

2013

# A Theory of Pleading

William Hubbard

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## Recommended Citation

William H. J. Hubbard, "A Theory of Pleading" (Coase-Sandor Institute for Law & Economics Working Paper No. 663, 2013).

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# CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 663  
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 446



COASE-SANDOR INSTITUTE  
FOR LAW AND ECONOMICS

THE UNIVERSITY OF CHICAGO LAW SCHOOL

A THEORY OF PLEADING, LITIGATION, AND SETTLEMENT

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

November 2013

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## A Theory of Pleading, Litigation, and Settlement

William H.J. Hubbard<sup>†</sup>

*Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal are the most important cases on pleading in fifty years. A large literature argues that these cases have raised pleading standards, empowered federal judges as the gatekeepers to federal court, and undermined the “liberal ethos” of the Federal Rules of Civil Procedure. This understanding of pleading doctrine has in turn led to predictions of dramatic effects on dismissal rates, particularly for claims, such as employment discrimination claims, where plaintiffs often lack knowledge of the defendant’s intent at the outset of the case. The accumulating empirical evidence, however, confounds these predictions. Why have the most significant pleading cases in 50 years had virtually no statistically significant effects? Why, in an era of heightened pleading, do defendants file motions to dismiss in only 6 percent of cases? Why have employment discrimination cases been largely unaffected by Twombly and Iqbal? To explain these puzzles, I develop a new theory of pleading, in which pleading practices are not driven by pleading rules and doctrine, but by litigation strategy, and in particular the use of detailed pleadings to precipitate early settlement. I argue that even in a world with no motions to dismiss, we should expect detailed, plausible pleadings to be the norm. I conclude by arguing that Twombly and Iqbal advance rather than weaken the “liberal ethos” of the Federal Rules. Viewed in this light, Twombly and Iqbal point us to a crucial margin on which they may—or may not—have had a hard-to-detect but potentially important effect: with respect to a small, but disproportionately expensive, set of cases.*

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## I. INTRODUCTION

Scholars today describe the pleading requirements of the Federal Rules of Civil Procedure as making judges the gatekeepers to the federal courts.<sup>1</sup> Rule 8(a)(2) requires that a plaintiff's complaint contain "a short and plain statement of the claim showing the pleader is entitled to relief." As originally envisioned by the drafters of the Federal Rules, and as affirmed in the seminal case *Conley v. Gibson*,<sup>2</sup> the gatekeeping function of federal judges was minimal: "notice pleading," which required only that the pleading give the defendant notice of the plaintiff's grievance. Notice pleading reflected a deliberate break with prior pleading regimes, whose cumbersome requirements were seen as traps for the unwary.<sup>3</sup> Rather than having courts decide cases based on the niceties of pleading, the "liberal ethos" of the Federal Rules required only the barest of allegations, so that cases could be decided "on the merits, by jury trial, after full disclosure through discovery."<sup>4</sup> A line from *Conley* became the mantra for the liberality of this approach:

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<sup>1</sup> Benjamin P. Cooper, *Iqbal's Retro Revolution*, 46 WAKE FOREST L. REV. 937 (2011) ("Pleading is often described as the 'gatekeeper for civil litigation.'") (quoting Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010); Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 PA. L. REV. 585, 586 (2011) (noting that "pleading is the gateway by which litigants access federal courts").

<sup>2</sup> *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

<sup>3</sup> See, e.g., Statement of Edgar Tolman, in PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES (1938), reprinted in RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 301 (William W. Dawson ed., 1938) ("It was impossible for the ordinary practitioner to know all the pitfalls that were lying in wait as traps for the unaccustomed practitioner.").

<sup>4</sup> Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986). The story of regime of "fact pleading" that preceded the adoption of the Federal Rules of Civil Procedure and the development of simplified pleading systems, including the Field Code in the 19th Century, which culminated in the adoption of the Rules in 1938 may be of interest to the reader. For an account, see, e.g., id. at 433–44; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573–76 (2007), (Stevens, J., dissenting); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109–14 (2009); Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191, 1196–218 (2010); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 PA. L. REV. 441, 447–52 (2010) [hereinafter Dodson, *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.”<sup>5</sup>

So when *Bell Atlantic Corp. v. Twombly*<sup>6</sup> “retired” the “no set of facts” language from *Conley*, the result was “shockwaves through the legal community—for academics, practitioners, and judges alike.”<sup>7</sup> *Twombly* instantly became a fixture in judicial opinions,<sup>8</sup> and after 50 years of near-dormancy, the scholarly literature on pleading exploded.<sup>9</sup> The academic reaction to *Twombly* reflected a sense of concern—even alarm—at an apparent revolution in pleading and court practice.<sup>10</sup>

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<sup>5</sup> *Conley*, 355 U.S. at 45–46.

<sup>6</sup> *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007).

<sup>7</sup> Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1305 (2010) (citations omitted). See also Douglas G. Smith, *The Twombly Revolution*, 36 PEPP. L. REV. 1063, 1063 (2009) (“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*.”); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 554 (2010) (characterizations *Twombly* as “[s]eemingly without warning”); Richard A. Epstein, *Twobly, After Two Years: The Procedural Revolution in Antitrust That Wasn’t*, GCP: THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY, July 2009 at 4 (calling *Twombly* “out of the blue”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B. C. L. REV. 431, 431 (2008) [hereinafter Spencer, *Plausibility*] (“a startling move by the U.S. Supreme Court”); Smith, *supra* note 7, at 1063 (“a surprising departure from ingrained federal pleading rules”)

<sup>8</sup> *Twombly* has been cited in judicial opinions tens of thousands of times and is already one of the most cited decisions in the history of the United States. See Steinman, *supra* note 7, at 1295 (noting that “[a]s of March 2010, *Twombly* had been cited in nearly 24,000 federal decisions—already number seven of all time.”); Ettie Ward, *The Aftershocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 893 (2008) (noting that “*Bell Atlantic Corp. v. Twombly* was decided by the U.S. Supreme Court on May 21, 2007, and has already been cited more than 9,400 times as of March 15, 2008.”).

<sup>9</sup> See Stancil, *supra* note 4, at 137–38 (writing “Until recently, the scholarly literature on pleading standards was remarkably thin, with only a few significant pieces written from the 1930s through the early 2000s. Widespread scholarly interest in pleading is a remarkably recent phenomenon, tracing its birth to the Supreme Court’s 2007 opinion in *Bell Atlantic Corp. v. Twombly*.”) I cannot begin to survey the literature on *Twombly*. For a litany of citations, see Steinman, *supra* note 7, at 1296–98 & nn.10–14.

<sup>10</sup> See, e.g., Schneirder, *supra* note 1, at 527 (“a revolution in pleading”); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doc-*

Two years later, *Ashcroft v. Iqbal*<sup>11</sup> elaborated on *Twombly* and reiterated the rule that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”<sup>12</sup> With *Iqbal*, the controversy over pleading standards intensified. Bills to overturn *Twombly* and *Iqbal* were introduced in both the House and Senate,<sup>13</sup> and practicing attorneys and law professors testified before Congress that *Twombly* has had a “devastating impact” on many types of cases, and particularly civil rights cases, in federal court,<sup>14</sup> and that “*Twombly* and *Iqbal* have brought about sweeping changes in the lower courts, all for the worse.”<sup>15</sup> While a few scholars argued that plausibility pleading represented a modest doctrinal shift,<sup>16</sup> a near-consensus quickly emerged

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*trinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B. U. L. REV 1217, 1235 (2008) (“a sea of change”); Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009*, 10 available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf> (a “drastic departure from well-established pleading standards”); Steinman, *supra* note 7, at 1310 (“a new era”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 28 (2010) (a “radical departure from prior practice”); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Proceedings*, 14 LEWIS & CLARK L. REV. 185, (2010) [hereinafter Spencer, *Iqbal and the Slide*] (a “subversion[ ] of law to achieve the restrictive ends of societal elites”). See also Stancil, *supra* note 4, at 114 (Two years after *Twombly*, noting that “the furor regarding *Twombly* continues to rage.”); Epstein, *supra* note 7 at 2 (“Without question, *Bell Atlantic v. Twombly*[ ] ranks as one of the most controversial decisions of the United States Supreme Court in recent years.”). *Twombly* continues to generate headlines in the legal press. See generally, e.g., Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch 22*, ABA JOURNAL, January 1, 2011 available at <http://www.abajournal.com>).

<sup>11</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>12</sup> *Id.* at 679.

<sup>13</sup> See Notice Pleading Restoration Act of 2009, S. 1504, 111<sup>th</sup> Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111<sup>th</sup> Cong. (2009).

<sup>14</sup> Schneider, *supra* note 1, at 531. See also Davis (2009); Rubin (2009).

<sup>15</sup> *Hearings on Limitations on Complaint Dismissals: Hearing on H. 4115 Before Subcomm. On Courts and Competition Policy of the H. Comm. On the Judiciary*, 111 Cong. (2009) (statement of Eric Schnapper, Professor, University of Washington School of Law), [hereinafter *Statement of Eric Schnapper*].

<sup>16</sup> See generally, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) [hereinafter Bone, *Pleading Rules*]; Epstein, *supra* note 7; Steinman, *supra* note 7 (all arguing that

“among academic observers that the *Iqbal/Twombly* pleading standard marks a sharp break with the past.”<sup>17</sup>

Particular concern arose for civil rights plaintiffs, and especially employment discrimination plaintiffs, who often lack direct evidence of the defendant’s motives at the outset of litigation.<sup>18</sup> “The *Twombly/Iqbal* requirement that a complaint allege facts showing that the plaintiff’s claim is plausible is a requirement that—prior to filing suit (and before obtaining discovery)—the plaintiff must already have evidence sufficient to meet the new ‘plausibility’ standard. In discrimination cases this will often be an insurmountable barrier.”<sup>19</sup> In this way, the argument goes, *Twombly* and *Iqbal* create the “Paradox of Pleading”: “civil rights plaintiffs . . . cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim.”<sup>20</sup>

Viewed from the perspective of pleading doctrine, in which the baseline is liberal notice pleading and judges are the gatekeepers to court, the furor over *Twombly* and *Iqbal* is justified: these cases impose new, heightened standards by which many civil claimants will be denied access to courts. Federal judges are now more active gatekeepers. “Notice pleading” has become “plausibility pleading.” The “liberal ethos” has become a “restrictive ethos,” which eschews discovery and trial for dispositions at the pleading stage.<sup>21</sup> Bone summarized this view:

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*Twombly* and *Iqbal* did not represent a sharp break in precedent or was only a modest change in doctrine).

<sup>17</sup> Alexander A.Reinert, *The Costs of Heightened Pleading*, 86 IND L. J. 119, 122 (2011).

<sup>18</sup> See Reinert, *supra* note 12, at 123.

<sup>19</sup> *Statement of Eric Schnapper, supra* note 17). See also *Hearings on Limitations on Complaint Dismissals: Hearing on H. 4115 Before Subcomm. On Courts and Competition Policy of the H, Comm. On the Judiciary*, 111 Cong. (2009) (statement of Jonathan L. Rubin, Lawyer, Patton Boggs LLP); Hatamyar, *supra* note 7, at 602 n. 259; Reinert, *supra* note 12, at 122 (“Particular attention has been paid to the impact of the *Iqbal* and *Twombly* rules on civil rights litigation, where informational asymmetry is often at its highest point, but where federal courts and federal law have played an important historical role.”). Justice Stevens made a similar argument for antitrust cases in his *Twombly* dissent. See *Twombly*, 550 U.S. at 586–87 (Stevens, J., dissenting).

<sup>20</sup> Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010).

<sup>21</sup> See generally A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 101 (2010) [hereinafter Spencer, *Restrictive Ethos*].

Many judges and academic commentators read [*Twombly*] as overturning fifty years of generous notice pleading practice, and critics attack it as a sharp departure from the “liberal ethos” of the Federal Rules, favoring decisions “on the merits, by jury trial, after full disclosure through discovery.”<sup>22</sup>

Benjamin Spencer put it more pithily: “Notice pleading is dead.”<sup>23</sup>

These views are widely held, and together they reflect a coherent theory of pleading in civil litigation: pleading doctrine, whether notice pleading or plausibility pleading, drives litigation outcomes by setting the standards by which judges exercise their gatekeeping function. In federal court, this view implies that *Twombly* and *Iqbal* are watershed cases, and federal judges should now be turning away larger numbers of cases—especially employment discrimination cases—at the courthouse door.

But this theory, however compelling, requires reexamination. A number of scholars have wisely cautioned that the effect of *Twombly* and *Iqbal* is ultimately an empirical question, and careful observation would be necessary to inform our understanding of pleading.<sup>24</sup> We now have the benefit of a large body of empirical work inspired by the scholarship on *Twombly* and *Iqbal*. Many of the empirical findings in this scholarship, however, contradict rather than confirm our expectations about pleading practice:

Every study of the rates at which motion to dismiss are granted (with prejudice) has found *no* statistically significant change in grant rates after either *Twombly* or *Iqbal*, even for employment discrimination cases.<sup>25</sup>

The best estimates of the total number of cases affected by *Twombly* and *Iqbal*—assuming that they have had any effect at all—place that number at perhaps 1 percent of all cases, even for employment discrimination cases.<sup>26</sup>

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<sup>22</sup> Bone, *Pleading Rules*, *supra* note 11, at 875 (quoting Marcus, *supra* note 4, at 439).

<sup>23</sup> Spencer, *Plausibility*, *supra* note 7, at 431. *See also* Cooper, *supra* note 1, at 960 (stating that “liberal notice pleading appears dead”).

