the broader design choices. They

93. *Id.* § 2073(c).

94. See generally WINIFRED R. BROWN, FED. JUDICIAL CTR., FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981) (cataloguing the rulemaking problems of the participatory process, institutional structure, and broad scope); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229 (arguing for simplifying the rulemaking process).

95. See STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 121–27 (2006) (arguing that the debate must occur in a broad historical, social, economic, political, and jurisprudential context). For a comparative perspective on the debate, see Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 452–55 (2010) (describing heightened-fact-pleading regimes elsewhere); cf. Andrea Cheuk, Comment, *The Li'an ("Docketing") Process: Barriers to Initiating Lawsuits in China and Possible Reforms*, 26 UCLA PAC. BASIN L.J. 72, 75–79 (2008) (describing a system of extreme policing of complaints).

96. The ABA uploaded the following amicus briefs for *Iqbal*: Brief of William P. Barr et al. and Washington Legal Foundation as Amici Curiae in Support of Petitioner; Brief of National Civil Rights Organizations as Amici Curiae in Support of Respondents; Brief of Amici Curiae, The Sikh Coalition et al. in Support of Respondent *Iqbal*; Brief for the American Association for Justice as Amici Curiae Supporting Respondent; Brief of Amici Curiae Japanese American Citizens League et al. in Support of Respondent; Brief for Ibrahim Turkmen et al. in Support of Respondents; and Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents. ABA, Merit Briefs for December Supreme Court Cases, Term 2008–2009 (ABA Division for Public Education), <http://www.abanet.org/publiced/preview/briefs/dec08.shtml#ashcroft> (last visited Feb. 28, 2010). For *Twombly*, FindLaw uploaded the following amicus briefs in support of petitioners: Brief of Washington Legal Foundation as Amici Curiae in Support of Petitioners; Brief for the United States as Amici Curiae Supporting Petitioners; Brief of the Commonwealth of Virginia and 15 Other States as Amici Curiae in Support of the Petitioners; Brief of Amici Curiae Legal Scholars in Support of Petitioners; and Brief of the

came at the questions either as plaintiffs or defendants, activists or businesses, or conservatives or liberals. Indeed, the resultant ideological tone is some proof that the questions involved were more appropriately congressional than judicial.

Moreover, no brief marshaled data. Fundamental choices should be informed by information as well as argument. It is not uncommon for empirical scrutiny to contradict things that “everyone knows” about litigation, and so it is possible to create very bad procedure by failing to verify folk wisdom.<sup>97</sup> Data, if available, would be key in deciding whether pleading should play a greater gatekeeping role. One would want to know the “success rates”<sup>98</sup> of a sample of reported and unreported cases that satisfied notice pleading but would unavoidably fail the more stringent test. One would also want to know about the costs of discovery, time required for disposition, kinds of cases, and more. Although some of these data are easily available, others exist only in difficult-to-access forms, some do not exist, and some will never exist. Nevertheless, over the past decade, the Federal Judicial Center showed itself capable of producing good statistics on topics of rulemaking interest.<sup>99</sup> Other groups, like the National Center for State Courts and the RAND Institute for Civil Justice, also produced valuable

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Chamber of Commerce of the United States of America et al.—and in favor of the respondents: Brief of the American Antitrust Institute in Support of Respondents. FindLaw, Supreme Court Docket: Bell Atlantic Corporation v. Twombly, 05-1126, [http://supreme.lp.findlaw.com/supreme\\_court/docket/2006/november/05-1126-bell-atlantic-v-twombly.html](http://supreme.lp.findlaw.com/supreme_court/docket/2006/november/05-1126-bell-atlantic-v-twombly.html) (last visited Feb. 28, 2010). More amicus briefs appear on Westlaw, including Brief of Amici Curiae Legal Scholars Debra Lyn Bassett, et al. and of Certain Purchasers of Elevators and Elevator Maintenance Services, Including Transhorn Ltd., et al. in Support of Respondents, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2966600 (including Kevin M. Clermont as a signatory).

97. See generally Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002) (surveying empirical knowledge of civil procedure); Clermont, *Litigation Realities Redux*, *supra* note 41 (updating data in 2009).

98. Assuming one could assemble such a sample, one might define “success rate” as the percentage of claims found to be well-founded, as evidenced either by a judgment on the merits or by a settlement sufficiently close to initial demands to serve as a reliable proxy for such a judgment. But we recognize that accounting for the case-selection effect, which concerns cases never brought, would be a huge problem. One model is the fine study of the effect of heightening pleading standards done by Stephen J. Choi, Karen K. Nelson, and A.C. Pritchard. See Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 64–65 (2009) (“[M]any suits that would have been deemed nonnuisance prior to the PSLRA likely would not be filed after Congress adopted the PSLRA.”). Another feasible approach would be to study different state pleading regimes comparatively, trying to get a feel for the costs of false positives and false negatives.

