RATIONAL PLEADING IN THE MODERN WORLD OF CIVIL LITIGATION: THE LESSONS AND PUBLIC POLICY BENEFITS OF *TWOMBLY* AND *IQBAL*

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INTRODUCTION

The past few years have introduced some exciting, indeed revolutionary, changes to the world of pleading.[1] In what is traditionally a static topic of civil procedure, often viewed as an afterthought by all but first year law students, federal pleading requirements have received a modern-day makeover by the United States Supreme Court in two key decisions, *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*.[3] With these rulings, the Court signaled a decisive break from the broad "notice pleading" standard[4] that evolved out of the Federal Rules of Civil Procedure and became absorbed into many states' analogous pleading rules.[5] In its place, the Court has ushered

1. *See generally* Edward D. Cavanagh, Twombly*: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1 (2008); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063 (2009); Ettie Ward, *The After-shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893 (2008).

2. 550 U.S. 544 (2007).

3. 129 S. Ct. 1937 (2009).

4. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/29/dodson.pdf (declaring that "notice pleading is dead" after the Supreme Court issued its decision in *Twombly*).

5. *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 (1986) (reporting that most states have either replicated or similarly modified federal pleading rules); *see also* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL

in the era of so-called "plausibility pleading,"[6] which represents a more exacting standard, yet one that has resulted in significant confusion as lower courts attempt to decipher its meaning and impact.[7]

Although the contours of *Twombly* and *Iqbal* may not yet be fully understood, the Supreme Court's purpose in developing a more careful judicial review of pleadings was clear: More thorough review is necessary to protect against frivolous and purely speculative lawsuits.[8] Such cases take a considerable toll on the judicial system, wasting scarce judicial resources, delaying justice for meritorious cases, and burdening defendants with "sprawling, costly, and hugely time-consuming" discovery.[9] As the Court stated in *Twombly*, this mere "threat of discovery expense will push cost-conscious defendants to settle even anemic cases" during the pretrial stage.[10] Of equal importance to the Court's reasoning is that the lack of sufficient pleadings review has created an incentive for discovery "fishing expeditions,"[11] whereby claims are initiated with the primary objective of obtaining discovery to find support to file other lawsuits. The purpose of these lawsuits is not to win and secure a client recovery, but rather to provide information to spawn other lawsuits, which can similarly be used to leverage settlement.

As the Supreme Court further appreciated in recalibrating federal pleading requirements, the harmful effects of marginal litigation are often compounded in the modern world of civil litigation. The concept of notice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading.[12] Civil litigation at the time involved rela-

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PROCEDURE § 5.1 (4th ed. 1985) (discussing the intertwined history of state and federal pleading reform).

6. Spencer, *supra* note 4, at 431 ("Say hello to plausibility pleading.").

7. *See, e.g.*, Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011 ("Amorphous. This is how the Supreme Court's recent pleading paradigm has been appropriately described."); Benjamin W. Cheesbro, Note, *A Pirate's Treasure?: Heightened Pleadings Standards for Copyright Infringement Complaints After* Bell Atlantic Corp. v. Twombly, 16 J. INTELL. PROP. L. 241, 266 (2009) ("*Twombly* created quite a kerfuffle, and the dust has yet to settle.").

8. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007).

9. *Id.* at 560 n.6.

10. *Id.* at 559.

11. *Id.* at 577 (Stevens, J., dissenting).

12. *See infra* Part I.A.

tively simple and straightforward matters,[13] and most modern forms of complex litigation, such as regulatory actions or products liability suits regarding warnings and design, either were substantially limited in scope and sophistication or did not yet exist.[14] Concepts such as e-discovery, which alone can cost litigants millions of dollars, were not yet even in the realm of science fiction.

It is in this context that this Article analyzes the public policy of *Twombly* and *Iqbal*, and offers neutral principles for how both federal and state courts might interpret the Supreme Court's new, and admittedly vague, standard. Part I begins by explaining the historical justifications and development of notice pleading. It goes on to discuss the Supreme Court's interpretation of federal pleading requirements in *Twombly* and *Iqbal* and the Court's retreat from notice pleading. Part II examines how these rulings reflect a set of changed circumstances as to the propriety of traditional notice pleading in modern civil litigation. It then offers rational principles for courts to apply in meeting the Supreme Court's new mandate and determining the sufficiency of a pleading. These principles are rooted in the notion that the complexity of a case should bear directly on the degree of pleading specificity needed to establish plausibility. Finally, Part III analyzes the public policy implications of these principles and of greater judicial review of pleadings in general, and responds to arguments of proponents of broad notice pleading.

The Article concludes that broad, bare-bones notice pleading has rightfully "earned its retirement,"[15] and that lower courts could benefit from a framework for determining the plausibility of a complaint. The Article further concludes that although only federal courts are obligated to interpret pleadings in light of *Twombly* and *Iqbal*, there are convincing policy reasons for state courts to do the same.

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13. *See infra* notes 72–78 and accompanying text.

14. *See* DAN B. DOBBS, THE LAW OF TORTS 969–77 (2000) (discussing the development of product liability law); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 735–38 (11th ed. 2005) (same); *see also* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

15. *Twombly*, 550 U.S. at 563.

I. THE RISE AND FALL OF NOTICE PLEADING

A. The Development of Basic Pleading Standards

From the earliest formulations of pleading requirements in England during the Middle Ages until the establishment of the Federal Rules of Civil Procedure in the first half of the twentieth century, the focus in pleading was on formality. Generally speaking, courts during this period applied a rigid, highly technical review of pleadings for compliance with common law rules and, where established, civil codes.[16] In many instances, these procedural systems were designed not simply to control the level and types of cases heard, but as a mechanism to keep litigants out of the courtroom.[17] Legal history is stained with examples of such allegiance to formalism effectively providing a trap for the unwary and disenfranchised.[18] Over time, these legal hurdles stood increasingly at odds with Americans' expanding personal liberties and notions of equal justice, thereby fermenting an environment conducive to a fundamental overhaul of the existing pleading system.

1. Common Law Pleading

In Medieval England, courts generally presented those seeking legal recourse with two options: "the burdensomely technical route through the courts of law or the burdensomely factual route through the courts of equity."[19] Before this arduous process could even begin, however, plaintiffs had to overcome significant hardships in getting before the correct court and securing a defendant's appearance. For example, in the Court of the

16. Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008) ("The ultimate result at common law was a complex, verbose, and convoluted pleading that did not make clear what, exactly, the suit was predicated on.").

17. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004); Ward, *supra* note 1, at 896–97.

18. *See* Note, *Common Law Pleading*, 10 HARV. L. REV. 238, 239 (1897) (defending the old regime from the allegation that it was "a mere series of traps and pitfalls for the unwary").

19. Damon Amyx, *The Toll of* Bell Atlantic Corp. v. Twombly*: An Argument for Taking the Edge Off the Advantage Given Defendants*, 33 VT. L. REV. 323, 324 (2008); *cf.* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 519–23 (1925) (discussing the history of pleading requirements in Roman times).

Common Bench, the precursor to the Court of Common Pleas, a case could not proceed, regardless of the merits, without all parties properly before the court.[20] To compel a defendant's appearance, plaintiffs would typically have to persuade the court to engage in the "laborious and costly" process of "outlawing" the defendant.[21] By comparison, the "rival" Courts of the Exchequer and King's Bench, which were empowered to issue writs of arrest to facilitate appearances, only marginally improved upon this process.[22] In these courts, plaintiffs would often have to allege fictitious claims that were offenses to the king, such as a complaint of trespass, to secure a pretrial arrest writ.[23] After the courts obtained jurisdiction, these empty claims would be dropped and the real civil claims added so the matter could be adjudicated.[24]

When they arrived at the starting line, plaintiffs encountered a confining labyrinth of formality. Courts of law functioned according to a strict writ system. Here, a plaintiff needed to obtain a writ from the court before filing a claim, and, for the court to have jurisdiction, that claim had to fit within a specific form of action.[25] Writs were also "strictly limited to cases where precedents existed."[26] After obtaining a writ for a specific form of action, a plaintiff could expect to encounter very different procedures, depending on the form of action selected.[27] A "science of special pleading"[28] thus de-

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20. EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 169–70 (1913); Amyx, *supra* note 19, at 325.

21. JENKS, *supra* note 20, at 170.

22. *Id*.

23. *Id.* at 170–72 (explaining the use of trespass and a "Writ of Quominus," which created the legal fiction that the plaintiff owed money to the king to secure a defendant's arrest).

24. *Id.* at 170.

25. ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 545 (3d ed. 2009); Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice after* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 872 (2007) ("For the common law plaintiff to prevail, he was forced to fit his claim into one of eleven established categories . . . ."); *see also* William H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26 (1922).

26. Clark, *supra* note 19, at 527 ("The practice of the clerks in chancery of *forming* new writs had ceased by the middle of the thirteenth century.").

27. *See* JENKS, *supra* note 20, at 349–50.

28. Clark, *supra* note 19, at 526; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *305–06; William Searle Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMBRIDGE L.J. 261, 262 (1923) (quoting nineteenth-century legal writer

veloped, with the entire process "resembl[ing] an obscure game of chance,"[29] pitting claimants against the system as much as against each other.