<sup>24</sup> *See* Hoffman, *supra* note 10, at 1222 (“The Court’s recent decisions, and *Twombly* in particular, may or may not mark a fundamental change in where courts strike the balance between access and efficiency. It is still too early to say.”); Miller, *supra* note 10, at 2 (“Much fine-grained empirical research is needed to separate fact from fiction.”).

<sup>25</sup> *See infra* at nn. 37–40 and accompanying text.

<sup>26</sup> *See infra* at nn. 49–51 and accompanying text.

Even after *Iqbal*, motions to dismiss (for failure to state a claim upon which relief can be granted) are *filed* in only 6 percent of cases.<sup>27</sup>

In other words, neither the predicted seismic shift in pleading practice nor the predicted differential impact on employment discrimination cases has transpired. And the third empirical finding bears further elaboration. Its significance is not only that motions to dismiss have been rare after *Twombly* and *Iqbal*, but that motions to dismiss have *always* been rare. This might have been expected in the post-1938 world of liberal notice pleading, but what about in the pre-Rules world of strict fact pleading? What of the demurrer, the common law ancestor of the motion to dismiss? Here is what Charles Clark, the architect of liberal notice pleading, said in 1938:

I have had some experience in studying the statistics of trial courts, and very rarely indeed does a final action come on a demurrer—very, very rarely. The percentage is almost infinitesimal. Actually demurrers cut a very small figure in any general picture of the court's business.<sup>28</sup>

In short, the empirical picture under plausibility pleading, under notice pleading, and even under pre-Rules common law and Code pleading looks surprisingly similar.

Like the Ptolemaic model of cosmology, the prevailing theory of federal pleading struggles to account for the observed data. It is time to revisit the foundational assumptions of the incumbent theory:

What if federal judges are not the gatekeepers to civil litigation in the federal courts?

What if, in practice, the gatekeeping standard has nothing to do with Rule 8, *Conley*, *Twombly*, or *Iqbal*?

What if, in all but a small fraction of cases, neither “notice pleading” nor “plausibility pleading” affects how the pleadings are written, let alone whether the complaint is dismissed?

And what if, in that fraction of cases where pleading standards might matter, it is plausibility pleading, and not notice pleading, that better reflects the “liberal ethos” of the Federal Rules?

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<sup>27</sup> See *infra* at nn. 34–36 and accompanying text.

<sup>28</sup> Statement of Charles E. Clark, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES (1938), reprinted in RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 239 (William W. Dawson ed., 1938) [hereinafter *Statement of Charles E. Clark*].

In the course of this article, I begin to develop a theory of pleading that accounts for both the doctrine and the data on pleading.

The remainder of this article proceeds as follows. Part II makes the case for the central empirical result that a theory of pleading must explain: the minimal effect of *Twombly* and *Iqbal* on dismissal rates in the federal court, including among employment discrimination cases. The primary evidence upon which I rely is quantitative empirical studies of court data, a literature to which I have contributed in earlier work. But further evidence emerges from surveys of practitioners, a comparative view of pleading practice across U.S. jurisdictions, and from the opinions of courts themselves. This thoroughly consistent body of evidence, I argue, indicates that the modest impact of *Twombly* and *Iqbal* is a real phenomenon that requires explanation.

In Part III, I undertake to explain this central fact through a novel thought experiment: *What if there were no pleading standard at all, such that no complaints could ever be dismissed for failure to state a claim?* By approaching pleading in this way, we no longer see the universe of pleading as revolving around judicial decisions on motions to dismiss. Rather, pleading is simply one distinctive component of litigation practice, all of which revolves around the endgame of modern civil litigation: settlement.

I argue that in this hypothetical pleading regime, rational, strategic plaintiffs will still have the incentive to file factually detailed complaints (or not to file at all). If so, we begin to see why a plausibility pleading standard might have little effect. It is redundant with what plaintiffs would do regardless.

The argument is straightforward. Litigation is expensive, and this has two key consequences for civil practice. First, both plaintiffs and defendants prefer to settle rather than litigate. Second, a plaintiff will not bother to file suit if she doesn't stand a good chance of winning. Because of this, defendants are willing to settle with plaintiffs whose cases are strong enough to justify a lawsuit, but defendants would prefer to refuse to settle with plaintiffs whose claims are weak; such plaintiffs will abandon their claims if they cannot obtain a settlement without suing.

If defendants cannot perfectly discern plaintiffs with serious claims from others, plaintiffs with strong claims need a way to *credibly signal* the strength of their case. As I argue, civil procedure provides just such a mechanism: pleading. And it is through factually detailed pleading that a plaintiff communicates the strength of her case, and thereby facilitates settlement. Under this view, the contents of pleadings in federal practice are not driven by the prospect of a motion to dismiss, but by the impetus to settle. Judges serve a minimal gate-

keeping function because plaintiffs and their lawyers are the primary gatekeepers to the courts, and the gatekeeping function is driven not by pleading standards, but by the costs of litigation and the generosity of potential legal relief.<sup>29</sup>

In Part IV, I return to the empirical data and show that the theory of pleading presented in this article accounts for the observed patterns of behavior, including the remarkable constancy of dismissal rates before and after *Twombly* and *Iqbal* and the fact that even after *Iqbal*, motions to dismiss are filed in only 6 percent of cases. This analysis also shows that the catch-22 scenario described by the paradox of pleading will rarely arise in actual practice. Because plaintiffs and their attorneys carefully screen cases for merit based on the facts available to the plaintiff before filing suit, claims that cannot be pleaded in detail are not filed, even under a pleading regime in which *no* complaint is dismissed. The paradox of pleading assumes a plaintiff files a complaint, but cannot articulate why the claim stands a chance of winning; yet even before *Twombly*, no plaintiffs' attorney would take such a case.

Part V concludes, proposing that plausibility pleading embraces, rather than rejects, the "liberal ethos" of the Federal Rules—by promoting the ends of the liberal ethos in an era in which litigation strategy is not dominated by pleadings and trial, but revolves around settlement.

## II. SEMINAL CASES, MINIMAL EFFECTS

I devote this Part to establishing the key empirical findings that a theory of pleading must explain. While there is little doubt that *Twombly* and *Iqbal* stand as landmarks in the Supreme Court's jurisprudence on civil pleading, studies of court data, surveys of practitioners, and state court practice consistently reveal evidence casting doubt on any claim that *Twombly* and *Iqbal* would have a substantial effect on dismissals of federal civil cases.<sup>30</sup>

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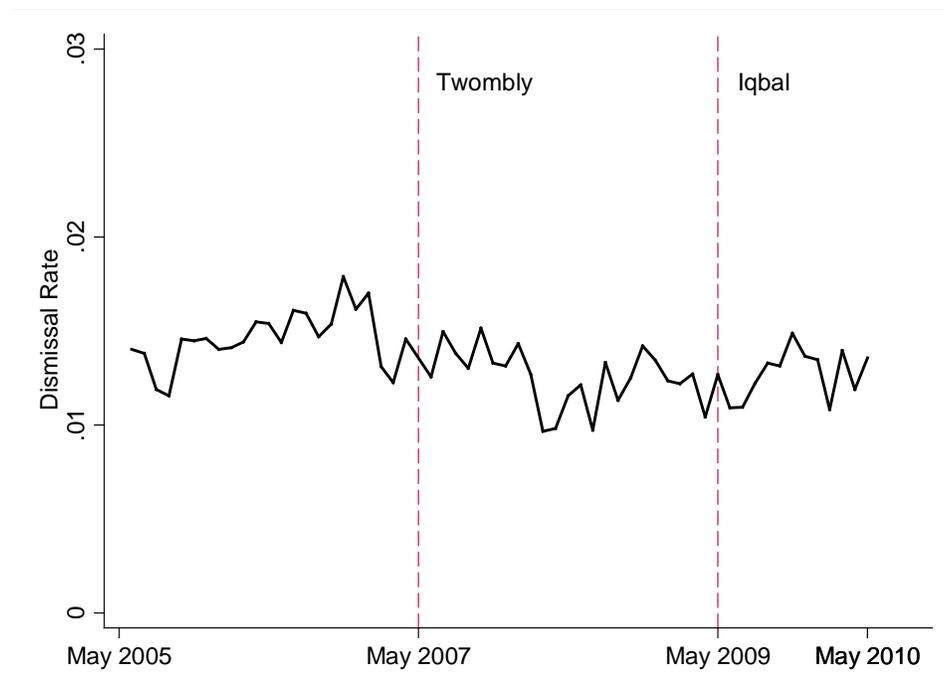
<sup>29</sup> That plaintiffs' attorneys are the gatekeepers to the civil justice system has long been recognized. See Herbert M. Kritzer, *Contingency fee lawyers as gatekeepers in the civil justice system*, 81 JUDICATURE 22, 22 (1997) ("Lawyers, particularly contingency fee lawyers, are gatekeepers who control the flow of civil cases into the courts."). The relevance of this fact to pleading practice, however, has received scant attention.

<sup>30</sup> Note that this evidence addresses on the purported shift from notice to plausibility pleading. It does not address super-heightened forms of pleading, such as required by Federal Rule 9(b) or the Private Securities Litigation Re-

### A. Quantitative Data on the Federal Courts

I begin by presenting some basic administrative data on the federal courts. I compiled a half-million observations of federal civil cases filed between May 1, 2005, and May 1, 2010. This data includes codes for the type and duration of each case, as well as the nature of the disposition of the suit. With this data, I compute the rates at which cases filed in a given month end in dismissal.<sup>31</sup> This data reveals no break in trend for dismissal rates in civil cases after either *Twombly* or *Iqbal*.<sup>32</sup> See Figure 1.

FIGURE 1: MONTHLY DISMISSAL RATES IN CIVIL CASES FILED  
MAY 2005–MAY 2010



form Act. As I note below (at the end of Part III.A), super-heightened forms of pleading may have different effects.

<sup>31</sup> Throughout this article, “dismissal” refers to dismissal for failure to state a claim upon which relief can be granted.

<sup>32</sup> For details on the data sources and data processing used to create Figures 1 and 2, see William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35 (2013) [hereinafter Hubbard, *Testing for Change*]. The most important details to note are that this data excludes *pro se* litigants and certain *sui generis* categories of litigation, such as defaulted student loans and prisoner litigation.

Further, in contrast to predictions that *Twombly* and *Iqbal* will disproportionately affect the filings and dismissals of complaints alleging employment discrimination,<sup>33</sup> trends in dismissal rates for employment discrimination litigation are unaffected. *See* Figure 2.

Perhaps even more striking than the lack of a spike in dismissals after *Twombly* or *Iqbal* is the low rate at which cases are terminated by dismissal—according to my data maybe 2 percent of all cases are terminated by the granting of a Rule 12(b)(6) motion to dismiss. This 2 percent figure is consistent with a massive study of federal docket records by Cecil et al. for the Federal Judicial Center (FJC).<sup>34</sup> Indeed, not only is the dismissal of a case rare; the mere filing of a motion to dismiss is an uncommon event in federal civil litigation. According to the FJC study, a motion to dismiss (for failure to state a claim) was filed in about 6 percent of cases (9 percent in employment discrimination cases) in 2010.<sup>35</sup> This was an uptick from 2006, when motions to dismiss were filed in about 4 percent of cases (7 percent in employment discrimination cases), and consistent with earlier studies finding motion to dismiss filings in 6 to 12 percent of cases.<sup>36</sup> Thus, a corollary puzzle to the modest effect of *Twombly* or *Iqbal* is the question of why motions to dismiss are filed, let alone granted, in so few cases. I will return to this question in Part III.B.

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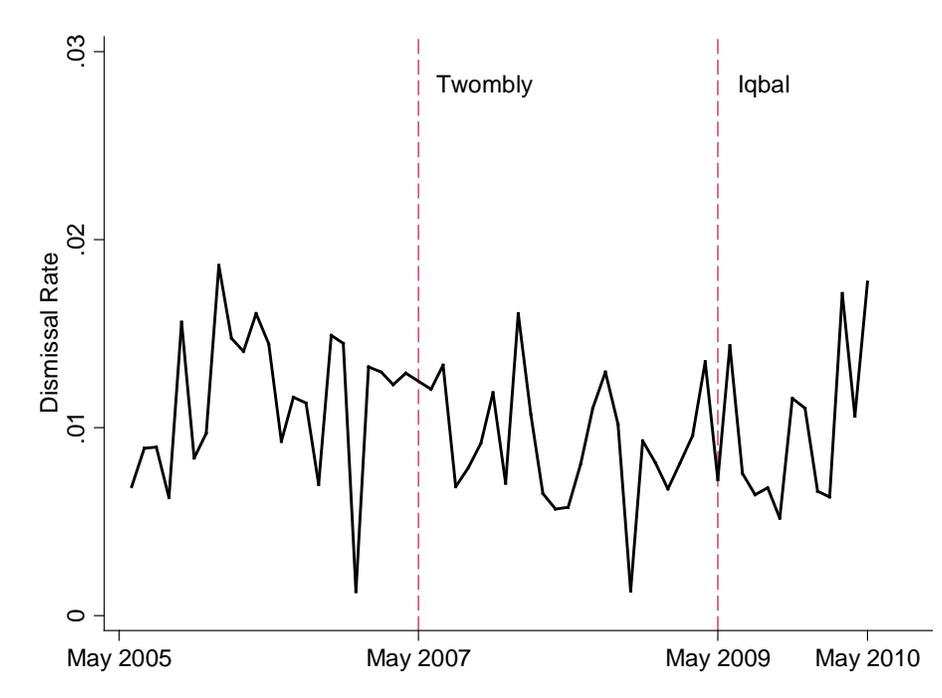
<sup>33</sup> *See* notes 18–20 and accompanying text.

