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A FRESH LOOK AT PLAUSIBILITY PLEADING

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THE LAW SCHOOL
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A Fresh Look at Plausibility Pleading

The plausibility pleading regime of Twombly and Iqbal has generated continuing controversy and concern over its effects on the ability of plaintiffs, particularly certain categories of civil rights plaintiffs, to bring cases in federal court. I assess the effects of plausibility pleading by undertaking a novel thought experiment: What would a plaintiff's filing and pleading decisions look like in a world with no pleading standard at all? In other words, what if there were no motions to dismiss for failure to state a claim, and every filed case could reach discovery? I show that in this hypothetical world, plaintiffs usually file factually detailed, plausible complaints or do not file at all. In short, pleading standards rarely matter. Perhaps most surprisingly, this is true even for cases in which information asymmetries favor the defendant. Plaintiffs' attorneys, not judges, are the gatekeepers to court, and pleading practices are driven not by doctrine but by settlement strategy. This analysis generates empirical predictions, which find support in a wide range of qualitative (though admittedly not conclusive) evidence. Further, this thought experiment may turn the normative critique of Twombly and Iqbal on its head: plausibility pleading may advance, rather than undermine, the "liberal ethos" of the Federal Rules. Plausibility pleading can make it easier for plaintiffs with risky but worthwhile cases to have their day in court.

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I. INTRODUCTION

When *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² put to pasture the venerable regime of “notice pleading” in federal civil procedure and introduced the concept of “plausibility pleading,” the result was “shockwaves through the legal community—for academics, practi-

¹ *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007).

² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

tioners, and judges alike.”³ After 50 years of near-dormancy, the scholarly literature on pleading exploded.⁴ The academic reaction to *Twombly* and *Iqbal* reflected a sense of concern—even alarm—at an apparent revolution in pleading and court practice.⁵ And now, six years after *Iqbal*, the turmoil still reverberates.

This continuing tumult is due to two fundamental factors. First, the stakes are understood to be extraordinarily high. Scholars tend to describe the pleading requirements of the Federal Rules of Civil Procedure as making judges the gatekeepers to the federal courts.⁶ And if pleading “is the key to the courthouse door,”⁷ then changing pleading

³ Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1305 (2010). See also Douglas G. Smith, *The Twombly Revolution*, 36 PEPPERDINE 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, *Twombly, 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) (“a startling move by the U.S. Supreme Court”); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L. J. 119, 122 (2011) (noting a near-consensus “among academic observers that the *Iqbal/Twombly* pleading standard marks a sharp break with the past”).

⁴ See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 137–38 (2009) (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 survey, see Steinman, *supra* note 3, at 1296–98 & nn.10–14.

⁵ See, e.g., Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B. U. L. REV. 1217, 1235 (2008) (“a sea of change”); Steinman, *supra* note 3, 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”).

⁶ Benjamin P. Cooper, *Iqbal’s Retro Revolution*, 46 WAKE FOREST L. REV. 937 (2011); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

⁷ Steinman, *supra* note 3, at 1295.

standards means changing the number of plaintiffs who will be turned away from court.

As originally envisioned by the drafters of the Federal Rules, and as affirmed in the seminal case *Conley v. Gibson*,⁸ the gatekeeping function of federal judges was minimal: “notice pleading,” which required only that a 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.⁹ 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.”¹⁰

Today, though, “notice pleading” in federal court is no more, and “plausibility pleading” reigns: the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”¹¹ And the “liberal ethos” of the Federal Rules has become something else—what Benjamin Spencer calls the “restrictive ethos,” which eschews discovery and trial in favor of dispositions at the pleading stage.¹²

Scholars have expressed concern for civil rights plaintiffs, and especially employment discrimination plaintiffs, who often lack direct evidence of the defendant’s motives at the outset of litigation.¹³ In this

⁸ *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

⁹ Edgar Tolman, Statement in *Proceedings of the Institute on Federal Rules*, reprinted in *Rules of Civil Procedure for the District Courts of the United States* (William W. Dawson ed.) (1938).

¹⁰ 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; *Twombly*, 550 U.S. 544, 573–76 (2007), (Stevens, J., dissenting); Stancil, *supra* note 4, at 109–14; 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 PENN. L. REV. 441, 447–52 (2010).

¹¹ *Twombly*, 550 U.S. at 570.

¹² A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 101 (2010).

¹³ Reinert, *supra* note 3, 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

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.”¹⁴

As a doctrinal matter, this is surely true. But what effects have come to pass? While many observers predicted large, observable changes in filing or dismissal rates, others were less sure.¹⁵ For example, Paul Stancil surmised that “the vast majority of litigated cases already satisfy the heightened [pleading] standard.”¹⁶ Thus, scholars have been careful to caution that the effect of *Twombly* and *Iqbal* is ultimately an empirical question, and careful observation would be necessary to inform our understanding of pleading.¹⁷

This brings us to the second factor fueling the continued ferment on pleading standards: despite a large body of empirical work on *Twombly* and *Iqbal*, the quantitative evidence on the effects of plausibility pleading on plaintiffs is to date inconclusive. The best meta-analysis of this literature is by David Engstrom,¹⁸ who notes serious problems with the reliability of results due to various selection effects in the data and collects results from the literature consistent with the number of affected cases being anywhere from zero to 100 percent of cases!¹⁹ While this literature will continue to mature and will serve as

and federal law have played an important historical role.”). For a sampling of citations, see Steinman, *supra* note 3, at 1311 n. 116.

¹⁴ Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010). See also Hatamyar, *supra* note 3, at 602 n. 259; Justice Stevens made a similar argument for antitrust cases in his *Twombly* dissent. See *Twombly*, 550 U.S. at 586–87 (Stevens, J., dissenting).

¹⁵ Note that throughout this article, “dismissal” refers to dismissal for failure to state a claim upon which relief can be granted.

¹⁶ Stancil, *supra* note 4, at 126.

¹⁷ See, e.g., Hoffman, *supra* note 5, at 1222; Arthur R. Miller, *supra* note 5, at 2; Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 *Lewis & Clark L. Rev.* 157, 158 (2010).

¹⁸ David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STANFORD L. REV. 1203 (2013).

¹⁹ The latter number is due to the fact that Jonah Gelbach estimates only a lower bound for the share of cases negatively affected, and finds that the lower bound is significantly different from zero. 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). For further discussion of selection effects in this literature, see also William H.J. Hubbard, *Testing for Change in*

the ultimate arbiter of the effects of plausibility pleading, right now the time is ripe for a fresh approach to both the theory and data animating our analysis of pleading.

In this paper, rather than focus on pleading *doctrine* or on *quantitative* evidence, I develop a theory of pleading *practice* and consider *qualitative* evidence. I make a case for reconsidering what effects we ought to expect plausibility pleading to have.

In doing so, this paper raises the questions: 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, for more cases than we expect, neither “notice pleading” nor “plausibility pleading” affects how pleadings are written, let alone whether the complaint is dismissed? And what if, for most of the cases for which pleading standards might matter, it is plausibility pleading, and not notice pleading, that better reflects the “liberal ethos” of the Federal Rules?

My analytical approach is to attempt to capture, in a simplified way, essential features of the practice of pleading and litigation, and then consider how we might expect pleading standards to affect litigation behavior. I undertake 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? In this hypothetical pleading regime, I argue, rational plaintiffs will still (usually) have the incentive to file factually detailed complaints or not to file at all. In other words, pleading standards do not dictate plaintiffs’ strategies for filing and pleading. Instead, filing and pleading practices reflect plaintiffs’ judgments about the costs and benefits of litigation and the best means of obtaining settlements.

The basic argument, which is detailed in Part II.A, 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 does not 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 not to settle with plaintiffs whose claims are weak; such plaintiffs will abandon their claims if they cannot obtain a settlement without suing.

Procedural Standards, with Application to Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, (2013); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014).

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. Civil procedure itself provides just such a mechanism: pleading! Through factually detailed pleading, 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 gatekeeping function because plaintiffs and their lawyers are the primary gatekeepers to the courts.²⁰ In this way, I offer a functional theory of pleading that complements doctrinal arguments by Adam Steinman, Robert Bone, and others, that *Twombly* and *Iqbal* are best understood as effecting a subtle, rather than dramatic, change in law or practice.²¹

The remaining portions of Part II then consider possible limits on this analysis. Perhaps surprisingly, the most-often-cited concern with plausibility pleading standards—asymmetry of information favoring defendants—does not affect my central thesis. In contrast, *pro se* and *in forma pauperis* plaintiffs may be affected by pleading standards. So too may claims involving asymmetry of costs or unusually high stakes.

Part III then considers how the practices of screening for merit by plaintiffs' attorneys and detailed pleading may influence the behavior of judges. Because detailed pleadings signaling merit are the norm even under the most liberal pleading standard, judges will see pleadings lacking detail as aberrant and signaling a lack of merit. If judges feel pressure to control their caseloads or resolve litigation inexpensively, they may tend to dismiss such complaints regardless of the (ostensible) pleading standard.

Part IV discusses the positive, empirical implications of this theory, and finds support for these implications in familiar, if somewhat old-fashioned, sources of data: aggregate court statistics, practitioner surveys, state law surveys, and doctrine. While I deliberately eschew the growing, but currently inconclusive, statistical literature on the effects of *Twombly* and *Iqbal* (including my own work in this area), I

²⁰ Of course, 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 (1997). Kritzer notes: "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.