99. For an example, see Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson (Nov. 2, 2007), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/\\$file/insumjre.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf) (reporting research on summary judgment). The Federal Judicial Center is now collecting data on motions to dismiss. See Judicial Conference Comm. on Rules of Practice & Procedure, Minutes 40 (Jan. 14–15, 2008), *available at* <http://www.uscourts.gov/rules/Minutes/ST01-2008-min.pdf> (mentioning plans to collect data at a panel discussion on pleading).

studies of possible procedural changes.<sup>100</sup> The Court did not demand data. Even though the absence of data is normally an argument against altering the status quo, the Court plunged ahead. The simple fact remains that, even after *Twombly* and *Iqbal*, there are still no empirical studies whatsoever on the virtues of case exposition through differing approaches to pleading, and thus no data exist on the extent of the Rules' former pleading problem or the efficacy of the Court's imposed cure.<sup>101</sup>

## 2. The Road Not Taken: Rulemaking

Even before *Twombly*, some had criticized notice pleading as excessively lax.<sup>102</sup> One can view some of the last three decades' Rules amendments as responses aimed at this arguable failing. For example, Rule 11 now punishes those who make allegations without an evidentiary basis for doing so;<sup>103</sup> indeed, one could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.<sup>104</sup> As another example, Rule 26 now provides that normally no discovery

100. See, e.g., PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 13–14 (2002), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/juries&CISOPTR=27> (considering the desirability of nonunanimous verdicts to address the problem of hung juries in criminal cases); JAMES S. KAKALIK, DEBORAH R. HENSLER, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA, at xxvii (1998), available at [http://www.rand.org/pubs/monograph\\_reports/2009/MR941.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf) ("Discovery is not a pervasive litigation cost problem for the majority of cases.").

101. See Michael Chiorazzi et al., *Empirical Studies in Civil Procedure: A Selected Annotated Bibliography*, LAW & CONTEMP. PROBS., Summer 1988, at 87, 120 ("[T]here are no studies on pleading per se, perhaps because of the advent of modern notice pleading."); Civil Rules Advisory Comm., Minutes 37–38 (May 22–23, 2006), available at <http://www.uscourts.gov/rules/Minutes/CV05-2006-min.pdf> (discussing possible amendment to FED. R. CIV. P. 8 and noting the lack of data); Civil Rules Advisory Comm., Minutes 29–35 (Oct. 27–28, 2005), available at <http://www.uscourts.gov/rules/Minutes/CV11-2005-min.pdf> (same).

102. E.g., Hazard, *supra* note 6, at 1671–72 (noting the potential problems associated with notice pleading); Sherwin, *supra* note 6, at 318–20 (same); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985, 992–94 (1987) (same).

103. See FED. R. CIV. P. 11 (requiring that every paper, and thus every claim, be signed to certify that, to the best of the signer's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," it has factual support).

104. As things have worked out, the new toughness under *Twombly–Iqbal* does not mesh easily with the relative leniency under FED. R. CIV. P. 11(b)(3) (providing that the signature warrants that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"). On the one hand, a *Twombly–Iqbal* dismissal should not necessarily imply a Rule 11 violation for lack of evidentiary support. On the other hand, a plaintiff with very little knowledge of the facts apparently could use such specifically identified allegations to circumvent *Twombly–Iqbal* initially, but would then likely fall to a Rule 11 motion. See Posting of Tobias B. Wolff, Professor, University of Pennsylvania Law School, [twolff@law.upenn.edu](mailto:twolff@law.upenn.edu), to civ-

may proceed—the great worry of the *Twombly* and *Iqbal* majorities<sup>105</sup>—until the parties have adopted, or the judge has ordered, a discovery plan, which can specify “whether discovery should be conducted in phases or be limited to or focused on particular issues.”<sup>106</sup> These measures sought to keep the gate, preventing unwarranted “fishing expeditions” and excessive and burdensome discovery requests. Moreover, these measures pursued those ends without the destabilizing effects of *Twombly–Iqbal*.

Those measures may well have been imperfect. It is entirely arguable that pleading should provide additional, and more vigorous, gatekeeping. But before discarding the pleading system that has been in place for many years, we ought to discuss its virtues and failures soberly and with the relevant information before us. The rulemaking bodies should have hosted that discussion. *Twombly* and *Iqbal* short-circuited any such discussion. These cases worked their reform by a process—adjudication—that is hardly the preferred path to design change.

### III. WHY THEY DID IT

Many observers glance at these cases from the Supreme Court and see the same old right/left story: the conservatives seek to protect rich or powerful defendants, while the liberals stand with the little plaintiffs. But that story immediately runs into the uncomfortable fact that Justice Souter wrote *Twombly* and Justice Breyer joined him, yet both wrote dissents in *Iqbal*.