<sup>34</sup> *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., *OF WAVES AND WATER: A RESPONSE TO COMMENTS ON THE FJC STUDY “MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL”* 9 (Working Paper 2011), (Table 1, 14 Table 4 [hereinafter CECIL ET AL., *OF WAVES AND WATER*]). An examination of these tables reveals that across all cases (and both sample periods), about 5 percent of cases involve a motion to dismiss, and about 40 percent of rulings on a motion to dismiss are grants without leave to amend. Thus, 2 percent ( $0.05 \times 0.40$ ) of cases involve a motion to dismiss being granted without leave to amend. Of course, this is just a back-of-the-envelope estimate; note, for example, that courts do not ultimately rule on every motion to dismiss that is filed.

<sup>35</sup> *See id.* at 9, Table 1.

<sup>36</sup> THOMAS E. WILLGING, FED. JUDICIAL CTR., *USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS*, (1989) reviews three sets of district court docket records, and finds rulings on Rule 12(b)(6) motions to dismiss in only 6 to 12 percent of cases.

FIGURE 2: MONTHLY DISMISSAL RATES IN EMPLOYMENT  
DISCRIMINATION CASES FILED MAY 2005–MAY 2010



These aggregate statistics may not, however, tell the whole story. More nuanced empirical analysis is a complement to the raw statistics. Over the past half-decade, a large number of studies have attempted to quantify the effects of *Twombly* and *Iqbal* on federal civil litigation. Taken together, these studies test two crucial hypotheses raised by the large literature on plausibility pleading: first, that *Twombly* and *Iqbal* will cause more cases to be dismissed, and second, that this effect will be most pronounced among employment discrimination cases.<sup>37</sup>

<sup>37</sup> “[T]he perception among many practicing attorneys and commentators is that the [Rule 12(b)(6) motion to dismiss] grant rate has increased, particularly in civil rights cases, employment discrimination, private enforcement matters, class actions, and proceedings brought pro se.” Miller, *supra* note 10, at 21. In most of the literature, this prediction is perhaps so obvious that it goes unstated; but many make it explicit. See Ward, *supra* note 8, at 916 (“Post-*Twombly*, a defendant would predict a higher rate of success on [a Rule 12(b)(6) motion.]”); Kendall W. Hannon, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814 (2008) (“Generally, any substantive alteration to the pleading standard would have an effect on the dismissal rate under 12(b)(6).”). See also notes 14–20.

Every published study of the effect of *Twombly* has found no statistically significant effect. Hannon,<sup>38</sup> Hatamyar,<sup>39</sup> Hatamyar Moore,<sup>40</sup> Seiner (two studies),<sup>41</sup> and Brescia<sup>42</sup> all present data from published court opinions before and after *Twombly*, and none find a statistically significant change in the share of cases granting motions to dismiss.<sup>43</sup> This is true regardless of whether the study looks across case types or focuses on civil rights or employment discrimination cases.

Studies on *Iqbal*, or the combined effect of *Twombly* and *Iqbal*, largely reach the same conclusion. Cecil et al. (two studies),<sup>44</sup> Hatamyar Moore,<sup>45</sup> and Brescia<sup>46</sup> find a rise in dismissals without prejudice after *Iqbal*, but no change in dismissals with prejudice.<sup>47</sup> For example, Hatamyar Moore looks at a sample of 1,326 opinions ruling on motions to dismiss decided between May 22, 2005 (two years before *Twombly*) and May 18, 2010 (one year after *Iqbal*). The study focused on cases citing *Conley*, *Twombly*, and *Iqbal*. Although she finds that grants *with leave to amend* rose after *Iqbal*, the results for dismissals *with prejudice* were quite different. The percentage of motions to dismiss that were granted without leave to amend were 40 percent among cases citing *Conley*, 39 percent among cases citing *Twombly*, and 40 percent among cases citing *Iqbal*.<sup>48</sup> This result continued to

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<sup>38</sup> Hannon, *supra* note 36.

<sup>39</sup> Hatamyar, *supra* note 7.

<sup>40</sup> Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012)

<sup>41</sup> Joseph A. Seiner, *Pleading Disability*, 51 B. C. L. REV. 95 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).

<sup>42</sup> Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY L. J. 235 (2012).

<sup>43</sup> As I note in Hubbard, *Testing for Change*, *supra* note 31, Hannon, *supra* note 36, reports a single significant result in one of his regressions, but this is due to a specification error. A corrected regression on the same data (not reported, on file with author) yields no significant effect.

<sup>44</sup> CECIL ET AL., OF WAVES AND WATER, *supra* note 33; JOE S. CECIL ET AL., FED. JUDICIAL CTR., *UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND*, (Working Paper 2011), [hereinafter CECIL ET AL., UPDATE]

<sup>45</sup> Hataymar Moore, *supra* note 39.

<sup>46</sup> Brescia, *supra* note 41.

<sup>47</sup> Hataymar Moore, *supra* note 39; Brescia, *supra* note 41.

<sup>48</sup> Hataymar Moore, *supra* note 39, at 613.

hold when Hatamyar Moore looked within categories of cases (such as contract, tort, Title VII, etc.).<sup>49</sup>

The distinction between dismissals with and without prejudice is crucial, because the only study on the *ultimate* effect of dismissals without prejudice concluded that, after accounting for amended complaints and subsequent motions to dismiss, there was zero change in the share of cases dismissed under Rule 12(b)(6) from the pre-*Twombly* to the post-*Iqbal* period.<sup>50</sup> Thus, the fact that other studies find increases in dismissals with leave to amend, but no change in dismissals with prejudice, suggests little effect on the share of cases effectively terminated by a ruling on a motion to dismiss.

This distinction between dismissals with and without prejudice is also important in interpreting the results reported by Dodson. Dodson examines rulings on motions to dismiss on a claim-by-claim basis, comparing pre-*Twombly* and post-*Iqbal* periods.<sup>51</sup> The analysis pools together dismissals with and without leave to amend. Dodson finds a small but statistically significant increase in dismissals (both with and without prejudice), though it appears that the statistically significant effect is entirely concentrated among prisoner litigation claims brought by *in forma pauperis* prisoners.<sup>52</sup> There is no significant change in the rate at which district courts dismiss claims in cases with represented plaintiffs.<sup>53</sup>

These simple comparisons of observed dismissal rates, however, must be approached with caution, as they do not account for the possibility that *Twombly* or *Iqbal* had a major effect, but the mix of cases before and after these cases changed in ways that masked the true effect on dismissal rates. For example, if the plausibility standard announced in *Twombly* led many plaintiffs not to file suit at all, it is possible that the share of *filed* cases being dismissed may not change, even though many (potential) plaintiffs are nonetheless losing their day in court.

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<sup>49</sup> *Id.* at 618.

<sup>50</sup> See CECIL ET AL., UPDATE, *supra* note 43. Excluding the “financial instruments” category of cases, which was affected by the home mortgage crisis that intervened between 2006 and 2010, the share of cases that ultimately were dismissed in the wake of a motion to dismiss fell from 56.8 percent to 56.2 percent, which is statistically indistinguishable from zero change. See *id.* at 7, table A-1 (calculations by author).

<sup>51</sup> Scott Dodson, *A New Look: Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127 (2012) [hereinafter Dodson, *New Look*].

<sup>52</sup> This conclusion is based on analysis of *id.* at 132 table 2.

<sup>53</sup> *Id.*

Some recent work has attempted to address the possibility of changes in the composition of filed cases after *Twombly* and *Iqbal*. In my earlier study of the effect of *Twombly*, I developed an empirical methodology to address this problem (which is sometimes referred to as “selection effects”).<sup>54</sup> The essence of this approach is to compare the outcomes of (1) cases that were filed before *Twombly* and which could have been dismissed before *Twombly* and (2) cases that were filed before *Twombly*, but which did not have an opportunity to be dismissed until after *Twombly*. Because *Twombly*’s “retirement” of the *Conley* dictum was largely a surprise to the bar, any effect of *Twombly* on the composition of filed cases would occur only with respect to cases filed after the *Twombly* decision. By limiting my analysis to cases filed before the decision, I was able to control for selection effects. Applying this approach to two data sets, together totaling tens of thousands of federal civil cases, yielded a very precise estimate of zero effect of *Twombly* on (1) the rate at which motions to dismiss were granted and (2) the share of all cases that were dismissed (for failure to state a claim).<sup>55</sup>

Additional sets of administrative data, only recently made available, has allowed me to extend my analysis to *Iqbal*.<sup>56</sup> Applying the same technique to control for selection effects, I have found no statistically significant effect of *Iqbal* on the rate at which cases are dismissed. Unlike in my study of *Twombly*, however, my data on *Iqbal* do not rule out the possibility that *Iqbal* had a meaningful effect. I cannot, for example, rule out the possibility that *Iqbal* has increased the share of employment discrimination cases that are dismissed by 1 percentage point.

One other study attempts to address selection effects and focuses on the outcomes of cases in the wake of *Iqbal*.<sup>57</sup> Gelbach used a unique, formal model to account for selection effects on the composition of cases with litigated motions to dismiss.<sup>58</sup> He generated a lower bound on the number of cases “affected” by *Twombly* and *Iqbal* that

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<sup>54</sup> Hubbard, *Testing for Change supra* note 31, at 35.

<sup>55</sup> *Id.* at 54–57.

<sup>56</sup> William H.J. Hubbard, *Two Models of Pleadings*, (2013) (unpublished working paper) (on file with author) [hereinafter Hubbard, *Two Models*].

<sup>57</sup> It is worth noting, however, that Gelbach corrects for changes in the selection of filed cases for motions to dismiss, but he does not account for the possibility that the composition of filed cases themselves may have changed between 2006 and 2010. Only my studies on *Twombly* and *Iqbal* account for both sources of selection effects.

<sup>58</sup> Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012).

represents 21.5 percent of all cases in which a motion to dismiss was filed.<sup>59</sup> To make this number comparable with my results described above, one must take into account that in the data used by Gelbach, 5.0 percent of all cases involved a motion to dismiss, which means that the lower bound for “affected cases” is about 1 percent of all cases.<sup>60</sup> His results were very similar for employment discrimination cases.<sup>61</sup> Thus, this lower bound represents a small but meaningful share of cases.

In short, the studies on *Twombly* and *Iqbal* do not demonstrate that these cases had any major effect on the willingness of district courts to dismiss cases. The evidence is overwhelming that *Twombly*, in particular, has had essentially no impact on dismissal rates. *Iqbal*, it appears, is associated with an expected rise in MTD filings, but if it has led to an increase in the courts’ willingness to dismiss cases, this latter effect is modest at best. The majority of studies on *Iqbal* find no statistically significant effect on dismissals, but there is some evidence suggesting a small but potentially meaningful effect.

## B. Evidence from Practitioners

Surveys of practitioners reinforce these findings. In December 2009 and January 2010, Willging and Lee surveyed both plaintiffs’ and defense attorneys across a range of practice areas and “[m]ost interviewees indicated that they had not seen any impact of the two cases in their practice.”<sup>62</sup> One attorney’s answer left no room for doubt: “No effect.”<sup>63</sup>

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<sup>59</sup> This number is statistically different from zero. *Id.* at 2331.

<sup>60</sup> According to the FJC data he cites, MTDs were filed in 5 percent of cases in the post-*Iqbal* sample period, and he estimates a lower bound of 21.5 percent of these filings were “affected” by *Twombly* and *Iqbal*. 21.5 percent of 5 percent is 1.075 percent.

<sup>61</sup> Gelbach is careful to point out that the “negatively affected share” was lower for employment discrimination cases (15.4 percent rather than 21.5 percent), a surprising result given the literature. Gelbach, *supra* note 57, at 2331–32. Because more employment discrimination cases involve motions to dismiss (9.0 percent, *id.* at 2326), however, dismissals as a share of all employment discrimination cases are slightly higher (15.4 percent of 9 percent is 1.386 percent).

<sup>62</sup> THOMAS E. WILLGING and EMERY G. LEE, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION, 3 (2010).

<sup>63</sup> *Id.* at 25.

These survey responses dovetail with the empirical results on the rarity of motions to dismiss as well. One respondent, speaking in the wake of *Iqbal*, stated, “I have never faced a serious challenge to a complaint in 20 years of practice and only have had 2–3 motions to dismiss for failure to state a claim filed.”<sup>64</sup>

A study commissioned by the National Employment Lawyers Association (NELA), an organization of attorneys who represent plaintiffs in employment litigation, lends further support to the notion that *Twombly* and *Iqbal* have had little effect.<sup>65</sup> Hamburg and Koski surveyed members of NELA during October and November 2009—two and a half years after *Twombly* and about six months after *Iqbal*. The respondents were overwhelmingly critical of *Twombly* and *Iqbal*,<sup>66</sup> and some reported hearing about “others” being hurt by the new pleading standards.<sup>67</sup>

But when describing their own experiences, the respondents were largely unmoved. At the time of the survey, 92.8 percent of the surveyed plaintiffs’ attorney had *never*, in two-and-one-half years, had a complaint dismissed under *Twombly* or *Iqbal*.<sup>68</sup> In addition to those respondents who stated that these cases have had “[n]o effect,” some respondents had seen not seen a single MTD filed under *Twombly* or *Iqbal*.<sup>69</sup>

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<sup>64</sup> *Id.* at 25.