²¹ See Steinman, *supra* note 3, at 1314–1327; Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 879–98 (2009).

hasten to note that as the results from this literature become clearer over time, these results will either confirm or reject the predictions of this theory. For now, though, the evidence I survey strongly supports the view that plausibility pleading has wrought no major change in practice.

Part V considers potential normative implications of this theory of pleading. It raises the possibility that plausibility pleading embraces, rather than rejects, the “liberal ethos” of the Federal Rules. As my thought experiment makes clear, neither notice pleading nor plausibility pleading will have much effect on the reality that most cases are not resolved by jury trial, or after full disclosure through discovery. Thus, the “liberal ethos” of resolving cases “on the merits, by jury trial, after full disclosure through discovery” will always, regardless of pleading standard, be little more than an unrealized ideal—with one exception. We surely want cases resolved “on the merits.” The challenge to honor the liberal ethos is a challenge to design procedure to resolve cases “on the merits” in an environment where trial (and even completed discovery) will always be the exception. As I argue herein, most of the cases that are affected by pleading standards involve cases less likely to be resolved “on the merits.” Consistent with this goal, however, special care may need to be reserved for *pro se* and *in forma pauperis* plaintiffs in the application of pleading standards.

Perhaps more provocatively, I argue that plausibility pleading may *benefit* plaintiffs with risky but worthwhile claims. While the concern that plausibility pleading hurts plaintiffs because of information asymmetries is chimerical, there remains the concern that the vague plausibility pleading standard confers discretion to judges, and in exercising this discretion, judges may (consciously or unconsciously) give play to anti-plaintiff biases. If so, does the plausibility standard hurt plaintiffs? Not necessarily. If anything, the effect is likely the reverse. After all, if a judge holds an anti-plaintiff bias, this bias will affect the case sooner or later. As a plaintiff’s attorney, when would you rather have the judge reveal her bias: early on, when you can cut your losses, or when the judge takes the case away from the jury, after you have spent tens or hundreds of thousands of dollars litigating the case? In the modern world of expensive discovery and extensive judicial control over fact-finding through summary judgment and other means, giving plaintiffs an early signal of judicial bias reduces the expected cost of litigation for plaintiffs, empowering plaintiffs to bring claims that would otherwise be too risky given the cost. In a world of high litigation costs, plausibility pleading serves the “liberal ethos” of the Federal Rules.

To be clear, I make no claim that plausibility pleading is an unvarnished good. Its likely effects are multifaceted, and there are some obstacles to settlement “on the merits” that pleading rules simply cannot address, such as litigation driven primarily by highly asymmetric costs. But as my theory of pleading makes clear, the effects of plausibility pleading, both for good and ill, are likely modest. Whether the courts’ objective is to impose a new “restrictive ethos” or to update the “liberal ethos” to account for modern realities, they will have to look elsewhere to effect large changes.

II. A THEORY OF 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”—although this may not be far from the original conception of “notice pleading.”²²

Since it is costly to prepare a lengthy complaint 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. I will argue that in general, even under a regime of *no* pleading standard:

- (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.

In Part I, I will present the argument in basic form. In subsequent subparts, I elaborate upon the basic argument, showing both its surprisingly broad applicability, and its limitations.

²² Charles E. Clark, primary architect of the Federal Rules of Civil Procedure, toyed with the idea of abolishing pleading standards altogether, as the English had done with their Equity Rules of 1912, which abolished the demurrer. In testimony in 1938 on the new Federal Rules governing pleading, he remarked, “We don’t go as far as the English rules, which I personally think we should eventually.” See *Proceedings of the Institute on Federal Rules* (statement of Charles Clark), reprinted in *RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES* 240 (William W. Dawson, ed. 1938).

A. Pleading With No Pleading Standard

Litigation is expensive; thus, a plaintiff will not bother to file suit if she doesn't stand a decent 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 against both the plaintiff and her lawyer.²³ 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. There is 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 prob-

²³ See, e.g., Federal Rule of Civil Procedure ("Rule") 11; 28 U.S.C. §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, Twombly, Leegin, and the Reshaping of Antitrust, SUP. CT. REV. 161, 176 (2007).

ability p , then the *expected judgment* is simply the judgment amount times the probability that she wins the judgment: pJ . 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:

$$\text{Prob. win} \times \text{Judgment amount} \geq \text{Cost of litigation} \quad (1a)$$

$$pJ \geq C \quad (1b)$$

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.²⁴

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 higher probability p) will be willing to sue:

$$p \geq C/J \quad (2)$$

Importantly, the facts available to the plaintiff determine p . 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 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. Thus, 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

²⁴ This is a standard result of the canonical Landes-Posner-Gould model. Note that although this discussion assumes risk neutrality, nothing turns on this assumption. (Technically, if the plaintiff is risk averse, then the criterion for willingness to litigate is if the “certainty equivalent” of $(pJ - C)$ is greater than zero. See, e.g., Andreu Mas-Colell, Michael D. Whiston & Jerry R. Green, *MICROECONOMIC THEORY* 186 (Oxford 1995).) Risk aversion will only amplify the plaintiff-screening effect I describe: because litigation is risky, risk averse plaintiffs may avoid it even if the expected judgment exceeds the monetary cost.

a weak claim. By doing this, she brings the defendant to the settlement table.²⁵

Applying some numbers to this model will make it more concrete. Litigating in federal court can be 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. Now imagine a plaintiff with a somewhat large, but not unusual, individual claim of \$250,000. Plugging these numbers into Expression (2) reveals that a plaintiff in this scenario will only be willing to sue if

$$p \geq 100,000/250,000 \quad (3a)$$

$$p \geq 0.4 \quad (3b)$$

Hence, this plaintiff is willing to sue if she believes that her likelihood of winning the judgment is at least 40 percent. Let's say that our hypothetical plaintiff believes that her chances are at least this good. Why does she believe this? There could be any number of reasons that our plaintiff could give, depending on the circumstances: "I had a contract with the defendant, and payment was due to me last month, and I never received payment." "I was struck by a car, and the defendant looks like the guy who was driving that car." "My boss was always mean to me, even though I always did a good job. After I complained about his treatment of women in my office, I was fired."

These reasons for believing that she has a decent chance of winning may be good reasons, or they may not be. These reasons may be a far cry from what it would take for the plaintiff to ultimately prevail on the merits. But any plaintiff who is able to answer to the (hypothetical) question, "Why do you think you have a 40 percent chance of winning this lawsuit?" can articulate *facts* that justify her belief in her case. Indeed, such a plaintiff would hardly expect to obtain a settlement without first articulating to the defendant her basis for demanding relief. And obviously, a plaintiff with a 40 percent chance of winning hardly has an "implausible" case.

²⁵ "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.).

Now we see why the presence or absence of a pleading standard will generally not matter. A plaintiff with a low chance of prevailing will not bother to sue. And a plaintiff with a relatively strong shot at winning will already have in her possession probative, favorable, and articulable facts—i.e., “enough facts to state a claim to relief that is plausible on its face.”²⁶ Indeed, while the courts have refused to articulate the plausibility standard in terms of percentages, a 40 percent chance of prevailing is well above whatever numerical threshold one might assign. In short, at least in cases broadly representative of the bulk of federal civil litigation, there will be no difference between a regime of no pleading standard, notice pleading, or plausibility pleading, because even under no pleading standard, the only cases that will be filed will be cases in which the plaintiff will plead facts stating a plausible claim.

Of course, the example above, while perhaps representative of “typical” federal litigation, hardly captures all the scenarios that might arise. There are a number of factors that may complicate the analysis in important ways. I identify six sets of factors:

The role of lawyers and lawyering. Given that litigation is divided into stages, and settlement often occurs early in litigation, a plaintiff may find it worthwhile to sue even if she is unwilling to spend the cost of taking the case all the way to trial. Further, many litigation decisions are made by plaintiff’s attorneys, and many plaintiff’s attorneys are compensated on a contingency basis. Other plaintiffs may act *pro se* or benefit from subsidized legal fees or legal aid. These plaintiffs may have a very different cost-benefit calculus than plaintiffs paying their own way.

Asymmetric information. Many cases involve asymmetric information, in which the defendant may know much more about the merits of the case than the plaintiff. Asymmetry of information lies at the heart of concerns over the “paradox of pleading.”

Spite, indignation, or optimism. Some plaintiffs may misjudge their chances in court due to irrational optimism, or they may not care about weighing costs and benefits, but simply want their day in court.

²⁶ *Twombly*, 550 U.S. at 570.

Nuisance suits. The analysis above assumed that the plaintiff's expected payoff from litigation will be based on the expected judgment she would obtain in court. It is conceivable, though, that a plaintiff will sue despite litigation costs that exceed her expected judgment, if the defendant would be willing to pay a sufficiently large nuisance settlement—a settlement the defendant pays to avoid *its* litigation costs.

Shoot-the-moon cases. Some cases may have such high stakes that they are cost-justified for the rational plaintiff even if p is very small—so small that the facts used to justify the belief in p would not be enough to survive a motion to dismiss in a regime with plausibility pleading.

Below, I address these factors, distinguishing those that do not alter the results above and those that do.