More to the point, all opinions in the two cases smack more of confusion than of political motivation. Indeed, it is quite hard to resist the conclusion that the Justices inadvertently stumbled into a new procedural era. Justice Souter seemed to have no idea where he was going.<sup>107</sup> Despite

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pro@listserv.nd.edu (June 7, 2009) (on file with the Iowa Law Review) (discussing the interaction of Rules 8(a)(2) and 11(b)(3)).

105. See *infra* note 124 (discussing reform aimed at discovery costs).

106. FED. R. CIV. P. 26(f)(3)(B); see *id.* 26(d) (prohibiting earlier discovery); see also *id.* 26(c) (involving protective orders).

107. The other Justices seemed just as confused, judging from their decision to overturn the pleading dismissal in *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), just two weeks after *Twombly*. In that case, the pro se plaintiff brought a civil-rights claim against prison officials for their wrongful termination of his medical treatment for hepatitis C, alleging that this action endangered his life. *Erickson*, 551 U.S. at 89–90. The Tenth Circuit affirmed the dismissal, on the ground that the plaintiff had pleaded the substantial-harm element in a “conclusory” fashion. *Id.* at 93. The Supreme Court vacated the ruling for having departed “in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure.” *Id.* at 90. It cited *Twombly* for the propositions that notice pleading does not require allegations of “specific facts” and that the “judge must accept as true all of the factual allegations contained in the complaint,” but it did not reach and made no reference to any plausibility test. *Id.* at 93–94. Although later the lower court could effectively find the ultimate inference of liability to be plausible, given that the allegations had survived the nonconclusoriness hurdle, *Erickson v. Pardus*, 238 F. App’x 335 (10th Cir. 2007), the Supreme Court hardly seemed on top of its new test. The Court’s summary action was per curiam, with Justices Scalia and Thomas dissenting on other grounds. *Erickson*, 551 U.S. at 95.

some fairly undeniable implications in his *Twombly* majority opinion, Justice Souter finished by complaining futilely of “a fundamental misunderstanding” of it by the *Iqbal* majority.<sup>108</sup> The oral argument revealed further confusion, as well as some unhappy facts about the deciding Court. Only Justice Souter had ever sat on a trial bench, and he did so in the non-Federal Rules state of New Hampshire.<sup>109</sup> Therefore, it is hardly surprising that no one leapt forward to answer Justice Breyer’s above-quoted “very elementary question” in *Iqbal* about how the Rules control discovery. No Justice distinguished himself or herself.<sup>110</sup>

Another piece of circumstantial evidence of inadvertence is how the Justices alighted on the buzzword “plausibility.”<sup>111</sup> Not only was it new to the

108. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting).

109. See Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 28, 2010) (providing biographical sketches); Oakley & Coon, *supra* note 40, at 1409 (describing New Hampshire’s procedural system as “idiosyncratic”); see also Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES, Feb. 17, 2009, at A14, available at <http://www.nytimes.com/2009/02/17/us/17bar.html> (“Chief Justice Roberts did say that the current justices’ limited trial court experience was ‘an unfortunate circumstance’ and ‘a flaw.’”); cf. The White House, Judge Sonia Sotomayor, <http://www.forbes.com/2009/05/26/sonia-sotomayor-judge-business-washington-supreme-court-background.html> (last visited Feb. 28, 2010) (stating that Judge Sotomayor replaces Justice Souter as the only Justice with experience as a trial judge). Whatever litigation experience any other Justice had in practice was scanty and long ago. See Luther T. Munford, *Recent Litigating Counts*, NAT’L L.J., Feb. 16, 2004, at 43, 43 (suggesting “the creation of a ‘litigator’s seat’”).

110. Justice Breyer in the *Iqbal* argument expressed further puzzlement about the possibility of limiting discovery as an alternative to testing the pleading. Transcript of Oral Argument, *supra* note 78, at 17 (“I want to know where the judge has the power to control discovery in the rules. That’s—I should know that. I can’t remember my civil procedure course. Probably, it was taught on day 4.”). Although Solicitor General Garre immediately pointed him to FED. R. CIV. P. 26, Justice Breyer did not grasp the response until much later. *Id.* at 34 (“I have the number of the rule I want. Maybe I am not understanding it. But Rule 26, I think, (e)(2) [sic], says—says, among other things, that the judge can change the number of depositions you get.”); cf. *id.* at 13–14 (“I thought Rule 8 was move for a more definite statement.”). Justice Ginsburg also pointed out to Justice Breyer that a competent trial judge, backed by the sanctions of Rule 11, should be able to prevent abuse of the discovery system. *Id.* at 19–20. Eventually, Justice Breyer wrote a separate dissent touting the district court’s limiting of discovery as an alternative means to protect defendants. *Iqbal*, 129 S. Ct. at 1961 (Breyer, J., dissenting). *But cf.* *Clinton v. Jones*, 520 U.S. 681, 723–24 (1997) (Breyer, J., concurring in judgment) (expressing doubt in the district court’s case-management ability to protect the defendant).