<sup>65</sup> “NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar” Hamburg and Koski, *supra* note 10, at 3

<sup>66</sup> Of the respondents who offered their own comments about pleading, 85 out of the 150 (by my count) made comments criticizing *Twombly* and/or *Iqbal*.

<sup>67</sup> Hamburg and Koski, *supra* note 10 at 62. *See also id.* at 65 (“I understand from colleagues . . .”).

<sup>68</sup> *Id.* at 28. In raw numbers, 195 respondents had filed at least one complaint and only 14—*fourteen!*—had even had a single complaint get dismissed since *Twombly*. The survey did not ask about experiences with cases being dismissed before *Twombly*.

<sup>69</sup> Four respondents specifically said, “No effect.” *Id.* at 68. Six others said something similarly explicit. Of course, the comments about “always” pleading with specificity imply no effect as well. Two respondents said that there were no MTDs filed under *Twombly* and *Iqbal*, and a third note that there were “initially . . . a few” but none since. *Id.* at 65, 68.

### C. Evidence from the States

Another data point, or perhaps fifty-one more, come from the experiences of state courts and the courts of the District of Columbia. While the civil procedure rules of most states (and the District of Columbia) essentially mirror the Federal Rules, seventeen states have pleading rules that require some version of “fact pleading”—a pleading standard ostensibly *higher* than plausibility pleading.<sup>70</sup> These seventeen states comprise more than half the U.S. population. Yet I know of no claims that pleading practice is dramatically different in these states, let alone any broad normative claims that plaintiffs are disadvantaged in these states, either before or after *Twombly*.<sup>71</sup>

Rather, the one study that has looked for differential patterns across fact pleading and notice pleading states in the wake of *Twombly* and *Iqbal* has found none. Curry and Ward search for changes in patterns of removal from state to federal court, based on the theory that defendants in notice-pleading states will now have a greater preference for pleading standards in federal court.<sup>72</sup> But they find no evidence that patterns of removal to federal court responded to *Twombly* and *Iqbal*, and no difference in response between notice pleading and fact pleading states.<sup>73</sup>

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<sup>70</sup> In sorting states into these categories, I rely upon 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), and John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L. J. 354 (2002–2003). According to these studies, the fact-pleading states are Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, and Virginia. In this context, “fact pleading” includes “code pleading” and “civil pleading,” i.e., pleading under the civil law system, which is used in Louisiana.

<sup>71</sup> If I may add the most dubious sort of empirical evidence—the personal anecdote: I practiced in Illinois (a fact-pleading jurisdiction) for five years before *Twombly*. I litigated cases in both state court (fact pleading) and federal court (notice pleading). In terms of length, specificity, and factual detail, the state-court and federal-court complaints I encountered were interchangeable.

<sup>72</sup> Jill L. Curry & Matthew Alex Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH. L. REV. 905 (2013).

<sup>73</sup> And while hardly dispositive, it is worth noting that to the extent that there are claims about “judicial hellholes” that are (allegedly) inordinately pro-plaintiff, such “hellholes” reside primarily in fact-pleading, rather than notice-pleading, states. A recent report from the American Tort Reform Foundation on “judicial hellholes” lists fourteen state-court jurisdictions as

Looking more broadly, Scott Dodson notes that the United States' concept of notice pleading is unique among countries; "America has the most lax pleading system in the world."<sup>74</sup> Often, civil law jurisdictions not only require fact pleading, but evidence, when a complaint is filed. Yet Dodson indicates that there appears to be little concern internationally over these differences in pleading rules.<sup>75</sup>

#### D. Evidence from Doctrine

Finally, the procedural history and opinions in *Conley* and *Twombly*—and a brief look at some cases in the interim—provide further indications that one might have expected little effect from *Twombly* and *Iqbal*.

##### 1. The *Conley* Opinion

The first clue comes from *Conley* itself, in which the complaint made the legal claim that the defendant union violated the plaintiffs' right of "fair representation" under the Railway Labor Act. The funny thing about *Conley* is that the pleadings in *Conley* were rife with factual detail. The Court summarized the facts alleged in the plaintiffs' complaint:

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agents under the Railway Labor Act for the bargaining unit to which petitioners belonged.

A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority.

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"judicial hellholes" or on a "watch list." See AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2011–2012, 2 (2012). Ten of these fourteen "hell-hole" jurisdictions are in fact-pleading states: California, Florida, Illinois (three), Louisiana, New Jersey (two), New York, and Pennsylvania. The notice pleading jurisdictions on these lists are in Alabama, Mississippi, Nevada, and West Virginia. As above, I base the categorization of states into fact pleading and notice pleading categories on Oakley & Coon *supra* note 69 and Oakley, *supra* note 69.

<sup>74</sup> Dodson, *New Look*, *supra* note 50, at 447.

<sup>75</sup> *Id.*

In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted.

In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority.

Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees.<sup>76</sup>

Given these factual allegations, there was the question of whether the duty of fair representation under the Railway Labor Act bars racial discrimination by the union in pursuing grievances brought by union members. This was a question of the meaning of the Railway Labor Act, and went to the “legal sufficiency” of the complaint. This was, in fact, the primary question addressed in *Conley*.<sup>77</sup>

But once that question is resolved in the affirmative, is there any doubt that this complaint contains enough in the way of factual detail to state a *plausible* claim under *Twombly*? While the legal sufficiency of the complaint posed a serious question, the “factual sufficiency” of the complaint in *Conley*—whether it pleaded enough factual matter to pass muster under Rule 8(a)—did not, as the procedural history of *Conley* demonstrated. The district court in *Conley* had not dismissed the complaint for failure to state a claim; it had dismissed the claim, and the appellate court had affirmed, on jurisdictional grounds. In the district court, the issue of the factual sufficiency of the pleading was the defendant’s *fourth-string* argument for dismissal. Indeed, the issue was not even briefed in the Supreme Court.<sup>78</sup> As Reinert noted, “*Conley* was a strange poster-child for notice pleading—the plaintiffs had provided extensive factual detail, they had specified their legal claims, and neither party briefed or addressed Rule 8.”<sup>79</sup>

Further, Emily Sherwin and others have taken care to point out that the famous “no sets of facts” language appeared in *Conley*’s discussion of the *legal* sufficiency of the complaint, i.e., whether the complaint contains a legal claim that would be viable *if facts existed* that

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<sup>76</sup> *Conley v. Gibson*, 355 U.S. 41, 43 (1957) (paragraph breaks added).

<sup>77</sup> *Id.* at 45–46.

<sup>78</sup> See Emily Sherwin, *The Story of Conley*, in *CIVIL PROCEDURE STORIES*, 295 (Kevin M. Clairmont, ed., 2008).

<sup>79</sup> Reinert, *supra* note 12, at 128..

met its elements.<sup>80</sup> It was only at the tail end of the opinion that the Court addressed the *factual* sufficiency of the complaint.<sup>81</sup> On *this* issue, the Court noted that “all the Rules require is ‘a short and plain statement of the claim’ [citing Rule 8] that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>82</sup> Given the factual detail of the plaintiffs’ complaint, the Court had “no doubt” that their complaint was factually sufficient.<sup>83</sup>

## 2. From *Conley* to *Twombly*

Long before *Twombly* and *Iqbal*, a small literature documented the consistent practice of the federal courts to expect factually detailed pleadings, even in the wake of *Conley*. A quarter-century ago, Marcus lamented: “Whatever the reason, for more than twenty years after *Conley*, there was virtually no academic recognition that pleading practice had not vanished; defendants continued to make motions to dismiss and courts continued to grant them.”<sup>84</sup> Marcus concluded notice pleading was a “chimera.”<sup>85</sup> Fairman called it a “myth,” providing numerous (albeit not systematic) examples of what appeared to be a wide range of ad hoc standards employed by district courts in ruling on motions to dismiss.<sup>86</sup>

Nonetheless, *Conley*’s famous dictum did not go away. As recently as *Swierkiewicz v. Sorema N.A.*,<sup>87</sup> the Court recited the rule that “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”<sup>88</sup> But *Leatherman*,<sup>89</sup> another oft-cited pre-*Twombly*

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<sup>80</sup> Sherwin, *supra* note 76, at 315–16. As noted above, the legal question was whether a union violated its duty of representation when discriminating on the basis of race in pursuing grievances raised by fired railroad employees.

<sup>81</sup> *Conley*, 355 U.S. at 47 (“The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination.”).

<sup>82</sup> *Id.* at 47.

<sup>83</sup> *Id.* at 48.

<sup>84</sup> Marcus, *supra* note 4 at 434.

<sup>85</sup> *Id.* at 451.

<sup>86</sup> Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

<sup>87</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

<sup>88</sup> *Id.* at 514 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)).

<sup>89</sup> *Leatherman v. Tarrant Cnty Narcotics and Intelligence Control Unit*, 507 U.S. 163 (1993).

pleading case, avoided citing this dictum, quoting instead *Conley*'s discussion of the factual sufficiency of the complaint.<sup>90</sup>

The Supreme Court itself in *Twombly* noted that over the previous half-century, “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.”<sup>91</sup> A striking example of such a “balk” is *Car Carriers, Inc. v. Ford Motor Co.*,<sup>92</sup> which, like *Twombly*, involved a claim of antitrust conspiracy. Twenty-eight years before *Twombly*, the *Car Carriers* court bluntly stated, “*Conley* has never been interpreted literally.”<sup>93</sup> In place of the “no set of facts” language from *Conley*, the court employed the rule that “a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.”<sup>94</sup> Just as in *Twombly*, the facts alleged in support of the illegal agreements were all entirely consistent with competitive behavior, and, just as in *Twombly*, the court rested its decision on that ground. In fact, in no fewer than three separate places did the court justify its ruling by pointing out that the specific allegations of illegal agreements were “implausible.”<sup>95</sup>

### 3. The *Twombly* Opinions

The procedural history of *Twombly* offers clues as well. The most telling, if overlooked, fact in the *Twombly* litigation is this: in 2003, the district court dismissed the complaint.<sup>96</sup> In other words, the Supreme Court’s “sweeping,” “startling,” and “surprising”<sup>97</sup> decision in *Twombly* simply affirmed the decision of the district court, made four years prior.<sup>98</sup>

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<sup>90</sup> *Id.* at 168 (quoting language from *Conley* reproduced above in text accompanying note 82).

<sup>91</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

<sup>92</sup> *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984).

<sup>93</sup> *Id.* at 1106.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1109–10.

<sup>96</sup> *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D. N.Y. 2003), *vacated*, 425 F. 3d 99 (2005), *rev'd* 550 U.S. 544 (2007).

<sup>97</sup> Smith, *supra* note 9 at 1063.

<sup>98</sup> Of course, the denial of a motion to dismiss is not generally an appealable order, so we might expect that any Supreme Court decision on the standard governing a Rule 12(b)(6) motion to dismiss would involve a dismissal at the district court level. Interestingly, the district court in *Iqbal* had *denied* the defendants’ motion to dismiss under *Twombly*, but the denial was appealed under the collateral order doctrine.

Notable, too, is the Second Circuit's opinion, which was reversed by the Supreme Court. It anticipated the terminology of "plausibility" pleading, even as it vacated the district court opinion. Consider the following quotes, which are drawn from the Second Circuit's and the Supreme Court's decisions in *Twombly*. One might have difficulty telling the earlier opinion from the one that reversed it.

A: "If a pleaded conspiracy is implausible on the basis of the facts pleaded—if the allegations amount to no more than 'unlikely speculation'—the complaint will be dismissed."

B: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."

C: "We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, [and] that the success of such meritless claims encourages others to be brought . . . ."

D: "[Pleading rules serve] the practical purpose of preventing a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value. . . . Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, . . . but quite another to forget that proceeding to antitrust discovery can be expensive."<sup>99</sup>

In short, the shortcoming of the Second Circuit opinion was not a failure to think in terms of plausibility. Instead, it appears that, to the eyes of the Supreme Court, the Second Circuit simply misapplied its standard to the allegations in the complaint. Stated more broadly, the complaint in *Conley* would have survived under *Twombly*, and the complaint in *Twombly* was (in fact) dismissed under *Conley*.<sup>100</sup> These

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<sup>99</sup> A: *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 111 (2nd Cir. 2005), *rev'd* 550 U.S. 544 (2007); B: *Bell Atl. Corp. v. Tomblly*, 550 U.S. 544, 570; C: *Twombly*, 425 F.3d at 117; D: *Twombly*, 550 U.S. at 558 (internal quotation marks omitted).

<sup>100</sup> I do not discuss *Iqbal* because the timing of the lower court opinions prevents an easy inference. The district court opinion was pre-*Twombly*, but the circuit court opinion was post-*Twombly*.

facts together raise the possibility that *Twombly* was error correction, and plausibility pleading was nothing new.

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Evidence from every quarter compels the conclusion that the effects of *Twombly* and *Iqbal* on pleadings practice in the federal courts has been modest. Both studies of court data and surveys of practitioners find little indication that practice has changed much. Juxtaposing federal and state practice suggests that the labels “notice pleading” and “fact pleading” represent no striking differences in practice. And even the treatment of pleadings in the lower courts in *Conley* and *Twombly* themselves, not to mention other lower courts in the interim period, suggests that even before *Twombly*, many federal courts were expecting to see factually detailed allegations.