B. The Role of Lawyers and Lawyering

So far, lawyers have been absent from the framework above. Considering the lawyer's role requires two key adjustments to the basic framework above. First, lawyers play a large role in legal decisionmaking, and this may be true nowhere more so than with respect to a lawyer representing an individual plaintiff on a contingency basis. Most individual plaintiffs hire attorneys on a contingency basis, whereby the attorney covers the plaintiff's litigation costs, getting repaid only if and when the plaintiff obtains a recovery. It is the attorney, not the plaintiff, who is financing the litigation, and therefore it is the attorney, not the plaintiff, who decides whether a potential lawsuit would be cost-justified.

A plaintiff's attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases. This changes the calculus slightly, but only magnifies the incentive to screen cases for quality (*i.e.*, high p), because the lawyer only gets paid if the plaintiff wins or obtains a settlement (both of which are more likely if the case is stronger). 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.²⁷

²⁷ Kritzer, *supra* note 20, at 27.

In terms of my model, if the decisionmaker is the plaintiffs' attorney working on a contingency basis, the attorney must weigh the expected fees earned through litigation against the costs of bringing the suit. Indeed, given a limited budget of time and credit (for litigation expenses) that he can extend to his clients, an attorney working on contingency must concentrate his efforts on cases with the highest settlement value. The attorney receives a fraction, around 33 or 40 percent, of the plaintiff's recovery as his fee. The comparison for the plaintiff's attorney is therefore

$$\text{Prob. win} \times \text{Fee} \times \text{Judgment amount} \geq \text{Cost of litigating} \quad (4a)$$

$$pfJ \geq C \quad (4b)$$

where f is the attorney's contingency fee. The left hand side is how much the plaintiff's attorney gets if the plaintiff wins, times the probability of winning. This must be greater than the right hand side, which is how much the plaintiff's attorney has to pay to litigate the case, regardless of whether the plaintiff wins or loses.

Second, lawyers litigate and negotiate for settlement in a dynamic setting. While it is a helpful simplification to assume that there is a single cost C to litigating a case, the reality is that litigation is divided in stages, and costs accrue incrementally over time. This can have profound effects on settlement dynamics and the plaintiff's willingness to sue.²⁸ Most useful here are the insights of Bradford Cornell²⁹ and Joe Grundfest and Peter Huang,³⁰ who observe that the revelation of information during the course of litigation creates "real options" for plaintiffs. A plaintiff need not weigh her expected judgment against the entire cost of litigating to judgment, because the plaintiff can abandon her claim (and thus avoid further litigation costs) if information revealed in discovery is unfavorable and press ahead only if the information revealed is sufficiently favorable.

Given this, the plaintiff's decision to sue—really the plaintiff's attorney's decision to take the case—now has two components. First, the plaintiff must determine whether, even if she files suit and the information revealed by discovery is favorable, the case is worth continuing

²⁸ See William M. Landes, *Sequential versus Unitary Trials: An Economic Analysis*, 22 J. LEGAL STUD. 99 (1993).

²⁹ Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173–187 (1990).

³⁰ Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006).

at that point. To do this, the plaintiff compares the *post-discovery* cost of litigation (call this c_2 , for the second phase of litigation) to the expected judgment *conditional on the information revealed in discovery being favorable* (call this p_2J , where p_2 is the probability of winning in the event of good news). If the expected benefits outweigh the costs, the plaintiff will be willing to litigate—and the defendant, who also learns p_2 through discovery, will be willing to pay p_2J to settle. Thus, if discovery reveals good news, the plaintiff can expect to obtain p_2J , no matter how unlikely good news is. And if discovery is unfavorable, the plaintiff can drop the case and cut her losses.³¹

Second, the plaintiff must determine whether the case is worth bringing in the first place. To do this, the plaintiff compares the cost of litigating *through discovery* (call this c_1 , for the first phase of litigation) to the expected recovery after discovery. From the discussion above, if the information revealed in discovery is favorable, plaintiff can obtain a settlement of p_2J .³² Call the plaintiff's belief of the probability that discovery will reveal favorable information p_1 . (Thus, the *ex ante* probability that plaintiff will prevail (what I have called p so far) is $p = p_1p_2$.) If the information is unfavorable, the plaintiff will drop the case. Then relevant comparisons for the decision to sue are now:

$$p_2fJ \geq c_2 \quad (5a)$$

$$pfJ \geq c_1 \quad (5b)$$

Expression (5a) simply ensures that, in the event of favorable discovery, the plaintiff is willing to go to trial; if the plaintiff would drop the case even after favorable discovery, the plaintiff would never file suit in the first place, regardless of the pleading standard. Expression (5b) is the crux, since it defines the threshold below which the plaintiff (and her lawyer) are unwilling to sue, even given the benefit of the option value that discovery creates.

³¹ The reader will note that this example assumes that “bad news” is news such that the case is not worth continuing. Since this discussion of option value only affects the basic framework of Part II.A for cases where the plaintiff has a low *ex ante* belief in her probability of winning, this is the relevant assumption for our purposes. In any event, this assumption is without loss of generality for the qualitative results. See Grundfest and Huang, *supra* note 30.

³² Note that this settlement value assumes symmetry of costs. I discuss asymmetric costs in Part II.E.

To make this analysis concrete, I turn to a study by Emery Lee and Thomas Willging,³³ who surveyed thousands of attorneys who had recently represented clients in federal civil cases about the nature of their cases and the costs they incurred in litigating them. My objective here is data not on how much a plaintiff's attorney must be *prepared* to pay to go trial, but rather how much he can *expect* to pay to conduct discovery and then settle a case. Not surprisingly, this latter number is far lower than the \$100,000 figure used above. For surveyed attorneys representing plaintiffs, their median costs were \$15,000,³⁴ and the median case had stakes of \$160,000. Plugging these values, as well as 33 percent for the contingency fee, into Expression (5b) yields:³⁵

$$p \times 0.33 \times 160,000 \geq 15,000 \quad (6a)$$

$$p \geq 0.284 \quad (6b)$$

Thus, we see that the basic qualitative results above—that plaintiff will not file unless she believes the case to be relatively strong—remains unchanged. If a plaintiffs' attorney will not take a case unless he has about a one-in-four chance of winning on the merits, then a complaint won't be filed unless the plaintiff has already convinced her attorney that her claim has a decent shot of winning—but this already puts the plaintiff's claim well past the threshold of “plausibility.”³⁶

³³ Emery G. Lee & Thomas Willging, *Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee On Civil Rules* (Fed. Judicial Ctr. 2009).

³⁴ This is a conservative estimate of c_1 , given that this amount is the median litigation cost among plaintiffs who engaged in *any* discovery, whether completed or not.

³⁵ Varying the contingency fee rate does not change the qualitative results. A 40 percent contingency fee yields $p \geq 0.234$.

³⁶ Note that there may be situations where the desire to signal case strength is overridden by other strategic considerations, such that the plaintiff will want to file a deliberately ambiguous or sparse pleading. See, e.g., Emery G. Lee & Thomas Willging, *Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee On Civil Rules*, *supra* note 33, at 29 (quoting a plaintiffs' attorney: “As a plaintiff I plead enough to tell the story but avoid pleading facts that might come back to haunt me.”) What is important to note, though, is that here the withholding of detail is strategic, rather than a reflection of a lack of information on the part of the plaintiff. (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

Of course, that plaintiffs' attorneys screen their cases based on plausible merit is well understood. But the significance of this fact has been overlooked by critics of *Twombly* and *Iqbal*. For example, in his influential article, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, Arthur Miller observes:

[R]ational plaintiffs' attorneys are very cost- and time-conscious. To avoid expenditures that may never be reimbursed and to prevent the loss of potentially more attractive alternative professional opportunities, they generally . . . screen potential cases using their own version of plausibility before taking on matters.³⁷

Yet Miller does not take the logical step that follows from this observation: plausibility pleading standards matter little, precisely because they do not impose a binding constraint on which cases get filed. Plaintiffs' attorneys set a higher bar than the courts.

To be sure, the centrality of the plaintiff's attorney to most civil litigation suggests that the results above may not apply as strongly when plaintiffs' attorneys are not exercising their gatekeeping function, either because (1) there is no plaintiff's attorney or (2) the plaintiff's attorney is acting on an appointed or *pro bono* basis. We might expect, therefore, that plausibility pleading may have some effect among *pro se* or *in forma pauperis* plaintiffs. Even here, though, we should expect to see the screening process described above continue to function for most cases. As the basic framework in Part II.A describes, a *pro se* plaintiff will weigh her *personal* costs in time and effort against the likely judgment in litigation. Of course, a *pro se* plaintiff may not do so as precisely as an attorney might. Also, 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. Nonetheless, the *pro se* plaintiff or *pro bono* attorney does not have the financial incentive that an attorney working on a contingency basis has, and thus we might expect

repleading with greater detail. Indeed, one often observes the dynamic of dismissal with leave to amend followed by repleading in greater detail. For some data on this, see Joe S. Cecil et al., *Update On Resolution Of Rule 12(B)(6) Motions Granted With Leave To Amend* (Fed. Judicial Ctr. 2011).