Courts of equity were only marginally easier to navigate. They did not have forms of action; however, equitable pleadings required very detailed and lengthy explanations of both law and fact.[30] The original pleading, in effect, provided the entire basis on which to determine a case. Facts were sworn to and generally could not be amended, and "rules of law were proposed, discussed, and approved or disapproved at the level of pleading."[31] A formal civil trial with witnesses did not become commonplace until relatively modern times.[32] Thus, this one-shot deal represented a considerable risk for plaintiffs, and placed tremendous pressure on the litigants to construct comprehensive, artful pleadings.[33]

By the end of the fourteenth century, these rigid common law pleading requirements had become fixed and would largely stay that way until the nineteenth century.[34] Some efforts were made to lend greater flexibility to the law, but oftentimes they did not function to aid those burdened in bringing an action. For example, during the eighteenth century more courts began to allow defendants to plead the "general issue," meaning that a defendant could respond with a general denial of the plaintiff's allegations and defend specific allegations at trial, rather than separately addressing each statement in the com-

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Frederick William Maitland referring to common law pleading as "[t]he most exact, if the most occult, of the sciences" (footnote omitted)).

29. JENKS, *supra* note 20, at 350.

30. Clark, *supra* note 19, at 528; Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 641 (1993).

31. Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 76 (2008).

32. Clark, *supra* note 19, at 528; *see also* Josephson, *supra* note 25, at 874 ("The pleading contest was the primary source of dispute resolution, with the 'trial itself as something of an afterthought.'" (footnote omitted)).

33. *See, e.g.*, Jason G. Gottesman, Comment, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 976–78 (2008) (discussing the early pleading standards' impact of reducing the likelihood of resolution on the merits of cases).

34. *See* Clark, *supra* note 19, at 527–30; *see also* Holdsworth, *supra* note 28, at 265 ("[B]oth the system of pleading and the system of procedure in which it played so important a part tended to grow more elaborate and more rigid as time went on.").

plaint.[35] Common law courts still insisted, however, that each of the plaintiff's allegations be whittled down to a single issue, divided into questions of law for the judge and questions of fact for the jury, and ruled on at the pleading stage.[36] Not until the wide adoption of code pleading would the common law finally shed some of its enduring arcane formalities and begin allowing for a more level playing field.

2. Code Pleading

Beginning in the early nineteenth century, frustrations with the rigidity and injustice of common law pleading led to the formation of the "code pleading" system. This system was predicated on a set of legislatively adopted rules intended to promote greater clarity and uniformity in pleading requirements, prevent unfair surprise to parties, and reduce costs.[37] The system was designed to accomplish these ends by streamlining cases and replacing technical pleading requirements with a requirement to plead operative facts.[38] Legal conclusions were not to be pled, enabling the court to narrow efficiently the issues in a case.[39]

In practice, the difficulty in distinguishing between operative facts, evidentiary facts, and legal conclusions made code pleading a spectacular failure. Like its common law predecessor, code pleading proved immensely technical, and uncertainty in what needed to be pled to give sufficient notice to a party quickly devolved into an overly-inclusive approach to pleading.[40] In the end, the system was "excruciatingly slow, expensive, and unworkable."[41]

The Hilary Rules of 1834 provide an archetypal example of the code pleading experience. The Hilary Rules were created pursuant to the Civil Procedure Act of 1833, which authorized

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35. *See* Amyx, *supra* note 19, at 328.

36. *See* Ward, *supra* note 1, at 896.

37. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 305 (1938) [hereinafter Clark, *Handmaid of Justice*]. *See generally* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 21–31 (2d ed. 1947) [hereinafter CLARK, HANDBOOK].

38. *See* JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 173–74 (4th ed. 1887).

39. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting).

40. *See* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260–68 (1926) (arguing that distinctions between law, facts, and evidence were often meaningless).

41. 5 WRIGHT & MILLER, *supra* note 17, § 1202.

courts to adopt their own procedural rules. Their purpose was to reduce entire controversies to one defined issue.[42] Their implementation introduced "a period of the strictest pleading ever known,"[43] as the rules required far more particularity to mold a case than the common law had. Only extremely proficient drafters could navigate the rules and avoid potential traps.[44] Litigation solely concerning procedural matters clogged the court system, leaving the actual merits of cases to take a backseat to artful pleading.[45] Failing to achieve any measure of improvement over the common law, and in fact exacerbating the pleading process, the Hilary Rules were completely abandoned within a few decades.[46] Nevertheless, this "disastrous mistake"[47] proved pivotal in changing attitudes regarding how pleadings should function, signaling the end of formalistic pleading requirements in the English common law system.

The United States, meanwhile, gained valuable insight from the early problems with the English code pleading system and set out to construct an improved pleading process. In 1848, New York, under the leadership of David Dudley Field, became the first state to develop a purported solution in its adoption of the "Field Code."[48] The Field Code merged actions in the American courts of law and equity into a single action, known as the "civil action."[49] It abolished common law forms of action, and in place of technical pleading language simply required that the complaint contain "[a] statement of the facts

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42. *See* Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520 (1957).

43. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–59 (1943).

44. *See id.* at 459.

45. *See* Weinstein & Distler, *supra* note 42, at 520; Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507 (1918) (stating that one in four cases was dismissed at the pleading stage as compared with one in six under the common law).

46. The Hilary Rules were officially ended with the enactment of the Supreme Court of Judicature Act of 1873, which combined the English courts of law and equity into a single body. *See* CLARK, HANDBOOK, *supra* note 37, at 14.

47. Clark, *supra* note 43, at 459 (quoting Holdsworth, *supra* note 28, at 271).

48. Judge Clark, the chief draftsman of the Federal Rules of Civil Procedure, suggested that much of the Field Code in fact emanated from Edward Livingston's Louisiana Code of Civil Procedure drafted in 1805. *See* Clark, *Handmaid of Justice*, *supra* note 37, at 305.

49. Gottesman, *supra* note 33, at 977 (quoting CLARK, HANDBOOK, *supra* note 37, at 23).

constituting the cause of action, in ordinary and concise language, without repetition."[50]

By several accounts, the Field Code represented an improvement over an American common law system still stifled by England's common law formalities. First, claimants gained easier access to the courthouse, and were no longer bounced between courts of law and equity. Second, the removal of forms of action opened avenues by which recovery was available. Finally, the novel concept of an "ordinary and concise" statement helped to liberalize pleading rules and eliminate frequent pleading traps.[51] These advances led over half of the states to adopt the Field Code as their procedural guide.[52]

The Field Code's ultimate goal of simplifying the pleading process, however, failed to materialize.[53] The practical difficulty in distinguishing between allegations of ultimate fact, which were appropriate for pleadings, and legal conclusions, which were inappropriate at that stage, left claimants mired in the same highly technical attention to detail present under the common law.[54] The rules were also rigidly enforced.[55] Even simple pleading requirements, such as the detail required to show negligence, were liable to trigger procedural defects.[56] Thus, on balance, the Field Code left in place a system that still inhibited rather than promoted the resolution of claims on the merits.

3. Notice Pleading

By the early twentieth century, grudging acceptance of code pleading's serious flaws and aggravation with hundreds of years of stagnant common law development combined to pro-

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50. 1848 N.Y. Laws 521.

51. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 934 (1987).

52. CLARK, HANDBOOK, *supra* note 37, at 14 (stating that by 1928 "twenty-eight states and two territories" had adopted the Field Code).

53. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986).

54. *See id.*

55. Gottesman, *supra* note 33, at 977–78.

56. *See* Marcus, *supra* note 53, at 438 (stating that "the detail needed to allege negligence was regularly recalibrated").

duce a breaking point.[57] The last straw was that by the 1930s, federal courts ran according to a "strange mixture" of procedure.[58] For actions at law, Congress's passage of the Conformity Act in 1872 required that federal district courts follow the procedure of the state in which the court sat, which varied between common law and code pleading.[59] For actions at equity, Congress's vesting of rulemaking authority in the United States Supreme Court resulted in adoption of the Federal Equity Rules in 1912, which delineated an entirely distinct set of procedures.[60] By the early 1930s it had become clear that only radical change would finally put an end to this fragmented, mystifying, and oppressive procedural system.[61]

As legal scholar John Frank later noted: "Just as the ship that is in the water too long becomes encrusted with barnacles, so legal proceedings may become encrusted with tradition; and some of them may from time to time need to be scraped off."[62] In 1934, Congress enacted the Rules Enabling Act,[63] authorizing the Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts. Four years later, the Federal Rules of Civil Procedure were born and with them the era of notice pleading.[64] The term "notice pleading" articulates a fundamental philosophical change in the new pleading rules that cast away formal and fact-intensive pleadings in fa-

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57. *See* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1295 (1935).

58. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 1.8 (5th ed. 2001); *see also* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 393 (1935).

59. Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 10–11 (2008); *see also* Clark & Moore, *supra* note 58, at 406–07.

60. Campbell, *supra* note 59, at 10–11; *see also* Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 638, 643 (1933).

61. *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007) (stating that the new Federal Rules of Civil Procedure were embraced "with great fanfare" and viewed as "an obvious advance over the earlier rules of procedure that were embodied in the standard codes"). *But see* Subrin, *supra* note 51, at 976–77, 983–84 (describing disagreement over liberal pleading among Advisory Committee members and resistance to it after 1938).

62. JOHN P. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 129 (1969).

63. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

64. *See* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992).

vor of merely providing a party "notice" that a lawsuit involving an incident or event was being brought.

Before "notice pleading" became established in legal parlance,[65] however, the drafters referred to their new procedural philosophy as "simplified pleading."[66] Pleadings still needed to incorporate the elements of a claim that were required under the common law or code pleading, but they merely had to state them in a concise manner, untethered from any formal guidelines.[67] Rule 8(a)(2) of the Federal Rules of Civil Procedure embodies this major shift in approach, requiring a plaintiff to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[68]

A guiding policy behind simplified pleading was that it would be more efficient, in terms of both cost and expediency, to resolve disputes using discovery rather than successive technical pleadings.[69] The drafters believed that the discovery system would screen less meritorious cases, encourage just settlements, and, overall, provide a superior means of early dispute resolution.[70] Looking back over the past seventy years of legal history, it is obvious that the drafters were seriously mistaken on this point, as discovery expenses have long represented the lion's share of litigation costs and have not effectively provided a means of early dispute resolution.[71] Rather

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65. *See infra* notes 81–85 and accompanying text.