If neither *Conley* nor *Twombly/Iqbal* seem to have defined the actual practice of pleading, perhaps our theories about pleading should not begin with court doctrine and pleading rules. If no new trends in dismissal rates emerged after *Twombly* or *Iqbal*, perhaps our theories about pleading should look toward what remained the same after *Twombly* and *Iqbal*, rather than what changed. In Part III, I approach pleading from the point of view of the litigants, rather than the court.

### III. PLEADING, LITIGATION, AND SETTLEMENT

Let us undertake a thought experiment: Imagine a pleading regime in which no complaint can be dismissed for failure to state a claim, so long as it names a defendant and describes some kind of injury. I will call this hypothetical regime “no pleading standard.” (This may not be far from the idealized conception of “notice pleading.”<sup>101</sup>) Since it is costly to prepare a lengthy complaint, rich with factual detail and legal background, one might expect that under no pleading standard, complaints would be short, sparsely pleaded documents that, were *Twombly* to suddenly appear, would surely be dismissed.

This conclusion would be too hasty. While detailed pleading is costly, so is litigation. Herein, I argue that in general:

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<sup>101</sup> Or at least an aspiration of the drafters of the Federal Rules. In proceedings on the Federal Rules of Civil Procedure in 1938, Charles E. Clark, primary architect of the rules, noted that the English Equity Rules of 1912 abolished the demurrer and remarked that in the Federal Rules, “We don’t go as far as the English rules, which I personally think we should eventually.” *Statement of Charles E. Clark, supra* note 28, at 240.

- (1) only a plaintiff who has facts establishing a plausible claim will file a lawsuit, and
- (2) when the plaintiff files suit, she will plead those facts in detail.

This is true even under no pleading standard. In Part III.A, I will present the argument in its most general form, setting aside the possibility of the “nuisance suit” (i.e., a lawsuit brought solely to extract a settlement because the defendant faces the prospect of high litigation costs).<sup>102</sup> In Part III.B, I then make the argument that, under no pleading standard, even plaintiffs bringing nuisance suits will tend to file detailed complaints for strategic reasons. Part III.C then raises some hypotheses about how the plaintiff-driven practice of detailed pleading may have shaped judicial views on pleading.

In Part IV, I then return to the empirical puzzles raised in the Introduction and describe how the understanding of pleading in Part III explains these findings.

#### A. Plausibility Pleading Given No Pleading Standard

Litigation is expensive; thus, a plaintiff will not bother to file suit if she doesn’t stand a good chance of winning. But a plaintiff will not believe that she has a good chance of winning unless she has in mind some *facts* that persuade her that she can win the suit. And, again because litigation is expensive, the plaintiff would prefer to settle than undertake a lengthy process of litigation and trial. Thus, she has every incentive to *signal* the strength of her case by communicating her facts to the potential defendant, if doing so will encourage the defendant to settle.

The defendant, also concerned about litigation costs, would prefer to settle than go to trial with a plaintiff who brings a strong claim, but the defendant is wary of a plaintiff with a weak claim bluffing her way to a settlement. The defendant will be reluctant to settle absent some assurance that the plaintiff’s claim is strong enough that it is worth paying a settlement. Thus, it is essential that the plaintiff with a plausible claim *credibly* communicate her facts to the defendant.

The plaintiff does so through pleading, which is a nearly ideal mechanism for making a credible signal: a complaint is costly to prepare, made in writing, public, and signed under penalty of sanctions

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<sup>102</sup> This is, of course, the “*in terrorem*” scenario contemplated by *Twombly*.

against both the plaintiff and her lawyer.<sup>103</sup> In other words, a factually detailed, plausible complaint makes the plaintiff's case credible, by backing up her claims with her money and reputation. Crucially, nothing in this argument depends on the existence, let alone strictness, of a pleading standard.

A simple model formalizes this intuition somewhat and will become useful in assessing the paradox of pleading described in the Introduction. Take a (potential) plaintiff and a (potential) defendant. The plaintiff has been injured and the defendant may be liable for the injury. The plaintiff can file a lawsuit seeking a judgment in the amount  $J$  against the defendant. If the plaintiff sues and the parties do not settle, it will cost the plaintiff  $C$  to litigate. Before deciding whether to sue, the plaintiff must assess the information available to her in order to make a judgment about her likelihood of winning the lawsuit. If we call this probability  $\pi$ , then the *expected judgment* is simply the judgment amount times the probability that she wins the judgment:  $\pi J$ . Given this expected judgment, the plaintiff will be willing to sue and go to trial if the expected judgment from litigating exceeds the costs of litigating:

$$\pi J \geq C$$

If not, then it is not worth pursuing litigation; the plaintiff stands to lose more in litigation costs than she stands to win in judgment.<sup>104</sup>

From this, one can immediately see that for any claim for judgment  $J$  that costs  $C$  to litigate, only a plaintiff with a relatively strong case (a high probability  $\pi$ ) will be willing to sue.<sup>105</sup> Importantly, the facts available to the plaintiff determine  $\pi$ .

A plaintiff who lacks facts implying a relatively high likelihood of success will abandon her claim, unless she can convince the defendant to settle. Such a plaintiff might approach the defendant and demand a settlement without filing a lawsuit. But a rational defendant will an-

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<sup>103</sup> See, e.g., FRCP 11; 28 USC §1927. Rule 11 requires that “factual contentions have evidentiary support,” lest the pleading party or its attorneys face sanctions. By pleading detailed facts, a plaintiff could pre-empt any threat of a motion for Rule 11 sanctions. Pleading parties thus have yet another an incentive to plead facts in support of legal claims regardless of the pleading standard. See Randal C. Picker. 2007. Twombly, Leegin, and the Reshaping of *Antitrust*. 2007 SUP. CT. REV. 161, 176 (2007).

<sup>104</sup> This result is simply an application of the canonical Landes-Posner-Gould model.

<sup>105</sup> Note that while this model does not incorporate risk aversion, doing so would only amplify the plaintiff-screening effect I describe here.

anticipate this possibility, and he will know that if he refuses settlement, the plaintiff will simply abandon her claim rather than hale him into court.

This, in turn, creates a problem for a plaintiff who has a strong claim. She, too, would prefer to settle out-of-court rather than sue, because litigation is costly. But a defendant may refuse to settle if the defendant cannot reliably distinguish between her and someone with a weaker claim. In this scenario, it benefits the plaintiff with the strong case to file a lawsuit and use the complaint as a credible signal of her willingness to pursue litigation. Detailed pleading is costly, but it allows the plaintiff with a strong claim to separate herself from the plaintiff with a weak claim. By doing this, she brings the defendant to the settlement table.

Applying some numbers to this model will make it more concrete and allow me to assess whether the paradox of pleading describes a scenario that is likely to arise.

Consider a large group of potential plaintiffs who might bring fairly typical employment discrimination claims in federal court. For example, you could imagine the set of all female mid-level employees who lost their jobs in a given time period. It is possible that any given one was fired for reasons related to sex discrimination, but it is also possible that she were fired for entirely separate reasons, such as poor individual performance or downsizing by the employer. Employment discrimination claims tend not to be high-stakes by federal court standards; but I will assign a robust potential judgment of  $J = \$500,000$  to each plaintiff in this scenario. This corresponds to the 75th percentile for stakes for employment discrimination cases in the study reported in Lee and Willging.<sup>106</sup> Litigating in federal court, however, is expensive even for plaintiffs bringing relatively modest claims. A rule of thumb is that a party ought to be prepared to spend \$100,000 to litigate in federal court, and in fact the 75th percentile for the costs of litigating to trial (for the plaintiff) in Lee and Willging is \$122,500.<sup>107</sup>

Given these numbers, a plaintiff in this scenario will only be willing to sue if

$$\pi J \geq C$$

$$\pi(500,000) \geq 122,500$$

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<sup>106</sup> See generally EMERY G. LEE & THOMAS WILLGING, FED. JUDICIAL CTR., RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009).

<sup>107</sup> Median costs are \$44,000, and median stakes are \$108,750. *Id.*

$$\pi \geq 0.245$$

Now assume, for the moment, that every plaintiff in this group has no information bearing on the defendant's discriminatory intent in her case. This set of plaintiffs is uniformly uninformed about the merits of their individual claims. In this situation, will every potential plaintiff in this group be willing to sue? This depends on whether  $\pi$  is at least about 25 percent.<sup>108</sup> Of course, this number is unknowable. In principle, it could be 1 percent, or 10 percent, or 99 percent. But while no one knows what the probability is that a *randomly chosen* woman who lost her job will be able to win a judgment on a claim that her employer intentionally discriminated against her, it seems doubtful that her chances of winning are one-in-four or better.<sup>109</sup> If this is right, then a plaintiff who has no facts tending to show that *she*, specifically, was the victim of discrimination will not be willing to sue.

Thus, only a plaintiff who has probative, favorable facts about her claim will be willing to sue. In some cases, the plaintiff knows that she was a hard-working employee who received positive evaluations from other supervisors. In some cases, the plaintiff knows that she was replaced by a worker who was not a member of her protected class. In some cases, the plaintiff heard discriminatory epithets from her supervisors. And so on. The plaintiff has some specific facts that are probative of discrimination, and thus she finds it worthwhile to sue. And because she wants a settlement from the defendant, it is her best strategy to plead with maximum detail, even if (as I have assumed throughout this Part) there is no pleading standard.

Of course, one may doubt that plaintiffs will make such cool-headed calculations about litigation payoffs when they feel they have been wronged. This may be true; but while I have simply referred to the "plaintiff" in this discussion, it may be more realistic to treat the decisionmaker as the plaintiffs' attorney. Most individual plaintiffs hire attorneys on a contingency basis. In other words, the attorney covers the plaintiff's litigation costs, getting repaid only if and when the plaintiff obtains a recovery.<sup>110</sup> It is the attorney, not the plaintiff, who

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<sup>108</sup> Median costs and stakes imply that  $\pi \geq 0.405$ .

<sup>109</sup> Note that I limit this discussion to claims of intentional discrimination; *i.e.*, disparate treatment. Of course, one can bring disparate impact, rather than disparate treatment, claims. But the "paradox of pleading" is about disparate treatment claims. The asymmetry of information motivating the paradox of pleading is the defendant's knowledge of his *intent*.

<sup>110</sup> Note that this definition includes arrangements in which the attorney's payment is contingent on winning, regardless of whether the attorney is paid a percentage of the plaintiff's recovery. For example, statutory fee-shifting in

is financing the litigation, and therefore it is the attorney, not the plaintiff, who decides whether a potential lawsuit would be cost-justified.<sup>111</sup> And given that the attorney's livelihood depends on making that judgment correctly, one should have little doubt that this model works as a fair approximation of the gatekeeping function that plaintiffs' attorney perform.

Further, much of this argument applies equally to the *pro se* plaintiff or *pro bono* attorney who is uninterested in cost-benefit considerations but simply wants to see justice done or desires to have her day in court. In these scenarios, the plaintiff deeply and sincerely feels wronged. If a plaintiff feels she has been wronged, *why* does she feel this way? Presumably because she witnessed or experienced something that led her to believe she was legally wronged. What she witnessed or experienced are facts, and she will be able to plead with factual detail.<sup>112</sup>

Indeed, given a limited budget of time and credit (for litigation expenses) that she can extend to her clients, an attorney working on contingency must concentrate her efforts on cases with the highest settlement value.<sup>113</sup> This fact is widely recognized, even by the harshest critics of *Twombly* and *Iqbal*.<sup>114</sup> What has been underappreciated, however, is that fact that the basis upon which the attorney makes judgments about the value of a case is whatever *facts* that her potential client, or her own independent investigation, reveals. And because

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favor of prevailing plaintiffs is a contingent form of compensation so long as the attorney recovers nothing if the plaintiff does not prevail. See, e.g., *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (holding that a prevailing plaintiff under Title II of the Civil Rights Act of 1964 “should ordinarily recover an attorney’s fee.”).

<sup>111</sup> A plaintiffs' attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases. This only magnifies the incentive to screen cases for quality (*i.e.*, high  $\pi$ ). Indeed, an important study of the practice of contingency fee lawyers from the pre-*Twombly* era found that “[l]ack of liability alone accounts for the largest proportion of cases declined,” rather than reasons such as inadequate damages, the case being outside lawyer’s area of practice, or other reasons. Kritzer, *supra* note 30, at 27.

<sup>112</sup> Of course, this hypothetical plaintiff’s complaint may be dismissed anyway, if the facts constituting her grievance do not give rise to a legal claim. But this is *legal* insufficiency of the complaint, and *Twombly* and *Iqbal* did not nothing to alter the requirement that complaint be legally sufficient.

<sup>113</sup> To the extent that attorneys working on a *pro bono* basis and legal aid providers are oversubscribed, one should again expect plaintiffs’ attorneys to screen cases on plausible merit before filing.

<sup>114</sup> See Schneider, *supra* note 1; Miller, *supra* note 10, at 67–68.

the only cases that get filed are the cases where the facts make it plausible that the attorney will recover a fee, a plausibility pleading standard will do little more than no pleading standard. Even after *Twombly* and *Iqbal*, the plaintiffs' attorney, not the judge, serves as the gatekeeper for the federal courts on the basis of merit.