³⁷ Miller, *supra* note 5, at 67.

the screening function of the plaintiff and the attorney to be weaker in this context.³⁸

C. Asymmetric Information

As noted in the Introduction, the “Paradox of Pleading” is a widely raised argument in favor of notice pleading. Rakesh Kilaru puts it most succinctly: “Civil rights plaintiffs alleging motive-based torts thus face a classic Catch-22: they 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.”³⁹ Perhaps because *Conley* and *Iqbal* were civil rights cases, this paradox is taken as uncontroversial.⁴⁰ But it is crucial to note that *everything in the discussion so far applies equally to cases with asymmetric information.*

The reason is that, even when there is no pleading standard, the plaintiff (or her attorney) will only file suit if it is worth the cost of litigating. And that determination depends on the facts known to the plaintiff at the time of filing. If the plaintiff does not have facts indicating that she has a decent claim, or at least facts showing a strong likelihood of uncovering favorable evidence in discovery (this is the “real option” value of litigation discussed above), the plaintiff simply won’t file suit. In short, asymmetry of information makes the plaintiff worse off, but this is true regardless of the pleading standard. The “paradox of pleading” has nothing to do with pleading; a more apt description would be the “tragedy of asymmetric information.”

Consider, for example, a large group of potential plaintiffs who might bring fairly typical employment discrimination claims in federal court. One might imagine the set of all 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 intentional discrimination, but it is also

³⁸ Further, while some plaintiffs prefer to proceed *pro se*, some plaintiffs proceed on their own precisely because they could not find an attorney who was willing to represent them on a contingency basis.

³⁹ Kilaru, *supra* note 14, at 927.

⁴⁰ See Miller, *supra* note 5, at 43–46; Steinman, *supra* note 3, at 1311–12; Spencer, *Plausibility Pleading*, *supra* note 3, at 481–83. 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.” See Miller, *supra* note 5, at 105 n. 404.

possible that she was fired for entirely separate reasons, such as poor individual performance or downsizing by the employer.

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? As shown above, this depends on whether p is at least about 25 percent, once one accounts for the possibility that the plaintiff can drop the case if discovery yields unfavorable evidence. Of course, the true p for this group is unknowable. In principle, it could be 1 percent, or 10 percent, or 99 percent. But remember that our concern is the paradox of pleading: we are assuming a set of plaintiffs *who cannot articulate any facts explaining why they believe they were victims of discrimination*. While no one knows what the probability is that a randomly chosen person 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. 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, even if there is no pleading standard. 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.

Therein lies the flaw in the "paradox of pleading." It 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 in 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*. 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.

To be clear: there are surely many potential plaintiffs who have been injured by the wrongdoing of a potential defendant, who have no facts suggesting this to them, *but who nonetheless would, after full discovery, have a strong case and secure a large judgment on the merits*. These plaintiffs, unfortunately, will not receive the judgment that the objective facts of their case merit. But to be equally clear: this will happen even with no pleading standard. The bar to their recovery is not pleading. It is that it is simply not worth it to sue. The plaintiff (or her attorney) estimates a low p , even after accounting for the possibility that, because of asymmetric information, discovery will reveal favorable facts that are currently obscured.

The problem created by asymmetric information is *not* that judges cannot distinguish (1) a plaintiff with a meritorious claim, but no facts, from (2) a plaintiff with no claim at all. It is that these two plaintiffs cannot tell *themselves* apart. There is nothing that pleading rules can do to fix this.

D. Spite, Indignation, and Optimism

Plaintiffs do not always make cool-headed calculations about litigation costs and benefits when they feel they have been wronged. Some plaintiffs, seething over a perceived legal wrong, would throw my framework out the window and go to court regardless of the costs. Other plaintiffs may weigh costs and benefits, but bias or optimism may infect their calculations.

These considerations surely temper the general results I have reached above, but these considerations themselves ought not be overstated. First, as emphasized above, it is usually more realistic to treat the decisionmaker as the plaintiffs' attorney, who has both the expertise, incentive, and emotional detachment to make decisions driven fundamentally by the calculus presented above.

Second, even a steaming mad plaintiff still will have a reason *why* she is steaming mad. For pleading standards to matter, it must be the case that a plaintiff is so indignant at a legal wrong that she is willing to go to court regardless of the cost—and yet she is unable to articulate facts that make her claim plausible. While such a scenario is not impossible, it borders on the fanciful.⁴¹

⁴¹ 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-

Likewise, an overly optimistic plaintiff will have a reason *why* she is so optimistic. Her reasons for optimism provide her with a basis for pleading and settlement, regardless of the pleading standard. Of course, there remains some subset of optimistic plaintiffs who are sufficiently unrealistic that the facts upon which they base their optimism would fail under a plausibility pleading standard. These plaintiffs will be affected by the pleading standard.

To recognize that these unduly optimistic plaintiffs will see their claims dismissed under a pleading standard, even if those claims would have survived under no pleading standard, is not to say that pleading standards necessarily make those plaintiffs worse off. Imagine an overly optimistic plaintiff who files suit because she believes her likelihood of winning is high, but in fact the case is so weak that it will be dismissed under the plausibility pleading standard. This plaintiff files because she believes that the expected benefits of litigation outweigh the costs. Because she is wrong about this, she will *lose* money litigating the case, even under no pleading standard. Having her case dismissed at the outset actually allows her to cut her losses. As I explain below in Part V.B, such plaintiffs are a subset of a larger set of plaintiffs benefited by the plausibility pleading standard.

E. Nuisance Suits

A nuisance suit is a suit brought despite having negative expected value (i.e., $pJ < C$ or even $pfJ < c_1$), because the defendant is willing to pay a settlement to avoid litigation costs. The idea here is that, so long as the plaintiff can credibly threaten to take the defendant to trial, the defendant will pay a settlement to the plaintiff, *even if the plaintiff would surely lose at trial*, because the defendant wants to avoid the high cost of litigation. 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.⁴² Thus, consideration of nuisance litigation is necessary to complete the picture of where and how plausibility pleading standards might affect litigation. The analysis above, which assumes that plaintiffs only sue if the expected judgment exceeds their own costs, does not apply. Thus, I examine the nuisance-suit scenario in detail here.

ing to alter the requirement that complaint be legally sufficient, i.e., state a legal theory that exists.

⁴² See *Twombly*, 550 U.S. at 546.

The linchpin of the nuisance-settlement strategy is a credible claim that the plaintiff will follow through on her threat to take the case to trial if the defendant does not settle. The key obstacle to this strategy is that the plaintiff's threat is usually not credible: if the defendant refuses to pay a settlement, the plaintiff will simply drop the case, because the plaintiff will spend more on litigation costs than she can hope to recover at trial. Indeed, because there are few, if any, objective measures of whether a suit is a "nuisance suit," whether nuisance suits are in practice a significant phenomenon remains an open question. Nonetheless, a rich theoretical literature has examined the conditions under which a nuisance-settlement strategy will work.⁴³ This literature generally predicts that asymmetry of litigation costs *may* lead to successful nuisance claims against defendants with relatively high litigation costs. Most relevant here, in recent formal game-theoretical work, I identify conditions under which pleading becomes an integral part of a nuisance-settlement strategy.⁴⁴ Herein, I describe the literature that relates pleadings to nuisance suits and present informally the logic of how pleading and pleading standards affect nuisance litigation.

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. 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.⁴⁵ 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.⁴⁶

⁴³ The seminal papers in this literature include David Rosenberg & Steven Shavell, *A Model in which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985), David C. Croson & Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 HARV. NEGOT. L. REV. 65–83 (1996), and Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD 1 (1996). I provide a brief review of this literature in William H.J. Hubbard, *A General Model of Nuisance Suits* (unpublished working paper) (2015).

⁴⁴ Hubbard, *supra* note 43.

⁴⁵ Rosenberg & Shavell, *supra* note 43.

⁴⁶ *Id.* at 4.

Robert Bone has applied this logic to pleading and motions to dismiss.⁴⁷ Echoing Rosenberg and Shavell, he claims 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.⁴⁸ 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."⁴⁹

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 initiate 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 gather-

⁴⁷ Bone, *Pleading Rules*, *supra* note 21, 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 motion to dismiss, an answer, or discovery.

⁴⁸ *Id.* at 921 & n. 202.

⁴⁹ Robert G. Bone, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 150 (2003).

ing 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 fewer additional costs if she moves forward with discovery.⁵⁰

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 device to credibly signal 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 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.⁵¹

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.

⁵⁰ 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.

⁵¹ 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.”).

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.⁵² 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. Indeed, a nuisance suit is filed precisely because the defendant would rather settle than sink the costs of litigation.⁵³

In short, a “nuisance suit” will only have settlement value if the plaintiff’s threat to impose discovery costs on the defendant is credible. By front-loading her own discovery costs, 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. This pre-complaint investigation will manifest itself in detailed pleading, even when there is no pleading standard.

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 in nuisance suits! But *Twombly* and *Iqbal* do not necessarily require *detailed* pleading; they require *plausible* pleading. What does this mean in the context of nuisance litigation?

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

⁵² See Picker, *supra* note 23, 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.”).

⁵³ 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.

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 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.⁵⁴ For other types of cases, though, the plausibility requirement may have teeth. Perhaps elaborate antitrust claims such as *Twombly* itself fall into this category.