66. *See* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 272 (1942); 5 WRIGHT & MILLER, *supra* note 17, § 1202. Judge Clark, in fact, vigorously opposed the term "notice pleading" as a "vague abstraction." Charles E. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 457 (1962).

67. *See* Sherwin, *supra* note 31, at 77.

68. FED. R. CIV. P. 8(a)(2); *see also* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (stating that the new pleading rules require "a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result").

69. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575–76 (2007) (Stevens, J., dissenting); R. David Donoghue, *The Uneven Application of* Twombly *in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 5 (2008).

70. *See Twombly*, 550 U.S. at 575 (Stevens, J., dissenting); Donoghue, *supra* note 69, at 5.

71. *See* Paul V. Niemeyer, *Report of the Advisory Committee on Civil Rules*, 192 F.R.D. 354, 357 (1999) (stating that "discovery represents approximately 50% of the [federal] litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed"); *see also* COMM. FOR ECON. DEV., BREAKING THE LITIGATION HABIT: ECONOMIC INCENTIVES FOR LEGAL RE-

than acting as a screen against cases without merit, discovery has become a magnet to attract them.

Nevertheless, in the context of the 1930s when the Federal Rules of Civil Procedure were enacted, the drafters' judgment was justifiable. Litigation was comparatively small.[72] Many lawyers practiced in localized settings in which they might be one of only a few practitioners, or perhaps the only attorney in town.[73] It was also not uncommon for attorneys to have personal and professional relationships with local judges.[74] This close-knit environment fostered greater mutual respect among counsel, leading to fewer antagonistic tactics and fewer unnecessary delays and costs.[75] In addition, cases typically involved simple, straightforward issues, so that discovery might only entail fairly inexpensive measures, such as taking witness statements.[76] The evolution of the large law firm with national, or even international, practices and greater incentives to aggressively litigate matters (and risk offending small-town sensibilities) was still many decades away.[77] Most forms of com-

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FORM 5 (2000) ("Discovery alone is estimated to comprise 80 percent of the cost of a fully litigated case.").

72. *See* Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 8–9 (1997) (describing the substantial increase in the volume and complexity of litigation since the Federal Rules were enacted).

73. Professor Arthur Miller summarized the changes in the legal community since the Federal Rules were enacted:

> The culture of the law and the legal profession itself are far different. Long gone are the days of a fairly homogeneous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of parties. The federal courts have become a world unimagined in 1938 . . . .

Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 11 (2009) (statement of Arthur R. Miller, Professor, New York University School of Law) [hereinafter Miller Statement].

74. *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 895–97 (2009) (discussing changes in the practice of law since adoption of the Federal Rules).

75. *See* Meador, *supra* note 72, at 13–14; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 523–24 (1986).

76. *See* Bone, *supra* note 74, at 896 (noting that in 1938 "[m]any cases were rather small affairs").

77. *See* Miller Statement, *supra* note 73, at 11 ("Opposing counsel [today] compete on a national and even a global scale, and attorneys on both sides employ an array of litigation tactics often intended to wear out or deter opponents.").

plex litigation were also decades away.[78] Hence, in the 1930s, as throughout legal history until that time, formalistic pleading requirements, not discovery, represented the most costly and burdensome aspect of the civil justice system.

The Supreme Court, eager to protect the important gains resulting from the dismantling of antiquated common law and code pleading barriers, issued a series of opinions over the ensuing decades that broadened the meaning and impact of simplified pleadings. The high-water mark came in 1957 when the Court, in *Conley v. Gibson*, delivered its broadest interpretation of federal pleading standards: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts* in support of his claim which would entitle him to relief."[79] The Court, for the first time, also adopted the term "notice pleading,"[80] further signaling its vision of pleading standards as meaning something broader than a simplified pleading.[81] According to one legal scholar, the new standard after *Conley* set such a low threshold that a party essentially had to "[plead] himself out of court."[82]

For the next fifty years, the Supreme Court appeared to embrace this broad view of pleading requirements. On a number of occasions, the Court cautioned lower courts that judges could not depart from the liberal notice pleading standard, even where circumstances might appear to warrant a heightened standard.[83] Tension, meanwhile, continued to build in some lower federal courts over specific types of cases where there were serious concerns about frivolous and fraudulent

78. *See* Henderson & Eisenberg, *supra* note 14, at 480.

79. 355 U.S. 41, 45–46 (1957) (emphasis added). *Conley* was a class action suit brought by African-American railroad employees against their union. *Id.* at 42. The employees alleged in the complaint that the union did not protect their jobs in the same way that the union protected the jobs of white employees. *Id.* at 46.

80. *Id.* at 47.

81. *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 111 (2009) ("*Conley* quickly became the dominant case interpreting modern pleading doctrine.").

82. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

83. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); *see also* Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19 (1994); Spencer, *supra* note 4, at 436–37.

lawsuits.[84] Nevertheless, the Supreme Court rejected changing the rules of the game with regard to select actions, ultimately opting instead to reexamine the policy and place of notice pleading in the modern world of civil litigation.

B. The Twombly *and* Iqbal *Decisions*

In 2007, the Supreme Court in *Bell Atlantic Corp. v. Twombly* shook the foundations of notice pleading for the first time.[85] Here, John Frank's comment about legal proceedings growing "encrusted with tradition" and needing to be "scraped off" appears particularly relevant.[86] The Court, with little fanfare or warning, retired *Conley*'s broad "no set of facts" standard and announced a new, more exacting standard for pleading "plausibility."[87] Integral to the Court's new direction was that the public policy underlying traditional notice pleading no longer provided the appropriate balance necessary to promote justice and curb frivolous or highly speculative litigation.[88]

Twombly involved a consumer class action brought against a variety of local telephone carriers for allegedly conspiring to inflate charges and to inhibit market entry of rival firms in violation of federal antitrust law.[89] Specifically, the plaintiffs main-

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84. *See, e.g.*, Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897–900 (D. Mass. 1991) (explaining the trend toward "higher standards of particularity"); Campbell, *supra* note 59, at 18–21 (discussing the "guerilla attacks" against notice pleading during the 1950s and the Federal Rules Advisory Committee's response); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988–89 (2003) (discussing judicially imposed heightened pleading standards in various areas of law); Marcus, *supra* note 53, at 445 (describing judges engaged in "something bordering on a revolt" over existing liberal pleading requirements); Koan Mercer, Comment, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1167 (2004) (describing judges as "defying clear and unanimous Supreme Court precedent" by demanding heightened standards); Recent Development, *Adequacy of Notice Pleading Reasserted in Second Circuit Private Antitrust Suits*, 58 COLUM. L. REV. 408, 408 (1958).

85. 550 U.S. 544 (2007).

86. *See* FRANK, *supra* note 62 and accompanying text.

87. *See Twombly*, 550 U.S. at 560–64.

88. *See id.* at 558–59.

89. The defendant companies, collectively called "Incumbent Local Exchange Carriers" (ILECs), were each formerly part of AT&T, but spun off following a 1982 consent decree to settle an antitrust case brought by the United States. That breakup of AT&T left in place regional monopolies, which Congress more than a decade later acted to eliminate through passage of the Telecommunications Act of 1996. Under the terms of the Act, ILECs must provide access to "competitive local exchange carriers" (CLECs). Despite these efforts, plaintiffs alleged that these

tained that based on a "compelling common motivatio[n]" to thwart competitive efforts of other local telephone and Internet service carriers, the defendant carriers "engaged in parallel conduct" in their service areas to prevent and frustrate the growth of competition.[90] The defendant carriers' actions "allegedly included making unfair agreements with [other non-defendant carriers] for access to . . . networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage [other local carriers'] relations with their own customers."[91] The complaint did not point to any specific agreements or arrangements among the defendant carriers, rather it argued that such agreements could be inferred from the defendants' "common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages."[92] The complaint also argued that a conspiracy could be inferred from a statement of the CEO of one of the defendant carriers that competing in an area formerly within a competitor's monopoly "might be a good way to turn a quick dollar but that doesn't make it right."[93]

A federal district court initially dismissed the complaint, finding that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement," did not state a valid claim.[94] On appeal, a unanimous Second Circuit panel vacated the district court's judgment.[95] The court reasoned that because Rule 9 of the Federal Rules of Civil Procedure already sets forth the actions that must be pled with factual particularity, and does not include antitrust actions, no more exact pleading was required.[96] Rather, the circuit court recited the traditional notice pleading rhetoric to find that the complaint was "sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[97]

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companies' anticompetitive conduct persisted, harming consumers through increased fees for telephone and Internet services. *See id.* at 549–50.

90. *Id.* at 550–51.

91. *Id.* at 550.

92. *Id.* at 551 (citation omitted) (internal quotation marks omitted).

93. *Id.*

94. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 180 (S.D.N.Y. 2003).

95. Twombly v. Bell Atl. Corp., 425 F.3d 99, 102 (2d Cir. 2005).

96. *Id.* at 107–09.