As noted earlier, surveys of attorneys elicited many responses among plaintiffs' lawyers that *Twombly* and *Iqbal* had little effect on their practice. These surveys responses go on to say that screening cases for merits was a regular practice long before *Twombly*:

"I plead facts based on the prescreening I do before filing a case. My work is done up front and I plead with specificity."<sup>115</sup>

"Plaintiff's counsel who practice wholly in this area also generally take nearly all work on a contingent fee basis, as almost no clients can afford to pay attorney's fees, and therefore are already extraordinarily careful in case selection."<sup>116</sup>

"I have always carefully screened my cases."<sup>117</sup>

These surveys also confirm that factually detailed pleading has always been the norm:

"I have always drafted detailed complaints."<sup>118</sup>

"We have always included more than is necessary for notice pleadings."<sup>119</sup>

"I never did notice pleading, always much more."<sup>120</sup>

"I have always done very fact-intensive pleading and could always add more facts if needed."<sup>121</sup>

Given all this, it should not be surprising that, as Stancil and other have surmised, "the vast majority of litigated cases already satisfy the heightened [pleading] standard."<sup>122</sup>

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<sup>115</sup> WILLGING & LEE, *supra* note 61, at 29.

<sup>116</sup> Hamburg and Koski, *supra* note 10, at 62.

<sup>117</sup> *Id.* at 64.

<sup>118</sup> *Id.* at 64. By my count, 31 respondents volunteered something to this effect. Of these, 27 explicitly said that they had "always" pleaded with detail. *Id.* at 62–74. In contrast, 7 said that they plead more facts, 3 noted that defendants are filing more MTDs, 1 attorney mentioned a complaint being dismissed and 1 said a case was not filed because of *Twombly* and *Iqbal*.

<sup>119</sup> WILLGING & LEE, *supra* note 61, at 28.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 28–29.

<sup>122</sup> Stancil *supra* note 4, at 126.

Of course, there may be situations where the desire to signal case strength is overridden by other strategic considerations, and the plaintiff will want to file a deliberately ambiguous or sparse pleading.<sup>123</sup> What is important to note here is that the withholding of detail is strategic, rather than a reflection of a lack of information on the part of the plaintiff. (As argued above, a true lack of information would be a reason for the plaintiffs' attorney not to take the case.) Thus, the plaintiff could always survive a motion to dismiss through repleading with greater detail.<sup>124</sup>

This is not to say that any pleading standard, no matter how strict, will have no effect. Rather, "plausibility" pleading has little bite because plaintiffs' attorneys already screen out implausible cases at the filing stage, no matter how low the pleading standard. If a "plausibility" standard morphs into something stricter, such that "plausible" cases may nonetheless get dismissed at the pleading stage, then litigation may look very different than it did before *Twombly*. For now, at least, the Supreme Court says the standard is simply "plausibility," and the data so far are consistent with this.

## B. Detailed Pleading in Nuisance Suits

Concern about the "*in terrorem*" effect of litigation costs on settlement value was expressly cited by the majority in *Twombly* as motivation for requiring plausible pleadings.<sup>125</sup> In Part III.A above, I set

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<sup>123</sup> See, e.g., WILLGING & LEE, *supra* note 61, at 29 (quoting a plaintiffs' attorney to say, "As a plaintiff I plead enough to tell the story but avoid pleading facts that might come back to haunt me"); *Coe v. N. Pipe Products, Inc.*, 589 F.Supp.2d 1055, 1098 (N.D. Iowa 2008) (in employment discrimination case, allowing plaintiff to invoke either a mixed-motives or disparate treatment theory at summary judgment when complaint was ambiguous as to the nature of the theory).

<sup>124</sup> This dynamic of strategic ambiguity followed by, if necessary, detailed and specific pleading explains why, among the small percentage of cases that do face motions to dismiss, a large fraction have the motions granted, but with leave to amend. See CECIL ET AL., OF WAVES AND WATER, *supra* note 33, at 14 Table 4 (reporting that 35.3 percent of motions to dismiss in 2010 were granted with leave to amend). In many cases with such dismissals, the plaintiff files an amended complaint that survives further challenge. See CECIL ET AL., UPDATE, *supra* note 43 at 10 Table A-4 (reporting that only 42.5 percent of cases in 2010 in which a motion to dismiss was granted were terminated within 90 days of the granting of the motion).

<sup>125</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

aside the possibility of a plaintiff bringing a lawsuit partly or solely on the basis of its nuisance value. I now address this possibility.

It has long been recognized that litigation is a strategic game, and that the burden and timing of litigation costs can factor into whether the parties settle, and for how much.<sup>126</sup> A canonical paper on this topic by Rosenberg and Shavell gives the example of a plaintiff who can file (at minimal cost) a complaint, even though both the plaintiff and the defendant know that the case has no merit.<sup>127</sup> Their model predicts that the defendant will not litigate the case and win; instead, the defendant will settle with the plaintiff. Why? Because defending the case is costly, and since both the plaintiff and defendant know that the case is meritless, they will agree to a “nuisance settlement”—a positive amount lower than the defendant’s cost of defending against the claim.<sup>128</sup>

Robert Bone has applied this logic to pleading and motions to dismiss.<sup>129</sup> He claims, echoing Rosenberg and Shavell, that the most a meritless suit could extract from a defendant is the defendant’s cost of answering the complaint. His explanation is that once the complaint is answered, the plaintiff must expend additional resources to continue the lawsuit, and if the suit is meritless, the plaintiff will not do so.<sup>130</sup> By this logic, meritless suits will be rare. Because “answering is seldom more costly than filing, the model predicts that few frivolous plaintiffs will find it worthwhile to sue.”<sup>131</sup>

Given this model of pleading and settlement, it seems that the problem of frivolous litigation which so preoccupied the *Twombly* court is unlikely to be very costly to defendants, assuming that it happens at all. But this model of pleading and settlement understates the relevance of discovery costs to settlement. So long as the plaintiff’s costs of conducting discovery are less than the defendant’s costs, the plaintiff can refuse the “nuisance settlement” predicted by Rosenberg and Shavell and Bone, force the defendant to file an answer, and then ini-

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<sup>126</sup> There is large game-theoretic literature on nuisance litigation. For a detailed review of the literature, and more formal treatment of the pleading strategies described below, see Hubbard, *Two Models*, *supra* note 55.

<sup>127</sup> David Rosenberg & Steven Shavell, *A Model in which Suits Are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3 (1985).

<sup>128</sup> *Id.* at 4.

<sup>129</sup> Bone, *Pleading Rules*, *supra* note 11, at 873. Rosenberg and Shavell’s model is sufficiently abstract that the cost of “defense” to which they refer could include all or some of the costs of a MTD, an answer, or discovery.

<sup>130</sup> *Id.* at 921 & n.202.

<sup>131</sup> ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 150 (2003).

tiate discovery, at which point the defendant is willing to settle—but this time, for any amount less than the cost of complying with the obligations of discovery.

This is not a trivial difference. The cost of copying each paragraph of the plaintiff's complaint and then inserting the word "Denied" beneath each one may not give a wealthy defendant pause; but the cost of preserving, collecting, reviewing, and producing millions of pages of records and electronically stored information will.

In order for this strategy to succeed, however, the plaintiffs' attorney must ensure that the plaintiff's threat to pursue discovery after the defendant files an answer is credible. To do this, the plaintiff must make pursuing discovery after the defendant answers as costless as possible for herself. If she does not, the plaintiff's threat to impose discovery costs on the defendant becomes less credible, because following through on the threat requires expenditures by the plaintiff as well.

For this reason, the timing of litigation expenses affects the credibility of threats to pursue litigation, and plaintiffs have an incentive to front-load discovery costs to the maximum extent possible. By gathering all information and evidence from the plaintiff *before the case is filed*, the plaintiffs' attorney turns all of the plaintiff's costs of discovery into sunk costs. By the time the defendant files its answer, the plaintiff faces little or no additional costs if she moves forward with discovery.<sup>132</sup>

The only challenge that remains for the plaintiffs' attorney in executing this strategy is to credibly communicate to the defendant that the plaintiff's costs of discovery have already been sunk. This is a challenge because every plaintiffs' lawyer will have an incentive to claim this is true in order to gain an advantage in settlement negotiations. It is here that detailed pleading serves as a nearly ideal device to credibly signal that that the plaintiff has sunk her discovery costs.

At this point, one may wonder how a plaintiff with a low-merit or meritless claim can expend costs on detailed pleading. It is worth noting that—at least in the absence of a plausibility pleading standard—the detailed pleadings need not contain allegations that, if true, tend

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<sup>132</sup> Of course, it will often be the case that it is much easier for the plaintiff to gather new evidence during discovery, when it can compel production from the defendant, than in advance of litigation. But note that in the scenario described here, the plaintiff is not seeking to discover information from the defendant in the pre-litigation period. Rather, the plaintiff is sinking the costs of *her own* production, as well as the costs of developing legal theories and the like. In a nuisance suit, the plaintiff has no desire prior to litigation to gather information in the possession of the defendant. By assumption, the (lack of) merit of the claim is already common knowledge to the parties.

to prove plaintiff's case. Instead, the plaintiff needs only ensure that the details in the complaint credibly reflect the expenditure of effort that otherwise would have to occur after the complaint was filed. In this respect, documenting a failed investigation works as well as documenting a successful one. If this sounds far-fetched, it may be. But perhaps, at least to the eyes of seven Supreme Court justices, this is exactly what the complaint in *Twombly* did.<sup>133</sup>

Nonetheless, whether the plaintiff's complaint details a successful or a failed investigation is relevant to one thing: a motion to dismiss. So far in this Part, I have assumed no pleading standard, but here we see where a requirement of plausibility pleading may have bite. If the suit is totally meritless or extremely weak, the complaint may not survive a motion to dismiss under a plausibility pleading standard. The best the plaintiff can do is a true "nuisance settlement" in the sense described by Bone. But in cases that have some (or even great) merit, the plaintiffs' attorney can still use the costs of discovery to negotiate a more favorable settlement. Thus, even in a case of limited merit a plaintiffs' attorney may want to invest in a strong pleading if the defendant's costs of discovery are likely to be very high.

It is important here to note that this same argument does not apply to detailed *answers* to pleadings. Given the argument above, a reader may wonder why, if detailed pleading is so advantageous, defendants almost never answer in detail.<sup>134</sup> The reason is that a defendant stands to gain nothing from detailed pleading in a nuisance suit. The point of detailed pleading in nuisance litigation is to document the expenditure of one's litigation costs—but the defendant's primary objective in a nuisance suit is avoiding its litigation costs.<sup>135</sup> Indeed, a nuisance suit is filed precisely because the defendant would rather settle than sink the costs of litigation.<sup>136</sup>

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<sup>133</sup> See Consolidated Amended Class Action Complaint, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220), 2003 WL 25629874 (containing 29 pages of allegations in 96 numbered paragraphs, with 94 of the paragraphs "based upon . . . the investigation of counsel.").

<sup>134</sup> See Picker, *supra* note 101, at 175 ("As a look at any recently filed answer makes clear, we know how the defendant is going to answer: the defendant is simply going to deny the allegation.").

<sup>135</sup> Recall that in nuisance litigation, both parties already know that the claim lacks merit, so detailed pleading does not serve to communicate information about the strength of the claims.

<sup>136</sup> As I explain elsewhere, under certain conditions a defendant does have a counter-strategy to deter nuisance suits of this type, but it has nothing to do with pleading. The key for the defendant is to hire litigators on a retainer, rather than hourly, basis to defend potential nuisance suits. See Hubbard,

In short, a “nuisance suit” will only have settlement value if the plaintiff’s threat to impose discovery costs on the defendant is credible. In order for the plaintiff’s threat to be credible, the plaintiff must not herself be deterred from litigating by her own discovery costs. How, then, can a plaintiff make the threat to litigate credible? One way is for the plaintiff to “front-load” much of her discovery costs, by engaging in a thorough pre-complaint investigation: identifying and collecting documents and witnesses, conducting legal research, and developing litigation strategy. By sinking all of these costs before the lawsuit even begins, the plaintiff will face little additional cost when responding to discovery from the defendant. Thus, the plaintiff can credibly threaten to impose burdensome discovery demands on the defendant, undeterred by the prospect of her own costs of responding to discovery.<sup>137</sup> Most importantly, considering the possibility of nuisance litigation does not change my central result from Part III.A: that even under no pleading standard, plaintiffs who file lawsuits will plead with factual detail.

Thus, the impact on *Twombly* and *Iqbal* on this category of cases is more subtle than commonly understood. As detailed pleading was the norm long before *Twombly*, we should not expect *Twombly* and *Iqbal* to change the presence or quantity of detail in pleadings—even frivolous pleadings! But *Twombly* and *Iqbal* do not necessarily require detailed pleading; they require plausible pleading. What does this mean in the context of nuisance litigation? By definition, a nuisance suit is one in which the parties know that the plaintiff’s claim will not prevail on the merits.

For some types of cases, even plaintiffs bringing nuisance suits can draft plausible complaints. Imagine an employment discrimination complaint that alleges that the plaintiff is a member of a protected class, that the plaintiff was fired while other employees—all white males under 40—were not fired, and the plaintiff was replaced by a white male under 40 whose resume and experience were weaker than the plaintiff’s. These allegations could be brought by a plaintiff with an overwhelmingly strong case, or they could be brought by a plaintiff

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*Two Models*, *supra* note 55. Empirically, this phenomenon manifests itself in the ever-growing in-house legal departments of large, repeat player defendants.