F. Shoot-the-Moon Cases

While for the vast majority of claims, plaintiffs (or their attorneys) will not file suit unless their assessment is that the claim is fairly strong, it is possible that for some claims with very high stakes and without proportionately high costs, it may be worth suing under no pleading standard, even though the likelihood of winning is very low. For example, if stakes are \$1,000,000,000 and expected costs are a hefty but not proportionately large \$1,000,000, then from Expression (5b) we have

$$0.33 p (1,000,000,000) \geq 1,000,000 \quad (7a)$$

$$p \geq 0.003 \quad (7b)$$

In other words, if the stakes are high enough, a plaintiff may be willing to accept lottery-ticket odds. For claims with very high stakes, plaintiffs may sue under no pleading standard even when they lack articulable facts supporting a belief that they have something close to a decent chance to prevail in court. And while litigation with very high

⁵⁴ 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.

stakes is uncommon, it is an important segment of the federal civil docket. *Twombly*, of course, was a case with astronomical stakes.⁵⁵

* * *

In sum, the thought experiment of a world with no pleading standard yields the conclusion that in general, cases that would not be filed (or that would be dismissed) under a pleading standard would not be filed even in the absence of a pleading standard, and complaints that are pleaded with factual detail under a pleading standard would be pleaded with factual detail even in the absence of a pleading standard. This is because the economics of litigation are such that it is not worth suing unless one believes the claim has a decent shot (maybe one-in-four) of prevailing. To form such a belief, though, one must already have articulable facts in mind. And if so, pleading these facts facilitates settlement, even if there is no risk of a motion to dismiss for failure to state a claim.

This basic logic, however, has its limits, and understanding these limits helps sharpen the descriptive and normative content of this analysis. As I show above, there are several factors that (perhaps surprisingly) do *not* affect the analysis:

Contingency fee arrangements. The widespread use of contingency fees by plaintiffs' attorneys reinforces the basic analysis. Because plaintiff's attorneys' compensation is a fraction of the settlement obtained, a plaintiff's attorney will only take a case that is relatively valuable when compared to the attorney's expected litigation costs.

Staging of litigation costs. The fact that litigation proceeds in stages, and thus the costs of litigation arise piecemeal allows

⁵⁵ When I teach *Twombly* to my Civil Procedure students, we work through a rough calculation of the stakes in that case. Given that the putative class included all U.S. households with phone or internet service during the period February 1996 through December 2003, this includes approximately 180 million households over 95 months. See Federal Communications Commission, *FCC Releases Study on Telephone Trends* (May 22, 2002) (available online at http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend502.pdf) (last visited February 13, 2015). Given that damages under the Sherman Act are trebled, a \$20 monthly overcharge per household due to the alleged conspiracy implies total damages exceeding \$1 trillion. This is more than 8 percent of the entire United States gross domestic product in 2003, the year the case was filed. Even a two-cent monthly overcharge implies damages to the class exceeding a billion dollars.

plaintiffs with relatively lower-expected-value claims to bring suit. This effect for a typical real-life case, however, does not induce plaintiffs without “plausible” (however sensibly defined) claims to file in the absence of a pleading standard.

Asymmetric information. Contrary to the popular view that heightened pleading standards create a “paradox of pleading,” pleading standards do not have any special effect when an asymmetry of information favors the defendant.

There are other factors, though, that do undermine the prediction that pleading standards will not affect the decision to file or the decision to plead in detail:

Plaintiffs who do not pay litigation costs. A *pro se* plaintiff with a very low opportunity cost of her time, or a plaintiff represented by an attorney acting *pro bono*, may be willing to bring suit even when unable to articulate facts explaining why the claim may have merit. Pleading standards therefore may affect such plaintiffs. Note, though, that to the extent that a provider of *pro bono* legal services is oversubscribed or otherwise resource-constrained, the provider will tend to focus its attention on the strongest cases, thereby replicating the screening effect predicted by my analysis.

Plaintiffs motivated by spite, indignation, or optimism. While their attorneys will often succeed at tempering their zeal, some plaintiffs may insist on filing suit even when they cannot articulate why they believe they have a decent claim. Outcomes for these plaintiffs could be affected by pleading standards.

Some nuisance suits. Some low-merit nuisance litigation may be discouraged by higher pleading standards. While most low-merit nuisance claims will not be brought, even under no pleading standard, claims in which litigation costs are highly asymmetric and favor the plaintiff may be viable in the absence of a pleading standard.

Shoot-the-moon claims. Related to low-merit cases with high litigation costs for the defendant are low-merit cases with extremely high stakes. These shoot-the-moon claims may be viable under no pleading standard but could be affected by a pleading standard.

The general result that pleading standards will not matter, as well as the qualifications to the scope of this result, generate several empirical predictions and may inform our normative assessment of plead-

ing rules as well. Before turning to these predictions, however, I briefly consider how judicial behavior may respond to the phenomenon of case screening and detailed pleading that occurs regardless of the pleading standard.

III. JUDICIAL PERCEPTIONS OF PLEADING

So far, I have argued that detailed pleading will arise even in a regime of no pleading standard. The goal of this thought experiment 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. So I now consider 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.

Because of incentives to screen merit and signal case quality, plaintiffs will file detailed factual pleadings regardless of the pleading standard. Thus, long before *Twombly* and plausibility pleading came along, federal court judges saw detailed pleadings in most cases. This not only meant that few complaints would be susceptible to motions to dismiss, but that the few complaints that lacked factual detail would appear exceptional in their lack of detail. From a sparse complaint, a judge could infer that the plaintiff lacked favorable facts and could conclude that the case was 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 understands that she operates in a liberal, notice pleading regime. The overwhelming majority of civil complaints that she sees are long—sometimes tediously so⁵⁶—recitations of the facts of the dispute, with particular emphasis on the facts that tend to prove the plaintiff's case.

Now imagine that a complaint is filed in this judge's court alleging an employment discrimination claim. This complaint offers nothing

⁵⁶ For examples of judicial complaints about this, see *Am. Nurses' Ass'n*, 783 F.2d at 724 (“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”).

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 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 draw a negative inference. Even plaintiffs with poor cases, she will reason, can muster *some* evidence of discrimination in their complaint. If this plaintiff’s attorney cannot state *one fact* suggesting race discrimination, the judge might wonder, why is this complaint worth months or years of the court’s time?

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.⁵⁷ 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 a notice 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 caseloads 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.

If so, then the practical difference between notice pleading and plausibility pleading becomes even narrower, even for those cases that are exceptions to the basic framework in Part II.A. This is because something like a plausibility pleading standard would have emerged

⁵⁷ *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (Easterbrook, J.).

endogenously from the behavior of plaintiffs and plaintiffs' attorneys long before *Twombly*.

IV. SOME EVIDENCE IN SUPPORT OF THE THEORY

My central thesis in this paper is that, in general, pleading rules will not operate as a binding constraint on litigant behavior, because other considerations—litigation cost, the need to signal case strength in order to obtain settlement—operate as stricter screens. Importantly, this claim is essentially an empirical one. In this Part, I describe some empirical implications of this theory of pleading and provide some limited evidence corroborating these predictions. To be clear, this evidence is impressionistic and merely suggestive. Ultimately, of course, these predictions will have to be tested against the results of the growing quantitative literature on pleading. My hope is that the predictions and evidence herein will inform future empirical studies of pleading.

A. Everything New Is Old Again

At the most basic level, this theory is summarized by the old cliché that the more things change, the more they stay the same. The most fundamental empirical prediction of this theory is that even in a world *with* pleading standards, dismissals for failure to state a claim will be rare no matter what the pleading standard, because cases close to the margin of dismissal simply won't be filed—*regardless* of the pleading standard. For the same reason, motions to dismiss will be uncommon.

In this respect, the data are uncontroversial: dismissals for failure to state a claim were rare in the past and are rare today—maybe 2 percent of federal civil cases.⁵⁸ Indeed, motions to dismiss are only

⁵⁸ See Joe S. Cecil et al., *Of Waves and Water: A Response to Comments on the FJC Study "Motions to Dismiss for Failure to State a Claim after Iqbal"* 9 (Table 1), 14 (Table 4) (Fed. Judicial Ctr. 2011). An examination of these tables reveals that across all cases in two samples from 2006 and 2010, 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 (0.05×0.40) of cases involve a motion to dismiss being granted without leave to amend. Of course, this is just a rough estimate; for example, courts do not ultimately rule on every motion to dismiss that is filed.

filed in about 5 percent of cases, a rate that has remained roughly constant for at least the past three decades.⁵⁹

Perhaps most striking is that even in the pre-Rules world of common law pleading, the demurrer, precursor to the motion to dismiss, was rare. Charles Clark, the architect of notice pleading himself, testified to this fact in describing the state of pleading in 1938. Here is what Clark said:

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.⁶⁰

Thus, the experience under common law pleading, even to the eyes of Clark himself, counseled that there was no reason to expect changes in pleading standards to dramatically affect practice.