Unfortunately, such a posture enflamed Justice Scalia, who expressed outrage that important people’s time was at the mercy of a federal district judge. Transcript of Oral Argument, *supra* note 78, at 35 (“Well, I mean, that’s lovely: That the ability of the Attorney General and the Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge.”). We pass quietly over the question of whether that is exactly what the rule of law is about: that power should sometimes have to stand to answer even when inconvenient.

111. See *supra* text accompanying notes 45–49, 77–87 (trying further to define “plausibility”).



world of pleading, it was largely new to the world of civil procedure. Apparently, the *Twombly* Court settled upon it because the Second Circuit had mentioned it below as having been used in a handful of prior antitrust cases, a field of law where substantive precedent already aggressively policed permissible inferences.<sup>112</sup> Yet the Second Circuit, in upholding *Twombly*'s complaint, had treated plausibility as a minimal test almost separate from sufficiency of pleading: “[S]hort of the extremes of ‘bare bones’ and ‘implausibility,’ a complaint in an antitrust case need only contain the ‘short and plain statement of the claim showing that the pleader is entitled to relief’ that Rule 8(a) requires.”<sup>113</sup> Without discernible thought, but with originality, Justice Souter adopted a different use of the word. As a consequence, he later faced an uphill battle in trying to keep his *Twombly* use of “plausible” under control, prompting his *Iqbal* reminder “that a court must take the allegations as true, no matter how skeptical the court may be.”<sup>114</sup>

Nevertheless, others could argue that the Court knew what it was doing. It clearly had concerns about meritless claims flooding the courts and generating heaps of discovery. Justices on the right and even on the left might have gotten this sense from conversing with lower-court judges at conferences, or they might have gleaned a need from the litigation-crisis propaganda we all ingest.<sup>115</sup> The Justices’ means of addressing the supposed problem were limited, however. Adjusting their reading of Rule 8(a)(2) might have been the only lever they could see to lean on.<sup>116</sup> And so they leaned on it. They might even have intended their move to be destabilizing, bringing on a cultural revolution to induce change. If so, they are likely to get their wish.

#### IV. WHERE TO GO FROM HERE?

Regardless of the Court’s motivation, *Twombly* and *Iqbal* leave the legal system with the question of how to restabilize. The superiority of the

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112. *Twombly v. Bell Atl. Corp.* (*Twombly I*), 425 F.3d 99, 111 & n.5 (2d Cir. 2005) (citing, *inter alia*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)), *vacating* 313 F. Supp. 2d 174 (S.D.N.Y. 2003); *see* Transcript of Oral Argument at 19–20, 35, 48, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3422211 (showing Justice Souter latching onto the term “plausible,” despite the resistance of counsel).

113. *Twombly I*, 425 F.3d at 111.

114. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting).

115. *See* Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 530–34 (1989) (discussing the impact of vantage point on perception); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 741 (1998) (discussing the impact of anecdote on perception).

116. *See generally* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116–19 (2009) (arguing that a case decision was institutionally the only way to change the status quo in pursuit of the Court’s vision for solving the problems of contemporary litigation).

remedial route turns on whether pleading should play a greater gatekeeping role in modern civil litigation, a question on which we have no well-developed view. Some thoughtful people have so argued;<sup>117</sup> equally thoughtful people believe otherwise.<sup>118</sup>

To reiterate, our criticism of *Twombly* and *Iqbal*, as opposed to their cure, does not depend on a stance for or against a stronger gatekeeping role for pleading. As further evidence for that proposition, we briefly sketch two paths that might be taken toward restabilization: one by those sympathetic to the new test's aims who nonetheless deplore the instability it has introduced, and the other by those who wish to undo *Twombly–Iqbal*. Both sketches are incomplete. We offer them not as fleshed-out proposals, but as indications of the directions such proposals might take *and* as contrasts to the path the majorities took in *Twombly* and *Iqbal*.

#### A. RETOUCHING TWOMBLY–IQBAL

Suppose one believed that—either in general or in certain cases—notice pleading did an inadequate job of screening out factually weak cases, that is, cases destined to fail but only after expensive discovery. How might one approach the problem? Again, responsible reformers would first seek to verify their belief. It would be folly not to seek at least some quick and dirty data here. Let us, however, leap over this important task and assume that good studies verified that certain complaints, or civil complaints in general, suffered from inadequate threshold gatekeeping *and* that tighter pleading rules could screen out substantial numbers of false positives at an acceptable cost in terms of false negatives. We can then offer two possible ways to implement such a new regime.

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117. See, e.g., JOINT PROJECT OF THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 5–6 (2009) (supporting a return to code-style fact pleading); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 99 (2007) (approving the result of *Twombly* by supporting “dismissal at the close of pleadings in any case where the defendant has negated all inferences of culpability by using the same kinds of public evidence that the plaintiff has used to establish a factual underpinning to the underlying complaint”); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 93–98 (2008) (criticizing lenient pleading rules); Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal 2*, 18–19 (Aug. 28, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1463844> (approving *Iqbal* as an evolution in the pleading standard that is likely to increase the efficiency and fairness of civil practice).