<sup>137</sup> Note that this argument applies only to nuisance suits brought in order to exploit high litigation costs of the defendant. Parties may bring nuisance litigation for reasons unrelated to the defendant’s litigation costs. For example, the “fishing expedition” lawsuit seeks not relief for its (pretextual) claims, but rather to uncover evidence that could justify the bringing of additional (potentially meritorious) lawsuits.

who is certain to lose—perhaps because other facts (plaintiff’s gross incompetence, mistreatment of co-workers, etc.) need not have been included in the complaint.<sup>138</sup>

For other types of cases, though, the plausibility requirement may have teeth. Perhaps elaborate antitrust claims such as *Twombly* itself fall into this category. But the hard-to-detect effect of *Twombly* and *Iqbal* on dismissal rates suggests either that these cases are relatively few—or that courts were dismissing them even before *Twombly*. As noted above, *Twombly* itself was dismissed by the district court.<sup>139</sup> I now discuss this hypothesis—that plausibility pleading was the norm long before *Twombly*.

### C. Detailed Pleading from the Judge’s Perspective

So far, I have argued that detailed pleading will arise even in a regime of no pleading standard. The goal of this thought experiment, of course, is to shed light on actual pleading practice in a world in which defendants *can* file motions to dismiss and judges *can* dismiss cases for failure to state a claim. I must consider, then, how screening of case quality by plaintiffs and the use of pleading detail as a signal to the defendant interact with the third actor in the courtroom: the judge.

At the end of Part III.B, I began this discussion in the specific context of the nuisance suit. In that context, a plausibility pleading standard creates an opportunity for a defendant to avoid settling those nuisance suits for which the plaintiff cannot muster sufficient allegations to survive a motion to dismiss.

Is this a reason to praise *Twombly* and *Iqbal*? Perhaps. Much scholarship takes for granted that plausibility pleading was the product of *Twombly* and *Iqbal*.<sup>140</sup> This is surely true as a doctrinal matter.

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<sup>138</sup> More generally, some categories of cases may involve “inventory”-type claims—masses of individual plaintiffs with similar allegations, some of which are meritorious and any many of which are not. It may be that in some circumstances, it is more cost effective for a plaintiffs’ attorney simply to file boilerplate (but plausible) complaints for the entire “inventory” than to engage in screening on merit before the fact. Anecdotally, some types of asbestos litigation have been described this way, as well as certain types of cases involving relatively small claims for fixed statutory damages, such as under the Fair Debt Collection Practices Act.

<sup>139</sup> See *supra* at n 96 and accompanying text.

<sup>140</sup> See, e.g., Miller, *supra* note 10; Spencer, *Iqbal and the Slide* *supra* note 10, at 201; J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L.

But as a matter of federal court practice, it may be just as hasty to praise *Twombly* and *Iqbal* for changing litigation outcomes as it is to lament their doing so. It instead seems that *Twombly* and *Iqbal* were merely an imprimatur by the Supreme Court of the practice of plausibility pleading.

The reason has to do with how the judge responds to the dynamic of detailed pleading described above. Because of the incentives to screen and signal case quality, plaintiffs will file detailed factual pleadings regardless of the pleading standard. Thus, even under *Conley*, federal court judges saw detailed pleadings in nearly every case. This not only meant that few complaints would be susceptible to motions to dismiss,<sup>141</sup> but that the few complaints that lacked factual detail appeared exceptional in their lack of detail. While spare allegations were consistent with notice pleading, a judge could infer that the plaintiff lacked favorable facts to plead and conclude that the case is exceedingly weak, at least relative to the great mass of cases with detailed pleadings. If so, a judge would be tempted to save the court's and the parties' time and dispose of the case at the outset.

Take a hypothetical district court judge in the pre-*Twombly* era. This judge has no particular opinions about pleading standards but understand that she operates in a liberal, notice pleading regime. The overwhelming majority of civil complaints that she sees are long—sometimes tediously so<sup>142</sup>—recitations of the facts of the dispute, with particular emphasis on the facts that tend to prove the plaintiff's case.

Now imagine a complaint is filed in this judge's court alleging an employment discrimination claim that offers nothing more than the identities of the plaintiff and defendant, the required jurisdictional allegations, and the following statement:

“I was turned down for a job because of my race.”

When the judge reads this complaint, what will her reaction be? Probably skepticism. All other plaintiffs in this kind of case—even the ones who end up losing—provide some indication in their complaints of why or how the denial of employment was because of race. Perhaps they describe how they were highly qualified for the job, how their

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REV. 1713, 1757 (2012) (“[I]n 2007 the Supreme Court introduced a more rigorous pleading-stage screen: the plausibility standard.”).

<sup>141</sup> An empirical regularity, as noted above in Part II.A.

<sup>142</sup> See *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7<sup>th</sup> Cir. 1986) (“The pleading of facts is well illustrated by the present case. The complaint is twenty pages long and has a hundred page appendix.”); *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 114 (2d Cir. 1982) (bemoaning the “prolix and discursive 69 page complaint”).

employers hired white applicants instead, or how the hired applicants were less qualified. Perhaps they allege comments about race made by human resources personnel or provide accounts of other minorities treated poorly by the defendant. But this plaintiff? Nothing.

Given that this judge lives in a world in which detailed factual pleading is the norm, she will likely draw a negative inference. Even plaintiffs with poor cases, the logic goes, can muster *some* evidence of discrimination in their complaint. How weak can this case possibly be? If this plaintiff's attorney cannot state *one fact* suggesting race discrimination, the judge might wonder, why is this complaint worth up to two years of the court's time?<sup>143</sup>

Of course, the judge might not grant a motion to dismiss the complaint. But the judge might. And *this* is the interesting part, because "I was turned down for a job because of my race" is all a complaint has to say" to state a Title VII claim for racial discrimination.<sup>144</sup> A complaint *will* say much more than it *has to* say. And if judges see detailed pleading all the time, it is natural that they would come to expect it.

In short, if virtually every plaintiff, even those with relatively weak cases, has an incentive to plead in detail, judges—even judges hearing cases under no pleading standard—will (accurately) perceive factually detailed pleading as the norm. Sparsely pleaded complaints will appear aberrant and suspect, leading judges to (accurately) infer that the claims raised by the complaint are likely to be relatively weak. Given this dynamic, the desire of judges to control their case-loads and weed out weaker cases will create constant pressure to dismiss the rare complaint that gives defendant "notice" of the plaintiff's claim but that raises an "implausible" claim.

This expectation of, and demand for, factually detailed pleading is consistent with the evidence from *Conley* through *Twombly* described above in Part II.D, as well as the tendency, meticulously documented by Marcus<sup>145</sup> and Fairman,<sup>146</sup> of pleading standards in practice to look more like fact pleading than notice pleading.<sup>147</sup> As one practitioner

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<sup>143</sup> According to my analysis of the administrative data described in Hubbard, *Testing for Change*, *supra* note 32, the median duration for a federal civil case litigated through trial during the period 2002–2008 was approximately 1 year, 10 months.

<sup>144</sup> *Bennett v. Schmidt*, 153 F.3d 516, 518 (7<sup>th</sup> Cir. 1998) (Easterbrook, J.).

<sup>145</sup> Marcus, *supra* note 4.

<sup>146</sup> Fairman, *supra* note 84.

<sup>147</sup> Additionally, scholars such as Bone argued that while *Twombly* was a surprise, it was hardly an innovation. See Bone, *Pleading Rules*, *supra* note

argued shortly after it was decided, *Twombly* “is less a sea change as it is a recognition of what was already going [on] out there in the trenches.”<sup>148</sup>

This leaves only the puzzle of why the Supreme Court bothered to address pleadings standards when it did—or at all. On this question, I will offer only conjectures. Perhaps *Twombly* and *Iqbal* were simply “oddball” cases, to use the term coined by Suja Thomas, and the Supreme Court was engaged in rare exercises in error correction.<sup>149</sup> Perhaps they were not about pleading at all; when teaching Civil Procedure, I prompt my students to consider the possibility that *Twombly* was simply an antitrust case and *Iqbal* was a case about *respondeat superior*. Perhaps, most simply, they are just a product of the Roberts Court’s distinctive interest in civil procedure and its efforts to “clean up doctrinal confusion” in the field.<sup>150</sup>

None of this is to claim that judges are dismissing the “right” cases. Indeed, this article makes no claim that judge are or are not screening out the right cases at the pleading stage. Rather, this article makes a more fundamental claim: in the mine run of cases, the judges are not, for better or worse, doing any screening at all. That job is handled by the plaintiffs’ attorney.

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11 and Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415 (2010).

<sup>148</sup> Andrew Pincus, *quoted in* Jeff Jeffrey, *The Changing World of Civil Procedure Post Twombly, Iqbal*, THE BLOG OF THE LEGAL TIMES (Aug. 10, 2012, 2:42 P.M.), <http://legaltimes.typepad.com>. Judges have long recognized this dynamic: “Plaintiffs’ lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to ‘educate’ (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove.” *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 723–724 (7th Cir. 1986) (Posner, J.). *See also* C. Kevin Marshall and Warren Postman, *Pleading Facts and Arguing Plausibility: Federal Pleading Standards a Year After Iqbal*, JONES DAY PUBLICATIONS (JUNE 2010) [http://www.jonesday.com/pleading\\_facts](http://www.jonesday.com/pleading_facts) (noting practice, even before *Twombly*, of pleading in detail).

<sup>149</sup> Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011).

<sup>150</sup> I take this view of the Roberts Court, and the quotation, from Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 317 (2012), although Wasserman himself does not characterize *Twombly* and *Iqbal* in this way in this article.

## IV. EVERYTHING NEW IS OLD AGAIN

I now return to the empirical puzzles posed at the outset of this article. The theory I present in this article predicts relative constancy in pleading practice, even as pleading rules or precedents change. In light of this, the seemingly minimal effects of *Twombly* and *Iqbal* become easy to explain. Even under notice pleading, plaintiffs would not file lawsuits that lacked plausible claims, so introducing an explicit requirement of plausible factual allegations requires little change in pleading behavior and precipitates little change in case outcomes.

This logic applies equally to explain the lack of any special effect on employment discrimination cases and other types of cases that have been the subject of special concern in the wake of *Twombly* and *Iqbal*. There are, no doubt, plaintiffs who never obtain relief because they never became aware of the facts, such as the defendant's discriminatory intent, that establish the strength of their claims. But even in a world with no pleading standard, such cases would tend not to be filed, for the simple reason that they are a bad investment. Litigation is costly. It is simply not worthwhile unless you have a good reason to think you will win.

Further, the number of motions to dismiss is, and always has been, relatively modest, and the number of cases dismissed is even smaller. These facts are a challenge to the view that plausibility pleading would make motions to dismiss routine. But the infrequency of motions to dismiss is natural consequence of the fact that the vast majority of cases are screened on plausibility before ever being filed.<sup>151</sup> This is as true today as it was before *Twombly*—and indeed, as it was before the Federal Rules themselves, as Dean Clark himself observed.<sup>152</sup> Motions to dismiss are only likely in cases where the parties happen to have very different ideas about what counts as plausibility, or where one or both of the parties don't care about plausibility—for example, a

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<sup>151</sup> Indeed, the magnitude of case screening by plaintiffs' attorneys dwarfs the screening activity of the federal courts. A survey of contingency fee lawyers—in 1997, long before *Twombly*, found that “contingency fee lawyers generally turn down at least as many cases as they accept, and often turn down considerably more than they accept.” Kritzer, *supra* note 30, at 26. *See also id.* at 28 (“We might return to Elihu Root's injunction, ‘about half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop,’ as one possible measure [of whether attorneys are too litigious]. If we take ‘half of the practice,’ to refer to the proportion of potential cases accepted, then most contingency fee lawyers achieve this measure of decency.”).

<sup>152</sup> *See supra* note 28 and accompanying text.

plaintiff who files a dubious complaint in the hopes of a nuisance settlement, or a defendant who files a dubious motion to dismiss in the hopes of intimidating the plaintiff or delaying discovery.

In contrast to the infrequency of motions to dismiss is the frequency with which filed lawsuits are settled shortly after a complaint is filed. In a recent study, Boyd and Hoffman study litigation activity in federal civil cases and find that about one-third of filed lawsuits are settled without any litigation activity occurring—no motions, no discovery.<sup>153</sup> This begs the question, *If the parties had no need for motion practice or discovery to reach settlement, why did the plaintiff bother to file at all?* The answer is that the act of filing a detailed complaint itself promotes settlement.<sup>154</sup>

Finally, as noted in Part I, the “Paradox of Pleading” is a popular argument in favor of notice pleading: “the plausibility inquiry employed by *Twombly* and *Iqbal* as a pre-discovery screening device . . . can thwart meritorious claims by plaintiffs who, without the discovery process, cannot obtain the information needed to satisfy the plausibility requirement.”<sup>155</sup>

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<sup>153</sup> Christina L. Boyd and David A. Hoffman, *Litigating Toward Settlement*, J. L. ECON. & ORG. (forthcoming).

<sup>154</sup> This is hardly a secret among practitioners. “A well-developed complaint may force the defendant to confront many questions that will require answers if it hopes to prevail; the more of these questions that give the defense pause, the more likely that it will be receptive to considering early settlement discussions or mediation on terms favorable to the plaintiff.” Alan Mansfield, *Factors favoring factually detailed complaints—Securing Early Settlement*, 1 BUS & COM. LITIG. FED. CTS. §7:33 (Robert L. Haig, ed., 3d ed. 2011).