Of course, while this fact is consistent with my theory of pleading, it hardly proves it. There may be other reasons why dismissal rates might remain constant, even across long periods and various pleading regimes. Most obviously, “selection effects” may confound any effort to draw inferences from trends in dismissal rates. If a change in the law induces changes in filing and settlement behavior, these changes may affect the composition of cases subject to motions to dismiss, thereby rendering changes in motion to dismiss filing rates and dismissal rates hard to detect. Still, lack of change in dismissal rates is informative.⁶¹

It is beyond the scope of this paper to systematically address such empirical issues. Rather, for the remainder of this Part I will concentrate largely on *qualitative* evidence. In this respect, the qualitative evidence discussed below has the advantage of being less sensitive to the selection effects that have bedeviled the empirical literature on *Twombly* and *Iqbal*. For example, open-ended survey questions to

⁵⁹ Joe S. Cecil et al., *Motions To Dismiss For Failure To State A Claim After Iqbal*, *supra* note 58, at Table 1 (indicating motion to dismiss filing rates of 4 percent in 2006 and 6 percent in 2010); Thomas E. Willging, *Use Of Rule 12(B)(6) In Two Federal District Courts* (Fed. Judicial Ctr. 1989) (finding motion to dismiss filing rates of 6 percent in 1988).

⁶⁰ Clark, *supra* note 22, at 239.

⁶¹ See Dan Klerman & Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209 (2014), who show that the leading models of selection in litigation and settlement will, under plausible conditions, allow inferences to be drawn from changes in dismissals rates (or the lack thereof).

practitioners will capture any effects of pleading standards on potential cases that were considered but never filed because the pleading standard affected their viability.

Below, I describe several predictions of my theory and present qualitative evidence indicating that these predictions are consistent with experience.

B. Practitioner Surveys

This theory of pleading generates several predictions about how practitioners themselves would perceive the effects of a change in pleading standards from notice pleading to plausibility pleading. The theory predicts that:

1. Practitioners will be largely unaffected by changes in pleading standards.
2. Plaintiffs' attorneys will plead in detail regardless of the pleading standard.
3. Plaintiffs' attorneys will screen cases for plausible merit regardless of the pleading standard.

Surveys of practitioners lend support to these predictions. In December 2009 and January 2010, Thomas Willging and Emery Lee surveyed both plaintiffs' and defense attorneys across a range of practice areas about the effects of *Twombly* and *Iqbal*, reporting that "[m]ost interviewees indicated that they had not seen any impact of the two cases in their practice."⁶²

A study commissioned by the National Employment Lawyers Association (NELA), an organization of attorneys who represent plaintiffs in employment litigation, lends support to every one of these predictions.⁶³ I emphasize this study because it surveys attorneys for the

⁶² Thomas E. Willging & Emery G. Lee, *In Their Words: Attorney Views About Costs and Procedures In Federal Civil Litigation*, 3 (Fed. Judicial Ctr. 2010).

⁶³ Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members*, Fall 2009, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf>, 3 (2009). "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."

group often considered the *most* affected by plausibility pleading: employment discrimination plaintiffs. Rebecca Hamburg and Matthew 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*,⁶⁴ and some reported hearing about “others” being hurt by the new pleading standards.⁶⁵ But when describing their own experiences, the respondents were largely unmoved. Of the 150 plaintiffs’ attorneys who offered comments on pleading, *one* mentioned that a case was not filed because of *Twombly* or *Iqbal*, and *one* mentioned a complaint being dismissed after *Twombly*.

Rather, the plaintiffs’ attorneys surveyed by Hamburg and Koski confirmed that factually detailed pleading has always been the norm. By far the most frequent description of the attorneys’ own experience was some version of the following:

“I have always drafted detailed complaints.”⁶⁶

Willging and Lee report virtually identical feedback from the plaintiffs’ attorneys they surveyed:

“We have always included more than is necessary for notice pleadings.”

“I never did notice pleading, always much more.”

“I have always done very fact-intensive pleading and could always add more facts if needed.”⁶⁷

Further, attorneys surveyed by both Hamburg and Koski and Willging and Lee confirmed that screening cases for merit by the plaintiffs’ attorney 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.”⁶⁸

⁶⁴ By my count, of the respondents who offered their own comments about pleading, 85 of 150 made comments criticizing *Twombly* and/or *Iqbal*.

⁶⁵ See Hamburg & Koski, *supra* note 63, at 62, 65.

⁶⁶ By my count, 31 respondents volunteered something to this effect. Of these, 27 explicitly said that they had “always” pleaded with detail. See Hamburg & Koski, *supra* note 63, at 62–74. In contrast, 7 said that they plead more facts, and 3 noted that defendants are filing more motions to dismiss.

⁶⁷ Willging & Lee, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION, *supra* note 62, at 28–29.

⁶⁸ *Id.* at 29.

“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.”⁶⁹

“I have always carefully screened my cases.”⁷⁰

These statements echo earlier survey findings on the screening role of plaintiffs’ attorneys. A decade before *Twombly*, Herbert Kritzer concluded that “contingency fee lawyers generally turn down at least as many cases as they accept, and often turn down considerably more than they accept.”⁷¹

Finally, as noted above, this theory also predicts that plaintiffs’ attorneys will report that they will rarely face (and even more rarely lose) motions to dismiss for failure to state a claim, regardless of the pleading standard. In Hamburg and Koski’s survey of plaintiffs’ attorneys practicing employment litigation, 92.8 percent of the surveyed plaintiffs’ attorney had never—not once!—had a complaint dismissed under *Twombly* or *Iqbal*.⁷² Some respondents had seen not seen a single motion to dismiss *filed* since *Twombly*.⁷³ Respondents in Willging and Lee’s survey had similarly little to report. Indeed, one respondent, speaking in the wake of *Iqbal*, explained: “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.”⁷⁴

C. Cross-Jurisdictional Practice

Just as this theory of pleading predicts that changes in pleading standards within a court system should have little effect on filing rates or pleading detail, it predicts that differences in pleading rules across jurisdictions should lead to few differences in practice. Even if

⁶⁹ See Hamburg & Koski, *supra* note 63, at 62.

⁷⁰ *Id.* at 64.

⁷¹ Kritzer, *supra* note 20, 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.”

⁷² See Hamburg & Koski, *supra* note 63, at 28.

⁷³ *Id.* at 65, 68.

⁷⁴ See Willging & Lee, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION, *supra* note 62, at 25.

selection effects bias *quantitative* evidence on dismissal rates towards a finding of no difference, *qualitative* evidence on relative, overall advantages of pleading rules should account for the various ways in which pleading rules can affect practice. Thus, a qualitative, comparative approach to pleading practice could reveal the differing effects of different pleading standards. For example, one could survey the experiences of practitioners in 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 *higher* than plausibility pleading.⁷⁵ These seventeen states comprise more than half the U.S. population.

Yet I know of no claims—from scholars, practitioners, whether in print or conversation, whether systematic or anecdotal—that fact pleading standards have generated systematic differences in litigation practice in these states, either before or after *Twombly*. If anything, some anecdotes suggest the opposite. For example, when pro-defendant organizations complain about “judicial hellholes” that are (allegedly) inordinately generous to plaintiffs, such “hellholes” reside primarily in fact-pleading, rather than notice-pleading, states.⁷⁶ Looking more broadly, Scott Dodson notes that pleading in the United States is unique among countries; “America has the most lax pleading

⁷⁵ 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); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L. J. 354, (2002–2003). In sorting states into these categories, I rely upon Oakley & Coon (1986) and Oakley (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.

⁷⁶ A recent report from the American Tort Reform Foundation on “judicial hellholes” lists fourteen state-court jurisdictions as “judicial hellholes” or on a “watch list.” See American Tort Reform Association, *Judicial Hellholes 2011–2012*, 2 (2012). Ten of these fourteen “hellhole” 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 75, and Oakley, *supra* note 75.

system in the world.”⁷⁷ Often, civil law jurisdictions not only require fact pleading, but evidence, when a complaint is filed. Yet Dodson observes little concern internationally over these differences in pleading rules.

And to 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.⁷⁸

D. *Pro Se* and *In Forma Pauperis* Plaintiffs

Given that this theory of pleading rests on the screening role of plaintiffs’ attorneys and plaintiffs themselves, one would expect that when neither the plaintiff nor his attorney bears the costs of litigation, the impetus to screen for merit will be weaker. If so, then pleading standards might have an effect, possibly even a large effect, on outcomes for such plaintiffs.

Empirically, we might expect that *pro se* plaintiffs, who are not constrained by an attorney and may have a very low opportunity cost of their time, and *in forma pauperis* (IFP) plaintiffs, whose costs are subsidized by the state and who may have appointed or *pro bono*

⁷⁷ Dodson, *Comparative Convergences in Pleading Standards*, *supra* note 10, at 447.

⁷⁸ Also, the two quantitative studies that have looked for differential patterns across fact pleading and notice pleading states in the wake of *Twombly* and *Iqbal* have found none. See 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); Roger Michalski and Abby Wood, *Twombly and Iqbal at the State Level*, USC Law Legal Studies Paper No. 14-30 (Dec. 3, 2014) (available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468864) (last accessed February 13, 2015). 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. 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. Michalski and Wood compare case filings and outcomes in state courts in Nebraska, a state that adopted plausibility pleading in the wake of *Twombly*, with outcomes in a set of states that did not adopt plausibility pleading. They find no evidence that adoption of plausibility pleading changed litigation outcomes in Nebraska.

counsel, will be affected by pleading standards. This prediction may manifest itself empirically in changes in dismissal rates of *pro se* or IFP cases after a change from notice pleading to plausibility pleading.

This prediction with respect to dismissal rates has an important advantage over hypotheses about dismissal rates generally. The premise underlying this prediction is that *pro se* and IFP plaintiffs do not face economic incentives to change their settlement or filing patterns in response to pleading standards.⁷⁹ In other words, for this group of plaintiffs, selection effects should be at their nadir.