118. This position is probably the majority view among academics. A fine statement of the position lies in A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460–89 (2008) (strongly criticizing the new regime of pleading); see also A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13–18 (2009) (arguing that pleading today centrally requires a complaint to describe events about which there is a presumption of impropriety).

The first possibility would be to revise Rule 9 to include more classes of cases, while abrogating *Twombly* and *Iqbal* as a general rule.<sup>119</sup> The present Rule 9(b) requires complaints “alleging fraud or mistake” to “state with particularity the circumstances constituting fraud or mistake.”<sup>120</sup> If one could identify other categories of cases that would profit from such a provision, one could add these categories to Rule 9(b).<sup>121</sup> One great advantage of this path flows from the seventy years of interpretation of the “particularity” requirement: competent litigators have a fairly good idea of what the phrase requires in terms of factual detail and so do judges.<sup>122</sup> We

119. See, e.g., Posting of Gregory Sisk, gcsisk@stthomas.edu, to civ-pro@listserv.nd.edu (June 6, 2009) (on file with the Iowa Law Review) (proposing such a reform); cf. Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 537 (arguing that substantive-specific federal common law could modify the transsubstantive Federal Rules on pleading); Edward D. Cavanagh, *Twombly*, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 879 (2008) (concluding that “certain classes of cases may well warrant particularized pleading but that the decision should be made by the rulemakers through amendments to the Federal Rules of Civil Procedure and not by judges on an ad hoc basis”); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 147 (2009) (calling for a return to fact pleading, but for only certain “high-risk” classes of cases).

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

121. For several decades, there has been a persistent contention that civil-rights claims, especially where the defendants asserted their immunity, would be good candidates for such inclusion. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 574–82 (2002) (criticizing lower-court civil-rights cases that required heightened pleading); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1027–32 (2003) (commenting on the heavy burden that heightened pleading places on plaintiffs); Marcus, *supra* note 12, at 1751 (describing cases raising the pleading standard); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444–51 (1986) (discussing the reaction to liberal notice pleading, resulting in heightened pleading for certain, enumerated types of cases). The Court has regularly pushed aside such arguments with the point that, if true, the right path was to propose a change in the Federal Rules. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513–15 (2002) (involving a Title VII employment-discrimination claim); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (involving a civil-rights claim against a municipality). We are skeptical that such a Rule change is a good idea. However, if adopting different pleading rules is a good idea, the earlier Court was correct in its opinion that a Rule change accomplished through established rulemaking procedures, not a judicial opinion, is the proper way to go. See *Jones v. Bock*, 549 U.S. 199, 224 (2007) (“We once again reiterate . . . 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.”).

122. See, e.g., *Stradford v. Zurich Ins. Co.*, No. 02 CIV. 3628, 2002 WL 31027517, at \*2 (S.D.N.Y. Sept. 10, 2002). The *Stradford* court stated:

Thus, it is unclear from the face of the [fraud] counterclaims whether defendants assert that Dr. Stradford’s claimed losses are improperly inflated, that Dr. Stradford’s office never even flooded, or that the offices flooded, but not during the term of the Policy. In essence, defendants claim that Dr. Stradford lied, but fail to identify the lie.

*Id.* at \*3; see also CLARK, *supra* note 11, at 225–40 (treating heightened pleading under the code regimes); 5A WRIGHT & MILLER, *supra* note 9, §§ 1296–1301.1 (treating heightened pleading under the federal regime).

would be spared the years of wandering in the “nonconclusory plausibility” wilderness to which we now seem doomed. An even greater advantage is that courts can sensibly demand factual detail, whereas testing for factual convincingness without an evidential basis is inherently destabilizing.<sup>123</sup>

A second, more elaborate way to preserve the new gatekeeping function in a fair fashion would involve facing the real concern of discovery<sup>124</sup> and then borrowing a page from criminal procedure.<sup>125</sup> A criminal equivalent of civil discovery is search and seizure: both procedures put in parties’ hands the power to compel an adversary to disclose information. The criminal law, however, features a much more regulated procedure. In general, to justify a criminal search, the police need either a warrant, which certifies that a magistrate believes there is probable cause to justify the intrusion on privacy,<sup>126</sup> or exigent circumstances, such as an arrest combined with probable cause, which make a warrantless search constitutional.<sup>127</sup> Were one convinced that U.S. civil litigants enjoyed excessive powers of discovery,<sup>128</sup> one might try to create a noncriminal version of a search warrant.

Accordingly, to preserve the new gatekeeping function in a fair fashion, civil rulemakers might require as the price of admission to discovery—

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123. See *supra* text accompanying note 49 (discussing the lack of precedent for testing convincingness on bare pleadings).