97. *Id.* at 118–19 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

The Supreme Court reversed and remanded the case. The Court stated that although parallel anticompetitive conduct may be "consistent with conspiracy," plaintiffs must ultimately prove that the defendant carriers actually agreed not to compete, and this proof requires "more than labels and conclusions."[98] As the Court explained: "Factual allegations must be enough to raise a right to relief above the speculative level."[99] In the present case, that meant "a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[100] The Court held that the facts and level of specificity pled by the plaintiffs, in contrast, were "just as much in line with a wide swath of rational and competitive business strategy."[101]

Rather than limiting its holding to the facts of the case—something the Court could have done very easily—the Court went a step further, overruling *Conley* and articulating a "plausibility" analysis for courts to perform. In chronicling problems with the "no set of facts" language,[102] the Court implicitly adopted Professor Geoffrey Hazard's position that "[l]iteral compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."[103] The Court therefore concluded that *Conley* was "best forgotten as an incomplete, negative gloss on an accepted pleading standard," which had "earned its retirement."[104]

The Court then interpreted the pleading standards of the Federal Rules of Civil Procedure as requiring "enough facts to state a claim to relief that is plausible on its face."[105] Although the Court, perhaps purposefully, left some ambiguity as to what constituted a plausible pleading, it did make clear what was not a plausible pleading. First, the Court explained that a "formulaic recitation of the elements of a cause of action" would not meet the plausibility standard.[106] Second, the Court

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98. *Twombly*, 550 U.S. at 554–55.

99. *Id.* at 555.

100. *Id.* at 556.

101. *Id.* at 554.

102. *See id.* at 561–63 (stating that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough").

103. Hazard, *supra* note 82, at 1685; *see also Twombly*, 550 U.S. at 562 (citing Professor Hazard).

104. *Twombly*, 550 U.S. at 563.

105. *Id.* at 570.

106. *Id.* at 555.

was adamant to distinguish plausibility from probability.[107] According to the Court, plausibility "simply calls for enough fact to *raise a reasonable expectation* that discovery will reveal evidence" of the wrongful conduct alleged.[108]

The Court grounded this requirement of a more judicious review of federal pleadings in public policy. It discussed the "potentially enormous expense of discovery" in cases such as antitrust suits and drew from precedent stating that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[109] Such "practical concerns" were also acknowledged in Justice Stevens's dissenting opinion, but he disagreed with the majority that this policy warranted a "dramatic departure from settled procedural law."[110]

In the aftermath of *Twombly*, both courts and commentators endeavored to decipher the full meaning and impact of plausibility pleading.[111] For example, Justice Stevens's dissent and numerous commentators expressed uncertainty about whether the Court in *Twombly* intended its interpretation of the Federal Rules of Civil Procedure to apply to all civil cases or to be limited to antitrust matters.[112] Others questioned whether the new standard would make any practical difference in how courts would review pleadings or motions for summary judgment, which may be granted under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.[113]

Two years after *Twombly*, the Supreme Court in *Ashcroft v. Iqbal* again addressed the sufficiency of a pleading under the

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107. *Id.* at 556.

108. *Id.* (emphasis added).

109. *Id.* at 558–59 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17 (1983)).

110. *Id.* at 573 (Stevens, J., dissenting).

111. *See, e.g.*, Smith, *supra* note 1, at 1063 ("No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.").

112. *See, e.g.*, *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 438 n.38 (2007) (stating that it is "not clear" whether *Twombly* "is really just about pleading in antitrust cases"); Donoghue, *supra* note 69, at 3 (arguing that "[p]atent pleadings should be held to the heightened *Twombly* standards"); *The Supreme Court, 2006 Term—Leading Cases,* 121 HARV. L. REV. 305, 310 n.51 (2007) ("Some scholars view *Twombly* as primarily an antitrust case.").

113. *See, e.g.*, Ward, *supra* note 1, at 915.

Federal Rules of Civil Procedure and helped to clarify these issues.[114] In *Iqbal*, a Pakistani Muslim who had been arrested and detained a few weeks after the September 11, 2001 terrorist attacks challenged the constitutionality of the detainee program run by the Federal Bureau of Investigation (FBI).[115] The complaint alleged that the FBI, acting under the authority of Director Robert Mueller, United States Attorney General John Ashcroft, and numerous other federal officials, adopted a policy that unlawfully subjected the plaintiff to "harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin."[116]

To support this claim, the plaintiff pointed to the thousands of Arab and Muslim men who were detained as persons of "high interest" after September 11.[117] He averred that this designation and eventual confinement was based principally on race, religion, or national origin, and that Ashcroft was the "principal architect" of the discriminatory policy.[118] The Second Circuit, considering the case in light of *Twombly*, ruled that it "did not present one of 'those contexts' requiring [factual] amplification."[119] Consequently, the court held that the complaint was adequate.

As in *Twombly*, the Supreme Court reversed and remanded the case. In doing so, the Court made clear that its plausibility analysis was intended to impact federal pleading standards meaningfully. The Court thoroughly reviewed the complaint, and explained that the plaintiffs' "bare assertions" amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[120] The Court also found the limited factual content in the complaint to be "conclusory and not entitled to be assumed true" for the purpose of surviving a motion for summary judgment.[121] Moreover, in the Court's view, no concrete facts were pled, only circumstances in which an inference could be made. The Court, in effect, concluded that the inference of a constitutionally discriminatory

114. 129 S. Ct. 1937 (2009).
115. *See id.* at 1951.
116. *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).
117. *Id.*
118. *Id.*
119. *Id.* at 1944 (quoting Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007)).
120. *Id.* at 1951 (citation omitted).
121. *Id.*

policy, without greater factual specificity, was too attenuated to be reasonable, given other logical explanations. In fact, the Court suggested one such explanation, stating that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[122]

In addition to demonstrating how lower courts should approach plausibility, *Iqbal* further resolved the dispute over the scope of this review. As the Second Circuit's decision in *Iqbal* illustrated, courts after *Twombly* were not entirely sure which "contexts" required more exacting review.[123] The Court in *Iqbal* confirmed that the plausibility standard applies "in all civil actions" under the Federal Rules.[124]

With the *Twombly* and *Iqbal* decisions, the Supreme Court has made a decisive break from broad notice pleading as envisioned by *Conley*, which had not necessarily reflected the same simplified pleading envisioned by Judge Charles Clark and the other original drafters of the Federal Rules of Civil Procedure.[125] Judge Clark's vision of providing "fair notice" of a claim remains very much intact in the Federal Rules after *Twombly* and *Iqbal*. These decisions merely reassess what "fair notice" means: Fair notice includes an element of plausibility, and courts must engage in careful judicial review to decide whether this standard is met. The Supreme Court has provided two examples of how this review should proceed, answering many critical questions. Nevertheless, "plausibility pleading" is in its formative stages, and all courts, both federal and state,[126] could benefit from a framework that suggests how to determine plausibility.

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122. *Id*.

123. *See id.* at 1944 (quoting *Iqbal*, 490 F.3d at 158).

124. *Id.* at 1953. A number of courts were already interpreting *Twombly* to apply to all civil cases prior to the Supreme Court's express pronouncement in *Iqbal*. *See, e.g*., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008); Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008); Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007).

125. *See supra* note 68.

126. *See infra* Part III.C.

II. PLAUSIBLE PLEADINGS LINE DRAWING

The Supreme Court's mandate for federal courts to examine more fully the sufficiency and plausibility of a pleading is, similar to the early pleading experience of separating facts and legal conclusions,[127] easier said than done. Plausibility, after all, is an imprecise term that may risk too broad or too narrow an interpretation.[128] In *Twombly* and *Iqbal*, however, the Court labored to pin down a meaningful and substantive test for plausibility.[129] That the Court in both cases reversed the appellate court, which had found the pleadings to be sufficient—the second time occurring two years after the new standard was in place—suggests that courts are to apply a rigorous review as to what is plausible for pleading purposes.

The determination of plausibility, of course, depends on the factual specificity of a complaint. Importantly, this factual specificity is not to be confused with pleading "particularity" under Rule 9,[130] which represents a narrow and precise standard for pleadings as the Court clearly stated in *Twombly*.[131] The difference is subtle: Factual specificity is a matter of degree, the demands of which may change depending on a case. Indeed, the Court's ruling in *Twombly* that the plaintiffs needed to present specific facts of an illicit agreement and the Court's holding in *Iqbal* that the plaintiff needed to show any non-circumstantial evidence of discrimination underscore the variable nature of the factual content required. Pleading particularity, in contrast, requires the pleading of facts that go to the intent elements of select types of actions.[132] This distinction is important not only in identifying what is required to establish plausibility, but in developing a set of neutral principles to guide courts in their analysis.

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127. *See supra* notes 37–41 and accompanying text.

128. *See, e.g.*, Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) ("Plausibility, in this view, is a relative measure.").

129. *See supra* Part I.B.

130. FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

131. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007) (distinguishing pleading requirements under Rule 9).

132. *See supra* note 130.

A. Complex Cases Should Require More Refined Pleadings

Implicit in the Supreme Court's recent decisions is the notion that the complexity of a case matters for pleading purposes. That the degree of factual specificity necessary to render a claim plausible is variable, unlike the particularity requirements of Rule 9, supports this conclusion. It is also supported by the Supreme Court's instruction that pleadings contain "enough fact to raise a reasonable expectation" that demonstrative evidence will be gained through the discovery process.[133] Logically, the more complex a case is, the more facts are necessary to reach a reasonable expectation that the case has merit. Conversely, in a less complex case, fewer facts are needed to make this determination.

For example, if a complaint stated simply that, "on New Year's Eve, the Defendant negligently crashed his car into my mailbox," a court probably would have little reservation in allowing the claim to proceed. The reason is that the claim implicates only a limited set of factual issues: Was the plaintiff's mailbox hit by a car? Was it the defendant's car? Was the defendant driving the car at the time of the accident? Each of these questions can reasonably be expected to be answered definitively during discovery. The complaint is, therefore, plausible.