Ironically, much of the empirical work on the effects of *Twombly* and *Iqbal* (including mine) has excluded *pro se* and IFP plaintiffs from their analysis, because the Supreme Court appeared to carve out such cases from the application of *Twombly* when, only weeks after *Twombly*, it decided *Erickson v. Pardus*,⁸⁰ which reversed a motion to dismiss a complaint by a *pro se* prisoner and insisted that a *pro se* pleading is “to be liberally construed.”⁸¹ Nonetheless, Scott Dodson and Kevin Clermont and Ted Eisenberg include such plaintiffs in their empirical studies of court judgments before and after *Twombly* and *Iqbal*.⁸² These studies offer suggestive evidence that *pro se* and IFP plaintiffs are differentially affected by pleading standards.⁸³

⁷⁹ To be more precise, the claim is that for this group of (potential) plaintiffs, many of them are close to the margin with respect to meeting the pleading standard but are *inframarginal* (i.e., unaffected by the pleading standard) with respect to the decisions to file or to settle. Anecdotally, at least, this seems a tenable characterization of a meaningful share of *pro se* and IFP cases.

⁸⁰ *Erickson v. Pardus*, 551 U.S. 89 (2007).

⁸¹ *Id.* at 94.

⁸² Scott Dodson, *A New Look: Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127 (2012); Kevin M. Clermont & Theodore Eisenberg, *supra* note 19.

⁸³ Dodson, *supra* note 82, includes both represented plaintiffs and plaintiffs proceeding *pro se* and IFP. Analysis of his results reveals that the statistically significant effect is entirely concentrated among prisoner litigation claims brought by *in forma pauperis* prisoners; there is no significant change in the rate at which district courts dismiss claims in cases with represented plaintiffs. (This conclusion is based on analysis of Table 2 in Dodson, *supra* note 82, at 132). Clermont & Eisenberg (*supra* note 19, at 13) use administrative data and report apparent effects of *Twombly* and *Iqbal* that are concentrated among *pro se* cases.

E. Settlement Patterns

The claim that detailed pleading serves to facilitate settlement offers a straightforward prediction about settlement: because detailed pleading serves as a credible signal of the strength of a plaintiff's case, the filing of a complaint may be sufficient to induce settlement, even without any other litigation activity. In a recent study, Christie Boyd and David Hoffman examine litigation activity in a sample of federal civil cases and find that about one-third of filed lawsuits are settled without *any* litigation activity occurring—no motions, no discovery.⁸⁴ 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 provided above is that the act of filing a detailed complaint itself promotes settlement.⁸⁵

F. Case Law

While the thought experiment presented in Part II presupposed an *absence* of case law or doctrine on pleading, Part III recognizes that there are pleading standards enforced by judges, and that this theory of pleading should predict both the nature of the complaints that judges see and how judges respond. While it would be impossible for this paper to satisfactorily canvas the jurisprudence on pleading, I will offer a handful of examples, including the two seminal pleading cases, *Conley* and *Twombly*, to suggest that the pleadings in those cases, and the judicial responses to those pleadings, are better predicted by this theory of pleading than by even the doctrine attributed to those very cases.

⁸⁴ Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J. L. ECON. & ORG. 898 (2012). It should be noted, though, that the sample in Boyd & Hoffman was limited to cases involving corporate veil-piercing allegations. While I see no reason why these cases would be exceptional in any way relevant to the argument here, there remains a need for further empirical evidence on this point.

⁸⁵ 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).

I begin with *Conley v. Gibson*,⁸⁶ the case that has long stood for “notice pleading.” 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 agent 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.

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.⁸⁷

Could there have been any doubt that this complaint contains enough factual detail to state a *plausible* claim under *Twombly*? None. Indeed, the Supreme Court in *Conley* said it had “no doubt” that the complaint’s factual allegations were sufficient.⁸⁸ Rather, the central question in *Conley* had nothing to do with pleading of facts; it was whether the duty of “fair representation” under the Railway Labor Act bars racial discrimination by the union in pursuing grievances brought by union members.⁸⁹ As Alex Reinert noted, “*Conley* was a strange post-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.”⁹⁰ In short, for the complaint in *Conley*

⁸⁶ *Conley*, 355 U.S. at 45.

⁸⁷ *Conley*, 355 U.S. at 43 (paragraph breaks added).

⁸⁸ *Id.* at 48.

⁸⁹ *Id.* at 45–46.

⁹⁰ Reinert, *supra* note 3, at 128.

itself, nothing turned on the difference between notice pleading and plausibility pleading.

In the long interim between *Conley* and *Twombly*, a small literature documented the consistent practice of the federal courts to see, and expect, factually detailed pleadings, even in the wake of *Conley*. Almost 30 years ago, Rick Marcus concluded notice pleading was a “chimera.”⁹¹ A decade ago, Christopher Fairman called it a “myth,” providing numerous examples of what appeared to be a wide range of ad hoc standards employed by district courts in ruling on motions to dismiss.⁹² These standards, whatever they were, were not notice pleading. Judges expected something more, and were willing to dismiss the occasional complaint that failed to state a plausible case. 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.”⁹³ Of course, *Conley*’s famous dictum did not go away. As recently as 2002, in *Swierkiewicz v. Sorema N.A.*,⁹⁴ 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.”⁹⁵

Nonetheless, 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.”⁹⁶ A striking example of such a “balk” is *Car Carriers, Inc. v. Ford Motor Co.*,⁹⁷ which, like *Twombly*, involved a complaint alleging an antitrust conspiracy which the court held failed to state a claim, despite a number of detailed factual allegations. Twenty-three years before *Twombly*, the *Car Carriers* said no fewer than

⁹¹ Marcus, *supra* note 10, at 451.

⁹² Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

⁹³ See Marcus, *supra* note 10, at 434.

⁹⁴ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

⁹⁵ *Id.* at 514 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)). Note, though, that *Leatherman v. Tarrant County Narcotics and Intelligence Control Unit*, 507 U.S. 163, 168 (1993), another oft-cited pre-*Twombly* pleading case, avoided citing this dictum.

⁹⁶ 550 U.S. at 562.

⁹⁷ *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984).

three times that given the allegations in the complaint, the claim was “implausible.”⁹⁸

Finally, the *Twombly* litigation reveals the same pattern of detailed pleading and an implicit requirement of factual allegations that render a claim “plausible.” The most telling if oft-overlooked fact about *Twombly* is this: in 2003, the district court dismissed the complaint.⁹⁹ Notably, the district court did so only a year after *Swierkiewicz* reiterated the *Conley* dictum. In other words, the Supreme Court’s “sweeping,” “startling,” and “surprising”¹⁰⁰ decision in *Twombly* simply affirmed the decision the district court, bound by *Conley* and *Swierkiewicz*, made four years prior.

Notable, too, is the Second Circuit’s opinion, which was reversed by the Supreme Court. It invoked 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*. Pop quiz: which of these quotes come from the court embracing notice pleading, and which come from the court rejecting 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

⁹⁸ *Id.* at 1109–10.

⁹⁹ *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).

¹⁰⁰ Smith, *supra* note 3.

to forget that proceeding to antitrust discovery can be expensive.”¹⁰¹

Whatever the difference was between the Second Circuit, which applied the notice pleading standard of *Conley*, and the Supreme Court, which announced a new regime of plausibility pleading, it was not that the Second Circuit failed to require that the plaintiff’s claim for relief be plausible!

In sum, the complaint in *Conley* would have survived under *Twombly*, the District Court in *Twombly* dismissed the complaint under *Conley*, and the Second Circuit in *Twombly* required plausibility under *Conley*. These facts together raise the possibility that just as detailed pleading has been nothing new for plaintiffs’ attorneys, plausibility pleading may be nothing particularly new for judges. As one practitioner 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.”¹⁰²

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.¹⁰³ Perhaps they are just a product of the Roberts Court’s distinctive interest in civil procedure and the Court’s efforts to “clean up doctrinal confusion” in the field.¹⁰⁴ Perhaps the Supreme Court is 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

¹⁰¹ 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. Twombly*, 550 U.S. 544, 570; C: *Twombly*, 425 F.3d at 117; D: *Twombly*, 550 U.S. at 558 (internal quotation marks omitted).

¹⁰² Jeff Jeffrey, *The Changing World of Civil Procedure Post Twombly, Iqbal, The Blog Of The Legal Times* (June 18, 2010) (quoting Andrew Pincus) (available online at <http://legaltimes.typepad.com/blt/2010/06/the-changing-world-of-civil-procedure-post-twombly-iqbal.html>) (last accessed February 13, 2015).

¹⁰³ See Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011).

¹⁰⁴ See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 317 (2012).

confirmation of existing practice.¹⁰⁵ For more than a decade after the *Celotex* trilogy was decided in 1986,¹⁰⁶ 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.¹⁰⁷

V. THE “LIBERAL ETHOS” IN MODERN PRACTICE

In presenting its account of plausibility pleading, the objectives of this article 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 Rick 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.”¹⁰⁸

Benjamin Spencer captures 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.¹⁰⁹ The restrictive ethos is “characterized by a desire to discourage certain claims and to keep systemic litigation costs under control.”¹¹⁰ This “restrictive ethos . . . frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court.”¹¹¹

While the merely descriptive account presented in this article does not establish any definitive normative claims about plausibility pleading, it does provide a framework for understanding its effects, which facilitates an evaluation of the doctrine. As I argue herein, the juxta-

¹⁰⁵ See Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143 (2010).