124. 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, 1255–70 (2008) (criticizing *Twombly* from a broad perspective, but ultimately approving a limited screening of conclusory pleadings unless the pleader can show a special need for discovery); Randal C. Picker, *Twombly, Leegin and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 176–77 (suggesting that the Supreme Court should have proceeded instead by limiting discovery); Posting of Eric Freedman, Professor, Hofstra Law School, lawemf@hofstra.edu, to civ-pro@listserv.nd.edu (Sept. 4, 2009) (on file with the Iowa Law Review) (suggesting disallowance of dismissals on the ground that a pleading is conclusory or implausible, “unless the court also determines that it is clear to a legal certainty that the factual contentions could not have evidentiary support after a reasonable opportunity for further investigation or discovery”). For a very sensible warning against trying to cure pleading without also considering discovery and case management, see generally Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIGATION, Spring 2009, at 1, available at [http://www.abanet.org/litigation/journal/opening\\_statements/09spring.pdf](http://www.abanet.org/litigation/journal/opening_statements/09spring.pdf).

125. See, e.g., Posting of Bryan Camp, Professor, Texas Tech University School of Law, bryan.camp@ttu.edu, to civ-pro@listserv.nd.edu (July 7, 2009) (on file with the Iowa Law Review) (suggesting a criminal-law analogy). For an article treating civil–criminal comparisons more generally, see generally David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2006).

126. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE 5–7 (2004) (discussing search warrants).

127. See *id.* at 446–51 (discussing warrantless searches); see also 3 *id.* chs. 5–7 (discussing warrantless searches in greater depth).

128. Indeed, many foreign observers, accustomed to the Continental system of investigative processes supervised by judges, find distressing the power put into the hands of U.S. civil litigants. See generally Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002) (comparing discovery practices).

imposed if the opposing party has successfully met the standard for dismissal under *Twombly-Iqbal*—that the claimant demonstrate something like probable cause to believe that allowing discovery before dismissal would yield significant pertinent evidence.<sup>129</sup> The judge would apply either the criminal probable-cause standard or some other standard, likely less demanding.<sup>130</sup> The judge could, as always, appropriately limit any allowed discovery.

In creating any such procedure, the drafters of the amended Rules would have to provide the necessary guidance to litigants and courts on what factors to consider. The procedure need not apply invariantly to all complaints. For example, the procedure might take into account any resource inequality or information asymmetry between the parties, or any especially heavy burdens or benefits of the particular litigation.<sup>131</sup> *Twombly* and *Iqbal*, of course, provide no such guidance.

### B. UNDOING TWOMBLY-IQBAL

Alternatively, one might well believe that notice pleading did a reasonably good job and that, especially in a relatively lightly regulated society, easy access to civil justice served important goals. By now, this side also has some obligation to seek data. If this side were to obtain some empirical support, then the appropriate question would become how to undo the harm caused by *Twombly* and *Iqbal*. A brace of relatively simple alternatives—simple conceptually, though perhaps not politically—lie open.

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129. Alternatively, one could build the procedure onto the existing framework for discovery, so that FED. R. CIV. P. 26(a)(1) would require each party to disclose all evidence supporting its claim or defense early in the case.

One could come at this solution from the opposite direction, that is, one could abrogate *Twombly-Iqbal* as a pleading test but give the defendant a means to cut out discovery in weak cases. For example, one could allow the defendant to make an early summary-judgment motion that would require the plaintiff either to show reasonable possibility, or plausibility, of the claim or to show under FED. R. CIV. P. 56(f) a reasonable possibility that discovery would yield significant pertinent evidence. Indeed, this route does not require much change in existing procedural law.

130. Denial of the discovery warrant would completely block the plaintiff who does not yet have the necessary information that discovery could deliver, while denying a search warrant is just one closed door along the corridor of criminal procedure. Arguably, then, a better standard would be the “reasonable suspicion” from stop-and-frisk law, rather than the “substantial possibility” (or perhaps more) associated with criminal law’s probable cause. See Clermont, *supra* note 47, at 1124 (specifying criminal standards of decision). Alternatively, one could more vaguely require a showing of “good cause,” a term that at least sounds more civil than criminal. The discovery Rules have made liberal use of that term from the beginning, as in FED. R. CIV. P. 35.

131. See Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 42–54 (2008) (using economic analysis to conclude that pleading standards should vary with the case’s evidentiary demands and the social costs of litigation).