But consider another claim arising out of the same event. Imagine that the driver of the car that hit the mailbox files a lawsuit against the car's manufacturer, alleging that a defect in the car caused the accident. This case is profoundly more complex. First, a multitude of factual issues would need to be resolved, including what part of the car is alleged to be defective. Without this basic piece of information, a court would have to rely on the discovery process to evaluate each component of the car. Assuming this question was answered during discovery, the court would then need to address perhaps hundreds or even thousands of other factual issues pertaining to the design and manufacturing process of the allegedly defective automotive part. If the alleged defect was an inadequate warning, the court would likewise need to answer a slew of questions such as how the warning was approved, what information was in the warning, whether the plaintiff read the warning, and how closely the plaintiff followed the warning. Each question influences the

133. *Twombly*, 550 U.S. at 545.

plausibility of the claim. The complexity of these factual issues alone creates tremendous uncertainty over what, if anything, discovery will reveal. The uncertainty, in turn, makes less reasonable the expectation that the case has merit. Hence, applying *Twombly* and *Iqbal*, the court should find that the complaint does not meet the plausibility threshold. There are simply too many unknown variables.

The juxtaposition of these examples can provide courts with valuable insight for conducting a plausibility analysis. They illustrate two points on opposite ends of a sliding scale. As the complexity of the dispute increases, and with it the number of unknown variables, more facts must be pled to reduce these unknowns and keep the pleading within the realm of plausibility. For instance, in the above example, a middle point on the spectrum might be a claim in which the car driver specifies the precise defect and offers competent scientific evidence of the car's unanticipated failure. Such a pleading would represent a clear improvement over the generalized claim of defect, eliminating by an order of magnitude the number of factual issues that would need to be resolved during the discovery process.

The sliding-scale or spectrum approach proposed here also finds substantial support in the underlying public policy of *Twombly* and *Iqbal*. Just as the Federal Rules of Civil Procedure represented a break from code pleading in the 1930s, and code pleading represented a break from the common law almost a century before, *Twombly* and *Iqbal* represent a break from the broad notice pleading that had evolved out of the Federal Rules.[134] The common thread in each of these watershed transitions is that pleading standards were amended to reflect changing attitudes and circumstances, and to provide a more just balance between a plaintiff's access to the judiciary and a defendant's ability to mount a defense.

Today, the civil litigation environment is radically different than it was seventy years ago when the Federal Rules of Civil Procedure were enacted. The difference can be attributed primarily to changes in complexity. The scale of litigation, the intricacies and advances in legal theory, the scope of legal representation, and even the sophistication of litigants, combine to produce a giant litigation infrastructure that simply did not

134. *See supra* Part I.

exist when the Federal Rules were adopted in 1938.[135] There were no multi-million or billion dollar lawsuits,[136] large national plaintiff and defense firms, or even many of the legal rights of action plaintiffs now take for granted. For example, the *Bivens* action that the plaintiff alleged in *Iqbal* was not recognized until more than thirty years after the Federal Rules were adopted.[137] Product liability law regarding warnings and designs, which is now a multi-billion dollar litigation enterprise, similarly did not exist then as it does today. The mass tort litigation industry is another testament to the incredible leap in size and complexity of legal actions, and the increased specialization among attorneys.[138] Other areas of law that did exist in 1938, such as patent protections, are virtually unrecognizable today.[139] Technological innovations such as the computer and fighter jet are a far cry from the farming equipment and automobiles of the 1930s, which at the time of the Federal Rules represented some of the most complex devices.

This is not to suggest that more modest litigation now plays only an insignificant role in the civil justice system; rather, the range between the most simple, straightforward disputes and the most complex lawsuits has widened immensely. As the Court in *Twombly* explained in the antitrust context, such complex litigation is especially prone to an "inevitably costly and protracted discovery phase."[140] The Court elaborated on the potential expense:

> [P]laintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against

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135. *See supra* notes 72–78 and accompanying text.

136. *See* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

137. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

138. *See* Joe E. Basenberg & S. Leanna Bankester, *Notice Pleading in the Mass Tort Arena: What is Sufficient Notice?*, 68 ALA. LAW. 74 (2007) (discussing the problem of "'shotgun' complaints [that] make it nearly impossible to identify which, if any, of the causes of action apply to each defendant, and often result in an enormous waste of time and resources").

139. *See* Miller Statement, *supra* note 73, at 11 ("In short, the world of those who drafted the original Federal Rules largely has disappeared.").

140. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (quoting Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)).

> America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of anti-trust violations that allegedly occurred over a period of seven years.[141]

In other words, the Court identified the complexity of the case and potential cost of defense as reasons for requiring greater scrutiny of the pleading. This concern goes hand-in-hand with the Court's overriding public policy goal of curbing frivolous and speculative litigation because the potential for high defense costs provides greater settlement leverage for plaintiffs in these cases.

Lower courts seeking to review pleadings in light of *Twombly* and *Iqbal* would be wise to follow such a framework. By first examining the relative complexity of the case, and then addressing what facts the complaint contains and what facts it lacks, courts are best able to determine plausibility.[142] To erase the relative number of unknown variables in the case, the necessary degree of factual specificity should be a function of the complexity of the case. As described below, such complexity should not be limited to factual complexity, but should extend to legal complexity and discovery complexity as well.

1. Specific Pleadings Are Appropriate When More Than Just Facts Are at Issue

Similar to a dearth of factual content creating too many unknown variables, the lack of specificity with regard to the legal theory upon which a plaintiff may recover should likewise render a pleading implausible. Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is intertwined with the basic statement of pleading in Rule 8, embodies this principle. Rule 12(b)(6) authorizes a court to dismiss an action for "failure to state a claim upon which relief can be granted."[143]

Traditionally, courts have taken an almost literal approach to this rule, granting motions to dismiss where either a claimant does not attempt to present a theory of recovery at all, or where

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141. *Id.* at 558.

142. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

143. FED. R. CIV. P. 12(b)(6).

the theory of recovery presented is nonexistent or inapplicable.[144] The rationale of *Twombly* and *Iqbal* suggests that this determination should not be so black and white, but rather many shades of grey. A pleading that states a claim or multiple claims for relief should be reviewed and evaluated for plausibility, in part based on the level of unresolved legal issues it creates. These issues would include essential legal questions beyond merely whether the proffered avenue for relief is generally available in the jurisdiction.

With regard to the example discussed earlier, where a driver sues a car manufacturer for a defect causing an accident, such a generalized pleading would leave several essential legal issues unresolved. For instance, whether the alleged defect is the result of a manufacturing defect, design defect, warning defect, or some combination of the three, remains unknown. Each of these avenues for relief implicate separate modes of legal analysis, and failure to identify the specific form of recovery adds uncertainty and complexity to the action. Applying strict liability to a manufacturing defect, for example, dramatically limits a defendant's available defenses and likely changes how resolution of the case would be approached. A defendant in the situation of defending against an unspecified defect would thus not appear to be given "fair notice" under the Federal Rules, as interpreted in *Twombly* and *Iqbal*.

The Supreme Court also cautioned against legal issues stated as mere "labels or conclusions."[145] Specifically, the Court rejected the notion that "a formulaic recitation of the elements of a cause of action" would render the pleading of legal issues plausible.[146] The Court instead adopted the view that legal issues must be tied specifically to factual issues in a complaint.[147] In this respect, the Court arguably edged the closest to requiring an artfully pled complaint in federal cases since the adoption of the Federal Rules. For instance, it would seem that a

144. *See* 5B WRIGHT & MILLER, *supra* note 17, § 1357 ("For many years after the promulgation of the Federal Rules of Civil Procedure the motion to dismiss for failure to state a claim was viewed with disfavor and was rarely granted; in many cases and in many courts, that restrained approach to the use of the motion continues to be the norm.").

145. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

146. *Id.*

147. *See id.* at 1950–52.

separate statement of facts in a pleading followed by statements outlining the various legal theories of recovery will no longer suffice. Fact and law must be woven together.

For courts evaluating the sufficiency of a complaint, such melding of fact and law should actually simplify the method of analysis proposed here. As a practical matter, it is easier to determine what is missing—that is, how many unknown variables a case is likely to create—when the full picture of a case is presented all at once.[148] Courts can more readily determine which facts correspond to and support each legal theory, and which legal theories are "unadorned the-defendant-unlawfully-harmed-me accusation[s]."[149] Moreover, from this required form, courts can more efficiently and effectively assess the factual and legal complexity of a case, and determine how a plaintiff's respective allegations weigh with regard to plausibility.

2. Anticipated Discovery Burdens Should Factor Into the Required Sufficiency of a Pleading

The purpose of analyzing the complexity of a case is to identify the degree of factual and legal issues that, if the case were to proceed, would have to be addressed by the discovery process. Greater case complexity generates more unknowns, requiring heightened pleading specificity to render an action plausible. Part of this basic calculus relies upon the ability of the discovery process to answer questions. A related factor, which, according to *Twombly* and *Iqbal*, courts are to consider irrespective of the level of unresolved factual and legal questions, is the anticipated burden of discovery.

In *Twombly*, the Supreme Court repeatedly emphasized the potentially punishing costs of discovery and the "common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[150] The Court thus expressed that the federal courts must weigh the burden and impact of discovery when evaluating the sufficiency of a pleading. This burden necessarily affects the dynamics of litigation

148. *See* Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (stating that a pleading must contain a "full factual picture").