<sup>155</sup> Steinman, *supra* note 7, at 1311. See also Stancil, *supra* note 4, at 92 (“An informational asymmetry favoring defendants over plaintiffs drives a preference for liberal pleading standards. That is, the typical defendant often has sole possession of relevant information, and plaintiffs often cannot know critical details of their claims before discovery.”); Gordon, *supra* note 10 (“Where intent or discriminatory purpose is at issue, the cases present the circular logic of catch-22. In civil rights claims or motive-based torts—on in claims where the defendant’s conduct is by nature concealed, like fraud or anti-trust—evidence is in the hands of the defense. Discovery remains the only opportunity to gather this kind of evidence. Yet if a meritorious claim can never get past the pleading stage, discovery—many claimant’s primary chance to uncover facts—is not even an option.”); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 168 (2010) (“[There] is the problem of ‘information asymmetry’ at the pleading stage. This is a common structural feature of modern federal litigation, particularly civil rights, where key relevant information is uniquely in defendants’ hands, unknown to the plaintiff at the time of pleading and unknowable without opportunity for discovery. . . . And if the complaint can-

Further, this concern appears to have particular traction in civil rights, and specifically employment discrimination, cases.<sup>156</sup> Perhaps because *Conley* and *Iqbal* were civil rights cases, this paradox is taken as uncontroversial.<sup>157</sup> But the discussion above should make clear that this “paradox” is more myth than reality.

The paradox begins with a plaintiff who believes she has a meritorious case but who is unable to plead facts establishing the plausibility of her case. This scenario begs the question of how it is that the plaintiff has formed her belief of the merit of her grievance. This belief must come from something that the plaintiff, or someone known to the plaintiff, saw, heard, or experienced—in other words, out of *facts*. But if so, then all the plaintiff needs to do is plead those facts that led *her* to conclude that her claim was meritorious. The only paradox here is why someone with no facts indicating that they have a claim would nonetheless believe they have a claim.

Of course, there are surely some potential plaintiffs who have been injured by the wrongdoing of a potential defendant, but who have no facts suggesting this to them. The problem is that neither we nor they can distinguish them from everyone else—those who have *not* been injured by the wrongdoing of a potential defendant, and who (like the first group) have no facts suggesting that they have been wronged.

In short, a plaintiff with no specific facts tending to show that she has a claim will rarely file a lawsuit, regardless of the pleading standard. The reason, as noted above, is that such a lawsuit is not worth bringing. Importantly, this result is inevitable under *any* pleading regime. The practice of plausibility pleading is the outcome of the strategic interactions of plaintiffs and defendants and their attorneys, for whom pleading serves as a mechanism for credible communication

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not survive—a more likely result under a stricter pleading regime—the plaintiff never will have an opportunity to truly test the merits of the claim.”). See also Spencer *Plausibility*, *supra* note 7, at 488; Miller, *supra* note 10, at 45, 105; Steinman, *supra* note 7, at 1311 n. 116 (citing additional sources); Martin H. Redish and Lee Epstein, *Bell Atlantic Corp v. Twombly and the Future of Pleading in Federal Courts: A Normative and Empirical Analysis* 2 (Northwestern Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 10–16, 2008), available at <http://ssrn.com/abstract=1581481>; Hoffman, *supra* note 10, at 1261.

<sup>156</sup> See *supra* nn. 19–20 and accompanying text.

<sup>157</sup> Indeed, Miller notes, “The problem was widely recognized at the Duke Conference [on civil litigation, May 10–11, 2010, sponsored by the Civil Rules Advisory Committee to the Judicial Conference] and no opposition was voiced to the need for solving the information-asymmetry problem.” Miller, *supra* note 10, at 105 n. 404.

and a catalyst for settlement. *Twombly* and *Iqbal* regularized formal doctrine, but did not revolutionize practice.

This raises a broader question: to what extent is the Supreme Court a lagging, rather than leading, indicator of changes in civil procedure and practice? Hillel Levin has noted that this is not the first time a landmark Supreme Court decision on procedure ultimately proved to be little more than a confirmation of existing practice.<sup>158</sup> For more than a decade after the *Celotex* trilogy was decided in 1986,<sup>159</sup> a steady stream of papers argued that these cases had brought about the end of the jury trial. But empirical studies found that summary judgment rates rose, and trial rates fell, years before the *Celotex* trilogy, and in fact those rates were basically flat throughout the 1980s.<sup>160</sup>

#### V. CONCLUSION: THE “LIBERAL ETHOS” IN MODERN PRACTICE

In presenting its account of plausibility pleading, the objectives of this paper have been essentially descriptive, rather than normative. But if plausibility pleading is—and has long been—the norm, one might ask whether this stands in tension with the purposes of pleading under the Federal Rules and the “liberal ethos” that the Federal Rules introduced in 1938. As Marcus put it, “Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the ‘liberal ethos,’ in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.”<sup>161</sup>

Spencer has captured a widespread sentiment in arguing that with *Twombly* and *Iqbal* the courts have rejected the “liberal ethos” of civil procedure in favor of what he calls the “restrictive ethos” in civil procedure.<sup>162</sup> The restrictive ethos is “characterized by a desire to dis-

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<sup>158</sup> See Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143 (2010).

<sup>159</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>160</sup> See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practices in Six Federal District Courts*, 1 J. EMPIRICAL LEGAL STUD. 861 (2007); STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, (2004).

<sup>161</sup> Marcus, *supra* note 4, at 439. See also Spencer, *Restrictive Ethos*, *supra* note 21, at 355–56 (footnotes omitted) (“Simplified pleading and broad discovery were designed to promote resolution of disputes on the substantive merits as opposed to procedural technicalities.”).

<sup>162</sup> Spencer, *Restrictive Ethos*, *supra* note 21, at 353.

courage certain claims and to keep systemic litigation costs under control.”<sup>163</sup> This “restrictive ethos . . . frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court.”<sup>164</sup>

While the merely descriptive account presented in this paper does not establish any definitive normative claims about plausibility pleading, it does suggest that a juxtaposition of “liberal” notice pleading and “restrictive” plausibility pleading may be more apparent than real. Rather, I would claim that plausibility pleading serves the same ends today that notice pleading sought to serve in 1938.<sup>165</sup>

Of course, *Twombly* and *Iqbal* certainly do not promote the resolution of disputes by jury trial, or after discovery. Quite the opposite, they seem to prefer disposition at the pleading stage, before discovery. But any conclusion as to the demise of the liberal ethos and the rise of the restrictive ethos would be doubly overstated. Judged by the standard of “disposition . . . on the merits, *by jury trial*, after full disclosure through discovery,”<sup>166</sup> the liberal ethos has never taken hold; jury trials comprise about 2 percent of all federal court civil dispositions, and did so long before *Twombly*.<sup>167</sup> But neither has the restrictive ethos taken hold; both before and after *Twombly* and *Iqbal*, granted motions to dismiss comprise an equally small share of federal court civil dispositions.<sup>168</sup>

The empirical infrequency of *both* jury trials and dismissals for failure to state a claim is a sign that our usual conception of the liberal ethos relies on a dichotomy—between resolution *on the merits at trial* and resolution *due to technical defects in the pleadings*—that no longer exists. This dichotomy existed under common law pleading, and was justifiably a concern of Dean Clark and the drafters of the Federal Rules. But it is irrelevant today. Instead, both resolution at trial and resolution on the pleadings are unusual outcomes in modern litiga-

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<sup>163</sup> *Id.* at 366.

<sup>164</sup> *Id.* at 353–54.

<sup>165</sup> In a closely related vein, Bone has argued at length that the vision of the drafters of the Federal Rules was a pragmatic one, and that *Twombly* reflects a pragmatic approach to pleading. See Bone, *Pleading Rules*, *supra* note 11, at 890–98.

<sup>166</sup> Marcus, *supra* note 4 at 439 (emphasis added).

<sup>167</sup> Analysis of the administrative data described in Hubbard, *Testing for Change*, *supra* note 32, during the period 2002–2008.

<sup>168</sup> See Figure 1 and accompanying text.

tion. The real endgame is settlement,<sup>169</sup> and the liberal ethos of the Federal Rules needs to be understood in this light.<sup>170</sup>

How does one translate the “liberal ethos” into a world of settlement? By recognizing that the critical distinction is not between pleading and trial, but between the resolution of litigation as “a game of skill” versus “on the merits.”<sup>171</sup> With common law pleading long buried, however, the “game of skill” that should attract our attention is not exploitation of the traps and technicalities of pleading, but rather the strategic use of discovery costs to obtain settlements unjustified by the merits of the claim.

Viewed in this light, plausibility pleading does not represent a departure from the liberal ethos.<sup>172</sup> The *whole point* of the plausibility standard is that the court is judging the *merits* of the complaint.<sup>173</sup> *Twombly*'s concern was a case that would settle not because it had merit, but because the costs of discovery were so large and so asymmetrically burdensome to the defendant. Dismissing such a case *on the merits* is preferable to having such a case settle *not on the merits*.

Of course, because the true merit of a case is unobservable, any system that dismisses some cases at the pleadings stage runs the risk of dismissing a case that, had it not been dismissed, would have settled *on the merits*. It is this trade-off between the benefits of preventing settlements not on the merits and the costs of preventing settle-

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<sup>169</sup> For a broader discussion of the ways that settlement interacts with the Federal Rules, see Glover, *supra* note 137 ).

<sup>170</sup> Indeed, a feature of the informal models I describe in this paper is that all of the litigation strategy and pleading behavior is driven by litigation costs and the desire for settlement—neither the legal rules of pleading nor trial *per se* play a role in the analysis.

<sup>171</sup> These quotes are from *Conley*. “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

<sup>172</sup> See also Bone, *Pleading Rules*, *supra* note 11, at 890–898.

<sup>173</sup> Richard Marcus made this point long before *Twombly*: “Under the received tradition, the problem with common law pleading practice was that, while it led to actual decisions, it often did not lead to merits decisions because cases were frequently resolved on technicalities. The notice pleading scenario, by way of contrast, eliminates the possibility for even genuine merits decisions at the pleadings stage. The middle ground is to use pleadings practice to make genuine and reliable merits decisions. Contrary to expectation, this activity is not dead, though it is often camouflaged in notice pleadings language.” Marcus, *supra* note 4, at 454.

ments on the merits that is, or at least should be, the central issue in the debate on the wisdom of *Twombly* and *Iqbal*.

The non-effect of *Twombly* and *Iqbal* as an empirical matter, however, provides some comfort here. If *Twombly* and *Iqbal* are requiring courts to screen out cases that would not have been dismissed before, it is a small set of cases.<sup>174</sup> And even the *de facto* regime of plausibility pleading that I argue existed before *Twombly* involved a tiny number of dismissals, precisely because most low-merit cases were screened out by plaintiffs' attorneys before ever becoming lawsuits. The model described in Part III.B does identify one category of litigation in which plausibility pleading leads to different outcomes than no pleading standard: cases of extremely low merit that have settlement value because of the defendant's litigation costs. In these cases, complaints will contain detailed factual allegations (to credibly show the defendant that the plaintiff has front-loaded her discovery costs) but despite their detail, the allegations will not state a plausible claim (because the claim is, by assumption, very low merit). For these cases, plausibility pleading makes a difference relative to no pleading standard.

Further, while such cases are likely a small set of all filed cases, they may have a disproportionate impact on federal civil litigation as a whole.<sup>175</sup> The best available evidence on the costs of litigation indicate that even a tiny fraction of cases has the potential to impose large burdens on the federal courts and the civil justice system in general. My analysis of data from a recent FJC survey reveals that litigation costs are quite low in most cases—but a small fraction of cases are extraordinarily expensive: 5 percent of cases account for about 60 percent of litigation costs.<sup>176</sup>

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<sup>174</sup> As Suja Thomas has argued, *Twombly* and *Iqbal* were “oddball” cases—cases that involved unusual allegations and were unrepresentative of most litigation. Thomas, *supra* note 144, at 215. Perhaps, rather than have a broad effect, they will impact similar, “oddball” cases.

<sup>175</sup> *Twombly* and *Iqbal* have been criticized on the ground that “[a]lthough discovery can be enormously expensive in a small percentage of federal cases, *Twombly* and *Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them.” Miller, *supra* note 10, at 64. As this paper attempts to show, *Twombly* and *Iqbal* have not burdened “all cases”; they have had no effect on most cases. The only question is whether they are doing any good with respect to the “small fraction.”

<sup>176</sup> See WILLIAM H.J. HUBBARD, PRELIMINARY REPORT ON THE PRESERVATION COSTS SURVEY OF MAJOR COMPANIES (Sept. 8, 2011) (available online at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf\\_Empirical\\_Data/Civil%20Justice%20Reform%20Group.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Civil%20Justice%20Reform%20Group.pdf)), (Report submitted to Discovery Subcommittee of the Advisory Committee on Civil Rules) (using data reported in LEE & WILLGING, *supra* note 106).

What complicates this analysis is the fact that cases “with merit” and cases “with large and asymmetrical discovery costs” are not exclusive categories. A case can be both.<sup>177</sup> How to deal with litigation that is driven both by (plausible) merit and asymmetric litigation costs remains a critical policy question for civil procedure. *Twombly* and *Iqbal* direct our attention to this question, but hardly resolve it.

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<sup>177</sup> As Spencer notes, “discovery abuse in the form of impositional requests is not an evil unique to groundless or insufficiently pleaded claims. Such abuse can occur regardless of whether the underlying claims are legitimate or meritless, well-pleaded or not.” Spencer, *Plausibility*, *supra* note 7, at 452. See also Marcus, *supra* note 4, at 479 (noting, “The problem is identifying a strike suit. . . . [T]here is no intrinsic relation between litigation expense or other disagreeable side effects of a lawsuit and the absence of merit in a plaintiff’s case.”).

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