First, the obvious route to reform is through amendment of the Federal Rules. On the thought that the Court is ready neither to overrule these recent cases nor to welcome a direct amendment to Rule 8, however, some have suggested the tactic of encouraging the rulemakers to draft additional pleading samples for the Appendix of Forms of the Federal Rules.<sup>132</sup> One such form would be a sample antitrust complaint in which the plaintiff made a conclusory allegation of agreement. A second such form would be a *Bivens* allegation of intentionally unlawful behavior by high public officials, again cast in the conclusory form the Court found objectionable. But these forms, imposing somewhat awkward interpretive tasks even if expressing certain desired results nicely, could appear to be even more of a public repudiation of the Court's work in *Twombly* and *Iqbal* than an amendment to Rule 8. Because no such changes would reach the Court without the approval of the members of the several rulemaking bodies through which such proposals pass—dominated by judges but also containing respected litigators and academics—one can imagine that the Justices would think several times before rejecting the proposed changes. Nonetheless, one can picture the Court refusing to promulgate the added forms.

Second, given this fear that the Court would impede any repudiation of its work, another route would detour through Congress.<sup>133</sup> Congress has the

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132. See, e.g., Posting of Jonathan Siegel, Professor, George Washington University Law School, jsiegel@law.gwu.edu, to civ-pro@listserv.nd.edu (May 19, 2009) (on file with the Iowa Law Review) (proposing such a reform); see also FED. R. CIV. P. 84 (providing that “forms in the Appendix suffice under these rules”); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3162 (2d ed. 1997) (“Thus, it is clear that a pleading, motion, or other paper that follows one of the Official Forms cannot be successfully attacked.”). The Civil Rules Advisory Committee has the monitoring of *Twombly* and *Iqbal* on its current agenda. See Mauro, *supra* note 28, at 32 (describing the current posture of the Advisory Committee); see also Civil Rules Advisory Comm., Minutes 31–35 (Nov. 8–9, 2007), available at <http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf> (expressing cautious interest); Civil Rules Advisory Comm., Minutes 35 (Apr. 7–8, 2008), available at <http://www.uscourts.gov/rules/Minutes/CV04-2008-min.pdf> (postponing the discussion); Civil Rules Advisory Comm., Minutes 17 (Nov. 17–18, 2008), available at <http://www.uscourts.gov/rules/Minutes/CV11-2008-min.pdf> (same).

133. See, e.g., Posting of David Shapiro, Professor, Harvard Law School, dshapiro@law.harvard.edu, to civ-pro@listserv.nd.edu (July 7, 2009) (on file with the Iowa Law Review) (offering an amendment that Congress could make to FED. R. CIV. P. 8). Professor Shapiro proposed:

Except as otherwise expressly provided by statute or in these rules, an allegation of fact, or of the application of law to fact, shall [must?] not be held insufficient on the grounds that it is conclusory and/or implausible, unless the rules governing judicial notice require a determination that the allegation is not credible.

*Id.* In fact, on July 22, 2009, Senator Arlen Specter introduced a bill to restore the status quo ante, pending further study. S. 1504, 111th Cong. (2009). It could, of course, undergo revision after committee hearings, but it currently provides:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of

undoubted power to alter the Federal Rules.<sup>134</sup> Concededly, frustrated reformers should hesitate before running to Congress to turn a judicial matter into a legislative one. But the basic design choice here at stake may be at least as legislative as it is judicial in nature. In any event, we note that a

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enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

*Id.* In a congressional hearing on December 2, 2009, Professor Stephen Burbank suggested redrafting the bill so that federal pleading would simply revert to the “interpretations . . . that existed on May 20, 2007,” which was the day before the *Twombly* decision. *Whether the Supreme Court Has Limited Americans’ Access to Court: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. app. A, at 22 (2009) (prepared statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>. However, Michael C. Dorf, *Should Congress Change the Standard for Dismissing a Federal Lawsuit?*, FINDLAW, July 29, 2009, <http://writ.news.findlaw.com/dorf/20090729.html>, sharply criticized the bill’s approach. He proposed this version instead:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not deem a pleading inadequate under rule 8(a)(2) or rule 8(b)(1)(A) of the Federal Rules of Civil Procedure, on the ground that such pleading is conclusory or implausible, unless the court may take judicial notice of the implausibility of a factual allegation. So long as the pleaded claim or defense provides fair notice of the nature of the claim or defense, and the allegations, if taken to be true, would support a legally sufficient claim or defense, a pleading satisfies the requirements of rule 8.

Dorf on Law, An Alternative to Senator Specter’s Notice Pleading Bill, [http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice\\_28.html](http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice_28.html) (July 29, 2009, 3:13 EDT); see also Posting of Arthur Wolf, [awolf@law.wnec.edu](mailto:awolf@law.wnec.edu), to [civ-pro@listserv.nd.edu](mailto:civ-pro@listserv.nd.edu) (Oct. 20, 2009) (on file with the Iowa Law Review) (proposing an amendment of Rule 8(a)(2) to read either “a short and plain statement giving [sufficient] notice of the claim upon which relief can be granted” or “a short and plain statement of the claim upon which relief can be granted so that a party can [may] reasonably prepare a response”). On November 19, 2009, Representative Jerrold Nadler introduced another bill to similar effect. H.R. 4115, 111th Cong. (2009). It would add a new 28 U.S.C. § 2078 providing:

A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

H.R. 4115.