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

150. *Twombly*, 550 U.S. at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

as the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases."[151]

Importantly, consideration of the burdens of discovery can be separate from the degree of unresolved factual and legal issues presented by a case. Although a greater degree of unresolved issues will generally increase discovery burdens, certain factual or legal questions may yield a disproportionate effect. For instance, a single issue, such as causation, may constitute the whole ball of wax. In answering the single question, "Did *x* cause *y*?" the anticipated discovery burden may be enormous. Indeed, much of toxic tort litigation centers on this very issue.[152] Unsubstantiated general allegations of causation, the assessment of which entails expansive discovery and comprehensive scientific analysis, would appear to fail to meet the Supreme Court's more exacting pleading standard.

The policy interests expressed in *Twombly* and *Iqbal* suggest that a typical toxic tort action or complex product liability action, such as those involving pharmaceutical products or other intricate chemical compounds, requires factual specificity in the form of competent scientific evidence of causation in the complaint. This requirement does not mean that plaintiffs must necessarily prove their case at the pretrial stage, but something more than a bare assertion of a causal relationship needs to be presented to weed out speculative claims. Such specificity in the form of competent scientific evidence would also likely be justified separately under any of the principles discussed thus far, because establishing causation in the toxic tort or product liability context will generate highly complex factual and legal issues in addition to high anticipated discovery burdens.

The overlapping nature of the framework offered, in which courts may identify the need for greater pleading specificity based on the anticipated factual, legal, or discovery complexity of a case, provides a method of analysis amenable to the vast majority of civil cases. At the same time, the framework leaves

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151. *Id.*

152. *See, e.g.*, David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51 (2008) (discussing the challenges of proving causation in toxic tort cases); Jean Macchiaroli Eggen, *Toxic Torts, Causation, and Scientific Evidence After* Daubert, 55 U. PITT. L. REV. 889 (1994) (same); Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376 (1986) (same).

sufficient latitude for courts to evaluate pleadings in light of their "experience and common sense."[153] Hence, for most cases, the framework will appropriately end here. As discussed below, however, several narrower pleading contexts deserve further attention.

B. Certain Types of Claims Should Require More Exacting Pleadings

In addition to the complexity of a case supporting a sliding scale of judicial scrutiny, certain types of claims should always require a more thorough review of a pleading to determine plausibility. These claims include those with a heightened risk of frivolous or speculative litigation, which should raise a red flag to the court. It is significant to note that the heightened review proposed here is not action-specific, so as not to contravene the intended application of Rule 8. Rather, there are general qualities of certain claims that courts should view with appropriate skepticism.

1. Novel or Untested Claims Should Require More Specific Pleadings

Although the Supreme Court in *Twombly* and *Iqbal* appropriately cautioned against any probability inquiry of the ultimate success of a case, courts can and should examine whether a proffered legal argument is novel or otherwise untested to determine plausibility. When a claim for relief presents a legal issue of first impression or serves as a test claim for potentially mass litigation, the circumstances are compelling for courts to engage in their most thorough scrutiny of the pleadings. In effect, the novel nature of a claim, regardless of its complexity in other areas, is sufficient to override other considerations and warrant greater factual and legal specificity. Stated another way, the uncertainty of the novel legal issue alone creates enough case complexity to require greater pleading specificity in both fact and law.

The policy basis for a more exacting approach to the pleading review of a novel claim arises from hard-learned lessons and experience. Novel legal claims are inherently suspect for a reason; they either attempt to recognize an avenue for relief

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

where none has ever existed or they modify an existing legal theory for a purpose that may never have been intended or contemplated.[154] The legal sufficiency of these types of claims are too often little more than smoke and mirrors designed to create enough doubt in the defendants' minds to entice settlement.[155] Indeed, adept and organized plaintiff lawyer groups have increasingly cobbled together legal theories to promote massive statewide and national litigation.[156]

Heightened review of such pleadings also, importantly, does not compromise or inappropriately impede the law's ability to develop. Novel claims based on narrow legal footings or solely on compelling policy can still effectively permeate a tightened screen for junk claims. In fact, applying a more exacting review of a claim helps to ensure that the law develops in the clearest and most cohesive way possible. Concurrently, the public policy of *Twombly* and *Iqbal* is served by protecting defendants from the enormous costs of defending frivolous claims.

2. *Allegations of Intentional Conduct Should Be Supported By Specific Facts*

Another general type of claim in which pleading specificity is particularly relevant, yet perhaps too often insufficient or glossed-over, is where an element of intent is required. Under the prior broad notice pleading interpretation of *Conley*, it would appear that allegations of intent could be averred generally, with the weight placed on the discovery process to determine what, if any, intentional conduct was connected to the action.[157] *Twombly* and *Iqbal*, in contrast, appear to stand for the proposition that claims involving an element of intent should not survive a motion to dismiss if a plaintiff only generally avers his subjective belief of the defendant's intent. *Twombly*, after all, involved an alleged conspiracy, and *Iqbal* an alleged

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154. *See generally* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits,* 44 WAKE FOREST L. REV. 923 (2009).

155. *See id.* at 940–49 (discussing litigation examples).

156. *See id.* at 927–35 (discussing the coordination among state attorneys general and private contingency fee attorneys to pursue litigation that would hold manufacturers liable for the external risks created by a product).

157. *See supra* notes 79–83 and accompanying text.

intentionally discriminatory detainee program.[158] The reasoning of these decisions was, in part, based on the absence of any specific and non-circumstantial facts relating to the defendants' intent from which the Court could draw a reasonable inference of the alleged misconduct.

This rationale extends to all other claims in which intent is an element, and a faithful application of the Federal Rules requires that federal courts evaluate the specificity of a complaint in this manner. The threshold for facts relevant to the intent element of a claim appears to be "circumstances-plus," meaning that some form of specific factual evidence of intent, beyond surrounding circumstances or actions that are merely consistent with intent, must be pled. For example, a claim that an individual intentionally ran over a neighbor's dog must be supported by more evidence than merely that the pet was run over, which is only consistent with intent. A plaintiff would have to allege specific facts showing that the defendant disliked the dog, or that the defendant disliked the plaintiff and threatened injury, to state a plausible inference of intent that would withstand a motion to dismiss.

As discussed previously, the level of pleading specificity required to show intent under Rule 8(a) or for the purposes of surviving a Rule 12(b)(6) motion to dismiss is distinct from the requirements of Rule 9(b). Rule 9(b) concerns the intentional acts of fraud or mistake, requiring that each be pled with particularity. The rule further provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," or pursuant to Rule 8(a).[159] Hence, requiring greater specificity and a more thorough review of claims involving elements of intent does not in any way conflict with or alter Rule 9's special pleading requirements.[160]

Applying a more thorough review where an element of intent is implicated also comports with the civil justice system's objective of fair compensation. Intentional acts generally invoke a greater range of damages or punishment—punitive damages, for example—and routinely require higher evidentiary standards such as clear and convincing evidence.[161] It therefore fol-

158. *See Iqbal*, 129 S. Ct. at 1942; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550 (2007).

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

160. *See id.*; *Twombly*, 550 U.S. at 569 n.14.

161. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1013–14 (1999)

lows that greater factual specificity in a pleading is warranted to show a plausible claim involving intent.

Early indications from courts applying *Twombly* and *Iqbal* to cases alleging intentional acts suggest that lower courts are often following a more rigorous review. A federal district court in Florida, for instance, recently stated in the employment discrimination context that a plaintiff failed to sufficiently tie his firing to any unlawful intentional act of the employer because he did not allege a pretextual reason for his firing.[162] The court also noted that "[t]hese allegations *might* have survived a motion to dismiss prior to *Twombly* and *Iqbal*," but held that "now they do not."[163]

Similarly, a federal district court in New York rejected the level of pleading specificity in a case alleging sexual harassment and employment discrimination where the complaint pointed to only two "isolated incidents" that could arguably evidence workplace discrimination.[164] The court stated that "this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard . . . [b]ut it does not survive the Supreme Court's 'plausibility standard.'"[165]

Although such rulings represent a positive step in efforts by courts to curb frivolous lawsuits, or at least to require a reasonable level of concrete facts to support a meritorious claim, the many courts still confused or unsure about how to apply *Twombly* and *Iqbal* may benefit from the basic framework proposed here. Combining the principles discussed in this Part, the level of pleading specificity required under Rule 8(a) of the Federal Rules should be principally evaluated as a function of the complexity of the case. This complexity is defined by the degree of unknown variables or unresolved issues generated by a review of the complaint, and can be broken down into three categories: factual complexity, legal complexity, and dis-

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(discussing wide-ranging endorsement of clear-and-convincing standard in cases involving punitive damages).

162. *See* Ansley v. Fla. Dep't of Rev., No. 4:09cv|6|-RH/wcs, 2009 WL 1973548, at *1–2 (N.D. Fla. Jul. 8, 2009).

163. *Id.* at *2 (emphasis added).

164. *See* Argeropoulos v. Exide Techs., No. 08-CV-3760, 2009 WL 2132443, at *5 (E.D.N.Y. Jul. 8, 2009).

165. *Id.* at *6.

covery complexity. Complexity in any single category or across multiple categories such that a judge, in light of his other experience, cannot anticipate an efficient and focused discovery, should render a complaint insufficient. Two important corollaries also exist, which, regardless of the case's relative complexity, act to require additional pleading specificity: first, where a novel legal claim is involved, and second, when the claim at issue includes an intent element.