134. The most recent—though unfortunate—example is the congressional addition to FED. R. CIV. P. 35. At one point, the Rule provided that only a physician could conduct a mental examination, thus excluding clinical psychologists. See Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 481 (1997) (describing the sequence of events by which Congress amended the Federal Rules without any public notice). A senator, whose daughter happened to be a licensed clinical psychologist, successfully sponsored legislation amending the Rule to include her specialty. *Id.*

statutory amendment to Rule 8—stating the “short and plain statement” need not be “nonconclusory” or “plausible,” although as always it could still fail for being legally insufficient or factually frivolous—would serve as a quick and effective repudiation of *Twombly* and *Iqbal*.<sup>135</sup> With the status quo ante so restored, the ordinary rulemaking machinery could take over.

### C. RESTORING STABILITY

However the dust settles, the ball would then be bouncing back into the court of the ordinary rulemaking machinery. The rulemakers should soon commence a study of exactly where, in the middle between the two camps, the optimal pleading standard lies. The resolution of the pleading problem probably should have started with the rulemakers, but it surely should finish there.

Our point is simple: *Twombly* and *Iqbal* have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process through which all litigation must pass. We think the Court meant well in both of those decisions. Thrusting good intentions into a complex system, however, can have some very bad consequences. Here, the results are not likely to be pretty. The good news is that the states, including those that have adopted some version of the Federal Rules, are not bound by *Twombly* or *Iqbal*, and therefore can choose to proceed unaffected by those viral decisions. The bad news is that within the federal system, the *Twombly*–*Iqbal* virus is likely to infect civil proceedings unless someone in a position to act does something soon.

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135. The thus-amended Rule 8(a)(2) could require “a short and plain statement of the claim—regardless of its nonconclusory plausibility—showing that the pleader is entitled to relief.” A longer version might simply append a sentence to Rule 8(e): “The pleading, if otherwise sufficient, need not satisfy a requirement of nonconclusory plausibility.” A still longer version would spell out the meaning of the clumsy phrase “nonconclusory plausibility,” although we think that such detail is unnecessary to dispose of an identifiable judge-made test.



## APPENDIX

**Courtesy of Professor David Shapiro**  
 IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

Daniel Porter,	)	
Plaintiff	)	Civil Action No. 1:09-cv-2192-CEC
	)	
v.	)	<i>Order Granting</i>
	)	<i>Motion to Dismiss</i>
Louise Davis,	)	
Defendant	)	

In his complaint, after alleging jurisdiction on the basis of diversity of citizenship and the requisite amount in controversy, plaintiff's statement of his claim (which is followed by a brief paragraph alleging the injuries for which compensation is sought) reads, in full, as follows:

On January 5, 2009, at the corner of Boylston and Tremont Streets in Boston, Massachusetts, defendant willfully or recklessly or negligently drove a motor vehicle against the plaintiff.

Defendant has moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. With respect to the former, defendant points to the inadequacy of the allegation that "Plaintiff is a citizen of the state of Massachusetts and defendant is a citizen of the state of Wyoming." She notes that even if the court accepts the allegation of plaintiff's citizenship for purposes of the motion, it should not accept as plausible the conclusory allegation of defendant's legal status as a citizen of Wyoming. She notes that of the approximately six billion people in the world, only about one-half a million have even a plausible legal claim to be citizens of Wyoming, and that the odds that she is a citizen of that state are therefore approximately only 1 in 12,000. Thus, she contends, the bare allegation of this legal conclusion of state citizenship does not begin to "plausibly suggest" the existence of federal jurisdiction (*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009)).

Though we note the force of defendant's argument, we need not decide whether the *Iqbal* test applies to allegations of jurisdiction because it is evident that plaintiff has failed to set forth anything more than a "[t]hreadbare recital[] of the elements of a cause of action," *Iqbal*, at 1949, and thus the motion to dismiss for failure to state a claim must be granted. The allegation of willfulness, recklessness, or negligence is but an unsupported assertion of a legal conclusion (actually a series of mutually

exclusive legal conclusions) dependent on facts that are nowhere set forth. The services of this court, which has been established by Congress acting pursuant to the authority conferred on it by the Constitution itself, may not be invoked so casually.

Plaintiff argues that his complaint is fully consistent with Form 11, in the Appendix to the Federal Rules. That argument is not only unavailing but self-defeating. A complaint, in order to state a claim under the Rules, must do more than simply fill in the blanks on a boilerplate form. Indeed, a complaint that does no more than that is especially suspect.

Plaintiff asks that, in any event, he be given leave to amend. But he has already wasted enough of this court's time in considering a woefully inadequate complaint. He should not be granted the privilege of refileing.

For these reasons, defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6) is **granted**, and the complaint is **dismissed** without leave to amend.

IT IS SO ORDERED

Dated: October 8, 2009

Charles E. Clark  
United States District Judge