By reviewing pleadings in this light, courts can efficiently and effectively determine where the proverbial factual and legal "holes" are in a pleading, which facts fail to adequately support a proposed theory of recovery, and what vital information, if pled, would reduce the level of unknowns and potentially render a pleading sufficient. These considerations lie at the very heart of what the Supreme Court sought to achieve in *Twombly* and *Iqbal*. As the next Part will discuss, the Supreme Court's new mandate for federal pleading standards, on balance, represents the superior public policy position.

III. PUBLIC POLICY FAVORS GREATER JUDICIAL REVIEW OF PLEADINGS

A. Judges' Gatekeeping Role

In the modern litigation world, the role of judges to screen the sufficiency of a complaint and ensure that juries are not led astray by misleading or immaterial information has never been more critical. *Twombly* and *Iqbal* recognize that judges must be empowered to manage litigation at the pretrial level just as they are throughout other phases of litigation.[166] The Court understood that prior interpretations of federal pleading requirements often failed to balance properly this basic and inherent authority of courts. As one federal court articulated, the cases provide the "judicial means to part the wheat from the chaff in assessing the sufficiency of pleadings."[167] As gatekeepers to the effective and efficient administration of justice, judges have a duty to protect defendants from unfair burdens

166. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596–97 (1993) (recognizing the "gatekeeping" role of judges to screen admission of expert scientific evidence).

167. Kregler v. City of N.Y., 646 F. Supp. 2d 570, 577 (S.D.N.Y. 2009).

of litigation on par with the duty to safeguard plaintiffs' rights to their day in court.

Such a proposition should be neither new nor controversial. The Supreme Court's interpretation, after all, is consistent with many longstanding federal court interpretations of pleading standards that precede *Twombly*.[168] The Court in *Twombly* and *Iqbal* simply resolved to breathe new life into what was an underenforced and arguably misunderstood aspect of judges' gatekeeping role, and to attach a meaningful label to this standard so that judges could more readily provide a legal basis for dismissing an insufficient pleading.[169] At the same time, the Court clearly saw the writing on the wall

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168. *See, e.g.*, *In re* Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003) (stating that the court is not bound to credit "bald assertions" or "unsupportable conclusions" (citation omitted)); Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002) (stating that "allegations must be stated in terms that are neither vague nor conclusory" (citation omitted)); Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal."); Wiles v. Capitol Indem. Corp., 280 F.3d 868, 870 (8th Cir. 2002) (reasoning that courts may ignore "unsupported conclusions" and "unwarranted inferences"); DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998) (stating that courts need not accept "unsupported conclusions and unwarranted inferences" (citation omitted)); Sneed v. Rybicki, 146 F.3d 478, 480 (7th Cir. 1998) (stating that courts are "not obliged to accept as true conclusory statements of law or unsupported conclusions of fact"); Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995) ("[L]iberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences." (citation omitted)); Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." (citation omitted)); Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 n.2 (10th Cir. 1989) ("[C]ourts may require some minimal and reasonable particularity in pleading before they allow an antitrust action to proceed."); Ascon Prop., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." (citation omitted)); Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972) (stating that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal"); *see also Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 42–44 (2009) (statement of Gregory G. Katsas, Former Assistant Att'y Gen., Civil Division, United States Department of Justice) (citing additional cases).

169. Combined, *Twombly* and *Iqbal* already have been cited in over 10,000 reported cases on Westlaw.

that the problem of insufficient judicial review of pleadings would only become worse as litigation continued to grow in scope and complexity, inevitably providing plaintiffs with greater leverage, incentive, and opportunity to file frivolous or highly speculative lawsuits.

In particular, the Court focused on the "potentially enormous" costs of modern discovery.[170] For example, the expanding use of electronic data storage has exponentially increased discovery costs. At present, more than ninety percent of discoverable information is generated and stored electronically.[171] Such storage mechanisms have dramatically increased the volume of information that either is itself discoverable or that must be reviewed to find discoverable information. For instance, large organizations, on average, receive 250 to 300 million e-mail messages per month, generating data measured by the terabyte, each of which represents the equivalent of about 500 million typed pages.[172] Unsurprisingly, then, electronic discovery, or "e-discovery," which typically requires a document-by-document attorney review, can end up costing defendants millions of dollars to defend a single case.[173] The public policy behind the Supreme Court's interpretation of federal pleading standards, in a nutshell, is that such tremendous cost outlays must be justified by something more than a plaintiff's "bare assertions" of harm.

Requiring greater specificity in tying factual content to unlawful acts, and doing so in a way that is more than simply "consistent with" those acts, furthers several key policy objectives of the civil justice system. First, a group of actions that have no possibility of success are removed at the earliest point of entry into the judicial process. These actions are doomed to fail because there simply are not enough facts to demonstrate the requisite unlawful conduct necessary to satisfy the legal cause of action. The discovery process, therefore, would prove

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

171. Christopher D. Wall, *Ethics in the era of electronic evidence*, TRIAL, Oct. 2005, at 56, 56.

172. COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 23 (2005).

173. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 25 (2008) (noting that "e-discovery has penetrated even 'midsize' cases, potentially generating an average of $3.5 million in litigation costs for a typical lawsuit").

fruitless and wasteful. Second, the ability of plaintiffs (and their attorneys) to inappropriately leverage a costly and time-consuming discovery process to the detriment of a defendant is significantly reduced through heightened screening of pleadings. More exacting review also produces the secondary effect of discouraging the filing of such claims in the first place. Finally, in those cases where the pleading is sufficient under *Twombly* and *Iqbal*, greater specificity leads to more efficient discovery. Stated simply, when a more complete picture of the relevant facts and law of a case is presented in the complaint, the parties can better target discovery on material issues. Each of these scenarios saves time, money, and recourses for plaintiffs, defendants, and the civil justice system as a whole.

The pretrial stage is not the only phase of litigation where public policy supports increasing the safeguards against frivolous and speculative claims in order to limit burdens and conserve resources. Other judicial management measures, such as limiting the scope of discovery, increasing the enforcement of attorney sanctions under Rule 11 of the Federal Rules, and exercising judgment notwithstanding the verdict, are important complements to curbing abusive litigation and improving judicial fairness and efficiency. Indeed, the very function of the Federal Rules, as expressed in Rule 1, is for all of the civil rules to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[174] The distinguishing benefit of tightening controls at the pretrial stage is that it removes unsubstantiated claims at the most efficient point in the litigation process, namely the beginning. Thus, given the nature of modern litigation, shoring up the standards for pleadings as the Supreme Court has in *Twombly* and *Iqbal* represents the most logical, efficient, and effective means for judges to fulfill their gatekeeping role.

B. A Response to Critics

Despite the benefits that more exacting judicial review of pleadings likely provide, the *Twombly* and *Iqbal* decisions are not without critics. These criticisms, often voiced by members of the plaintiffs' bar and supported by various civil rights and

174. FED. R. CIV. P. 1.

consumer groups, generally assert that *Twombly* and *Iqbal* have unjustly barred the courthouse doors to plaintiffs, fundamentally denying them access to justice. Specifically, they argue that heightened pleadings provide a "blunt instrument" that will impair meritorious cases, chill the filing of future claims, undermine national policies, and infringe upon other constitutionally protected rights.[175] In addition, they allege that requiring anything more than broad notice pleading will permit many defendants to act with impunity, knowing that plaintiffs will be unable to satisfy pleading requirements without information that would, prior to *Twombly*, be obtained through discovery.

As evidence of unjust results and the chilling effect on the filing of meritorious cases, opponents of more exacting pleading review often point to cases in the employment discrimination context. They argue that, given the often indirect and subtle nature of employment discrimination, heightened pleading requirements make it very difficult for plaintiffs to plead the factual specificity necessary to withstand a motion to dismiss.[176] In particular, they allege that the inherent lack of objective and non-circumstantial evidence demonstrating an employer's discriminatory intent too often creates an unfair hurdle for plaintiffs, and one that concurrently provides employers with reduced burdens and apparent free reign to discriminate. The resulting public policy argument is, therefore, that only low-level notice pleading should be required because a defendant's burdens associated with conducting discovery are less objectionable when compared with a plaintiff's inability to receive any measure of justice.[177] Although employment dis-

175. *See, e.g.*, *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 62 (2009) (statement of John Vail, Vice President and Senior Litigation Counsel, Center for Constitutional Litigation) [hereinafter *Vail Testimony*]; *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 89–90 (2009) (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.) [hereinafter *Adegbile Testimony*]; Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 LITIGATION 1, 2 (2009).

176. *See, e.g.*, *Vail Testimony*, *supra* note 175, at 70–74; *Adegbile Testimony*, *supra* note 175, at 84–86; *see also* Seiner, *supra* note 7, at 1011.

177. *See* Brian Thomas Fitzsimons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 214–15 (2007).

crimination cases appear to provide the seminal example, critics further allege that a broader range of litigation is or will be similarly affected.

On the surface, these policy arguments seem compelling, but they fail to hold up to scrutiny. First, they improperly view the policy interests implicated as a zero sum game, equating any greater measure of pleadings review with the unjust denial of access to justice. This is not the case. The Supreme Court interpreted the Federal Rules in *Twombly* and *Iqbal* with the purpose of reaching the most fair and effective balance of varying policy interests. For instance, by providing improved means to curb the filing of frivolous and speculative claims, the Court directly facilitates access to justice for the remaining meritorious cases in the system. Plaintiffs who unfortunately have been victims of the adage that "justice delayed is justice denied," and in some cases have waited years just to get before a court, benefit from the Supreme Court's new pleadings mandate.

In addition, the Court's approach improves justice for plaintiffs by rewarding those who appropriately weave together facts and law in a plausible pleading. Well constructed pleadings, in effect, receive priority, enabling speedier resolution on the merits, which is a fundamental goal of pleadings as expressly stated in the Federal Rules. They also assist plaintiffs in reducing their own legal and discovery burdens through more efficient and targeted discovery requests. Thus, more exacting review of pleadings does not, as opponents allege, simply thwart plaintiffs to benefit defendants.

The more basic fallacy underlying many opponents' arguments is that they drastically overstate what *Twombly* and *Iqbal* say and do. The Court did not reinvent or completely change pleading; it articulated the basic concept that a claim must meet a minimum threshold, and that the threshold is that the claim needs to be plausible. Stating a plausible claim that provides a court with the reasonable belief that discovery will prove worthwhile and turn up demonstrative evidence of the misconduct alleged is not a chain on the courthouse door; it is a common sense reading of the Federal Rules. The alternative would be to allow claims to proceed to discovery where a court has no reasonable basis to believe that the claim has merit. That result would be intolerable to any civilized justice system.

Furthermore, the Supreme Court clearly envisioned some degree of flexibility in its plausibility standard, and this Article

proposes that the level of review should be primarily determined by an analysis of the case's complexity. Critics of *Twombly* and *Iqbal* dismiss this flexibility and characterize plausibility pleading as a strict and rigid standard reminiscent of the days of early common law and code pleading, in part to conjure up the nightmare scenario where no plaintiffs are able or willing to file claims. There is nothing to suggest that this scenario will come to pass. Accounts of disparate impacts in employment discrimination cases, for example, are based almost entirely on anecdotal evidence. In fact, the limited studies and reports on the impact of *Twombly* and *Iqbal* suggest no radical sea change or general denial of access to the courts for specific groups of plaintiffs.[178]

Nevertheless, acrimony over these decisions, primarily on the part of plaintiffs' attorneys, continues. Federal legislation has even been proposed that would restore the *Conley* "no set of facts" pleading standard.[179] Ironically, the legislation would seek to correct the alleged process failure of the Supreme Court in restating pleading requirements in the Federal Rules by overruling *Twombly* and *Iqbal* and bypassing the Federal Rules Advisory Committee, which is charged with drafting changes to the Federal Rules of Civil Procedure. In effect, the legislation seeks to circumvent the Federal Rules Enabling Act, which authorizes courts to make and interpret their own rules, by direct congressional action. Congress has traditionally and wisely refrained from intruding upon the Court's power in this area; indeed, it would be the sharpest break with an over seven decades true bipartisan delegation of power by Congress to the Judiciary for Congress to embark on setting forth the rules of civil procedure.

Even more to the point, there is no convincing reason to return to an antiquated standard that by many courts' assessments has "never been interpreted literally."[180] The modern

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178. *See* Hannon, *supra* note 16, at 1836 (concluding that *Twombly* has had a "slight impact in how courts have approached 12(b)(6) motions to dismiss"); Seiner, *supra* note 7, at 1029–31 (same). At the time of this writing, the Federal Rules Advisory Committee is conducting a comprehensive study of the impact of *Twombly* and *Iqbal*.

179. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

180. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

world of litigation has become too complex and exacting simply to grant plaintiffs a free pass to engage in broad discovery while maintaining fair protection for defendants. In many respects, the development of modern litigation over the past seventy years has already dramatically improved access to justice for plaintiffs, far beyond what was conceived in the 1930s when the Federal Rules were originally designed. An injured individual today, compared with a plaintiff in the 1930s, can much more easily hire an experienced attorney (often at no initial cost) who can make a case and construct a proper pleading when there is truly a case to make. A more exacting pleading standard does not interrupt this practice. In fact, in the vast majority of cases, more exacting standards would likely merely place the onus on the plaintiff's lawyer to spend a nominal amount of additional time drafting a pleading, which is not a bad result from any court's perspective. This incentive, again, also works to the advantage of plaintiffs because the extra upfront effort is more likely to lead to a successful result and lower total costs incurred by plaintiffs, compared to the alternative of a broad complaint leading to broad discovery.

The Court's flexible standard further serves to ensure that only those marginal and dubious cases initiated to achieve discovery or seek unjust settlement, or both, will be substantially affected. In this regard, the Court designed the most appropriate tool for the job. *Twombly* and *Iqbal* function to restore balance to a civil justice system sliding further out of balance, and to improve the litigation dynamic in a way that benefits all parties.

C. Lessons for State Courts

Although federal courts must faithfully apply *Twombly* and *Iqbal* in their review of pleadings, state courts are largely presented with a choice. State pleading standards often are identical to or closely imitate the language of the Federal Rules,[181] yet their ultimate rule interpretation rests with the state supreme court, assuming the interpretation does not violate the federal Constitution. At the same time, numerous states provide that

181. *See supra* note 5.

their rules should be construed in light of changes in federal interpretations of the Federal Rules on which they are based.[182]

The public policy underlying *Twombly* and *Iqbal* provides compelling reasons for state courts to adopt plausibility pleading. The standard promotes early dispute resolution, screens frivolous and purely speculative claims, enables more efficient discovery, and spares judicial resources—all allowing for the speedier resolution of meritorious cases. If states adopted the standard, they would add to these benefits greater uniformity in the interpretation of procedural law, preventing disparities among neighboring jurisdictions, confusion, and unfair surprise for litigants. This uniformity would in turn deter forum shopping or "litigation tourism" for those states that currently apply a very broad and low-level standard for the sufficiency of a claim.

A few state supreme courts already have expressly adopted plausibility pleading as stated in *Twombly* and *Iqbal*. For example, the Supreme Judicial Court of Massachusetts formally adopted the more exacting standard when dismissing a class-action complaint against a vehicle manufacturer for allegedly deceptive trade practices and breach of implied warranty.[183] The court explained that the factual allegations at issue would not have been sufficient under the state's prior pleading standards, yet nevertheless adopted *Twombly*'s "refinement" of pleading standards.[184] Similarly, the Supreme Court of South Dakota, which traditionally followed the "no set of facts" standard of *Conley*, recognized that the "new standards" of *Twombly* were more in line with the meaning and spirit of pleading standards that "require[] a 'showing' that the pleader is 'entitled' to relief."[185]

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182. *See, e.g.*, ALA. R. CIV. P. 1 committee cmts. on 1973 adoption ("It has long been settled in this state that when the legislature adopts a federal statute or the statute of another state, it adopts also the construction which the courts of such jurisdiction have placed on the statute. These rules represent an adaptation to the Alabama practice of rules of civil procedure already adopted for the federal courts and by many states." (citations omitted)); *see also* Edwards v. Young, 486 P.2d 181, 182 (Ariz. 1971) (according "great weight" to the federal interpretations of the Federal Rules); Oakley & Coon, *supra* note 5, at 1378–424 (surveying how states construe their rules in light of federal interpretations).

183. *See* Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008).

184. *See id* at 889–90.

185. *See* Sisney v. Best Inc., 754 N.W.2d 804, 807–09 (S.D. 2008).

Other state high courts have applied the rationale of *Twombly* and *Iqbal* without express adoption.[186] Still, most states appear to be in a holding pattern, declining to adopt a position on plausibility pleading one way or the other.[187] This hesitance to accept *Twombly* and *Iqbal* may be a deliberate attempt to get a sense of the practical impact these decisions have before committing to change. As explained previously, the data analyzed in the more than two years following *Twombly* suggest a very moderate impact, and not the radical barrier to court access that opponents suggest.[188] Over the same period, the federal courts' understanding of plausibility pleading has also become more crystallized, such that there is significantly less risk among state courts that the adoption of plausibility pleading would end up going "too far." Moreover, the public policy benefits of plausibility pleading far outweigh whatever reservations or alleged costs that states might have in choosing to adopt this more exacting pleading standard.

CONCLUSION

The Supreme Court's interpretation of federal pleading standards in *Twombly* and *Iqbal* represents a vital effort to balance justice more fairly between providing plaintiffs with court access and protecting defendants from undue burdens. These burdens, which include defending less meritorious claims and responding to costly and wasteful discovery fishing expeditions, have become increasingly onerous under modern e-

186. *See, e.g.*, Clampitt v. Am. Univ., 957 A.2d 23, 29 (D.C. 2008) ("Factual allegations must be enough to raise a right to relief above the speculative level." (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 235 (Minn. 2008) ("We are not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim." (citing *Twombly*, 550 U.S. at 555)).

187. *See, e.g.*, State v. Am. Family Voices, Inc., 898 N.E.2d 293, 296 n.1 (Ind. 2008); Hoover v. Moran, 662 S.E.2d 711, 715 n.3 (W. Va. 2008). In addition, a few state supreme courts appear to have rejected the pleading standard announced in *Twombly*. *See, e.g.*, Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345 (Ariz. 2008) (en banc); Colby v. Umbrella, Inc., 955 A.2d 1082, 1087 n.1 (Vt. 2008). *But see* Brooke T. Mickelson, Cullen v. Auto-Owners Insurance Co.: *Evaluating the Sufficiency of a Complaint Under Arizona's Rule 8 Notice-Pleading Standard in Light of* Bell Atlantic Corp. v. Twombly, 50 ARIZ. L. REV. 1215, 1215 (2008) (concluding that the Arizona Supreme Court "ultimately did not address whether the *Twombly* standard ought to be adopted").

188. *See supra* note 178.

discovery, and in the increasingly complex modern world of civil litigation generally. In recalibrating the scales, the Supreme Court put to rest a notice pleading standard that was the product of a different era in the development of American law, and one whose policy justifications no longer fit modern times. Federal courts now have a more exacting and complete standard in place, and neutral principles can guide courts as to when a more detailed pleading is required. Both federal and state judges now must faithfully fulfill their gatekeeping role and ensure the sufficiency of pleadings.