¹⁰⁶ See *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).

¹⁰⁷ 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).

¹⁰⁸ Marcus, *supra* note 10, at 439.

¹⁰⁹ Spencer, *The Restrictive Ethos in Civil Procedure*, *supra* note 12, at 353.

¹¹⁰ *Id.* at 366.

¹¹¹ *Id.* at 353–54.

position of “liberal” notice pleading and “restrictive” plausibility pleading may be more apparent than real. As Robert Bone has argued, the vision of the drafters of the Federal Rules was a pragmatic one,¹¹² and we should entertain the possibility that plausibility pleading serves the same ends today that notice pleading sought to serve in 1938. Indeed, I will make a more audacious claim: the “paradox” of plausibility pleading is not that it hurts plaintiffs facing information asymmetries, but that *raising* pleading standards is consistent with the “liberal ethos” and may help both defendants *and plaintiffs* in a world of costly litigation and sometimes hostile judges.

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,*” the liberal ethos has never taken hold; jury trials after full discovery comprise about 3 percent of all federal court civil dispositions, and did so long before *Twombly*.¹¹³ 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. This bears repeating: Only about 3 percent of federal civil cases are resolved by a jury trial—but only about 3 percent of federal civil cases are resolved by a motion to dismiss.

More to the point, judges have never been the gatekeepers to federal court, either before or after *Twombly* and *Iqbal*. That role has always belonged to plaintiffs’ attorneys. Pleading standards have little bite because litigation costs and litigation strategy constrain plaintiffs far more severely than pleading rules.

The infrequency of jury trials and the relative unimportance of pleading standards 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 famously existed under common law pleading, and was a concern of Dean Clark and the drafters of the Federal Rules.¹¹⁴ But it is irrelevant today. Instead, both resolution at trial

¹¹² Bone, *Pleading Rules*, *supra* note 21, at 890–98.

¹¹³ Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. OF EMPIRICAL L. STUD. 705 (2004).

¹¹⁴ See also Spencer, *The Restrictive Ethos in Civil Procedure*, *supra* note 12, at 355–356: “Simplified pleading and broad discovery were designed to pro-

and resolution on the pleadings are unusual outcomes in modern litigation. As Maria Glover has explained, the real endgame is settlement.¹¹⁵ The liberal ethos of the Federal Rules needs to be understood in this light.

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 resolution of litigation as “a game of skill” versus resolution “on the merits.”¹¹⁶ 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 strategies that lead to settlements or other outcomes unjustified by the merits of the claim but instead driven by litigation costs. While the *Twombly* court was focused on the dangers that high litigation costs pose to defendants, this concern is hardly unique to defendants. From the plaintiff’s perspective, litigation costs are also a first-order concern, because high litigation costs deter potentially meritorious claims for modest damages.

Once viewed in this light, it is no foregone conclusion that plausibility pleading represents a departure from the liberal ethos, for two reasons. First, I argue that plausibility pleading serves the ends of the “liberal ethos” by promoting the resolution of cases “on the merits” rather than through a “game of skill.” Second, I argue that raising pleading standards can, on the margin, increase access to the courts for plaintiffs whose risky but plausible claims would otherwise be too expensive to litigate.

A. “On the Merits” Rather than a “Game of Skill”

Despite the fact that this is a source of much criticism of the plausibility standard, the *whole point* of the plausibility standard is that the court is judging the *merits* of the complaint.¹¹⁷ It is true, of course,

mote resolution of disputes on the substantive merits as opposed to procedural technicalities.”

¹¹⁵ J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

¹¹⁶ 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*, 355 U.S. at 48.

¹¹⁷ Marcus, *supra* note 10, at 454. 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

that a judicial judgment on the merits early in a case is likely to be less accurate than a judicial (or jury) judgment on the merits after full discovery and trial. This is a fair criticism.¹¹⁸ But the relevance of this fact is overstated. It assumes that the alternative to a decision at the pleading stage is a decision at the trial stage. Such an assumption is almost quaint, though, in a world in which fewer than 5 percent of cases reach trial. Instead, most cases settle. Thus, the relevant comparison is the extent to which a decision (one way or the other) at the pleading stage is a less accurate reflection of the merits than a *settlement* by the parties in the shadow of the likely outcome, and the likely cost, of taking a case to judgment. Indeed, *Twombly*'s concern was a case that would settle not because it had merit, but because the costs of discovery were large and asymmetrically burdensome to the defendant. In short, the alternative to dismissal is not necessarily resolution "on the merits." Settlement may or may not be "on the merits," and dismissing a case *on the merits* is preferable to settlement *not on the merits*.

Of course, because the true merit of a case is never perfectly observable to the court, 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 benefit (preventing settlements not on the merits) and cost (preventing settlements on the merits) that is, or at least should be, the central issue in the debate on the wisdom of *Twombly* and *Iqbal*. In other words, we must assess the extent to which plausibility pleading makes a difference in those cases that might otherwise be decided "on the merits" rather than as "a game of skill."

In this respect, the theory of pleading that I develop above offers guidance: in most cases, the pleading standard simply won't make a difference. Importantly, this is even true for cases in which there is an asymmetry of information favoring the defendant. There are some categories of cases, though, for which pleading standards may matter: (1) low-merit nuisance suits; (2) shoot-the-moon cases; (3) suits driven by

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."

¹¹⁸ See, e.g., Steinman, *supra* note 3, at 1312; Spencer, *Plausibility Pleading*, *supra* note 3, at 483; Hoffman, *supra* note 5, at 1263.

spite, indignation, or optimism; and (4) cases with *pro se* or IFP plaintiffs.

Notably, three of these four categories of cases are cases that, by definition, do not settle on the merits. Low-merit nuisance suits, shoot-the-moon cases, and suits filed only because of spite, indignation, or optimism have settlement value *despite* their level of merit.

So, for the vast bulk of cases that are going to settle on the merits, the pleading standard isn't going to matter. And most types of cases for which plausibility pleading may lead to more dismissals are cases which will not otherwise settle on the merits. By replacing *settlement not on the merits* with *dismissal on the merits*, plausibility pleading serves, rather than departs from, the ends of the "liberal ethos."

But not perfectly. The fourth category of cases that may be affected by plausibility pleading includes cases with *pro se* or IFP plaintiffs. While many cases brought by such plaintiffs may be low-merit such that dismissal is normatively desirable, many may not be. Further, one might expect *pro se* plaintiffs to be less effective than represented parties at assessing the merits of their claims, screening on merit, and drafting detailed and effective complaints. The classic case, *Dioguardi v. Durning*,¹¹⁹ is emblematic of precisely this concern. If so, then if higher pleading standards are applied to such plaintiffs, relatively strong cases may be dismissed under a higher pleading standard. This counsels caution in the application of plausibility pleading to *pro se* and IFP plaintiffs. For these claimants, *Erickson* provides a doctrinal hook for a more liberal approach,¹²⁰ and perhaps it is no surprise that one of the leading examples of liberality in the application of plausibility pleading, *Swanson v. Citibank*,¹²¹ involved a *pro se* plaintiff.¹²²

B. When to Hold and When to Fold¹²³

Imagine a poker player who sits down to play a hand of poker. Both she and her opponent are skilled poker players, but only one will win the hand; the other will lose all of the money she has bet. But this poker player not only has to worry about her opponent, for this poker

¹¹⁹ 139 F.2d 774 (1944) (Clark, J.).

¹²⁰ *Erickson*, 551 U.S. at 94.

¹²¹ *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010).

¹²² *Id.* at 402.

¹²³ I am indebted to conversations with Bill Landes and J.J. Prescott for developing the ideas in this section. They bear no culpability, however, for the poker metaphor. Cf. Kenny Rogers, *The Gambler* (United Artists 1978).

game occurs in an unusual setting. There is a third person sitting at the table, the dealer, and although most dealers are fair, there is a chance that this dealer has stacked the deck against her. Of course, she still may be able to win the hand; a good player will sometimes beat the odds. But a good player also knows that, on average, she will lose more than she wins when the deck is stacked against her.

The dealer deals each player their cards. Our player looks at her hand: it is a decent, but not great, set of cards. With a fair deck, she would have a good shot at winning the hand, but with a stacked deck, this hand is a losing proposition. She faces a dilemma: What to do?

At this point, let's say the dealer says the following: "I know you're worried about whether you're playing with a stacked deck. I'm not going to keep you in the dark forever. I will reveal whether the deck is stacked against you after you have placed your bets and just before you reveal your hand."

Now, consider an alternate scenario. Let's say that the dealer instead says, "I will reveal whether the deck is stacked at the very beginning of the game, before you place any bets. But there is a catch: if I reveal that the deck is stacked against you, I will force you to fold."

In which scenario is our poker player better off? Put another way, in which scenario would our poker player even be willing to sit down at the table?

In the first scenario, our poker player's response to the dealer's offer will be "Thanks for nothing." By the time she discovers whether the deck is stacked, she has already placed her bets and there is nothing she can do but hope for the best and see how the cards fall.

But in the second scenario, it is as if she is playing with a fair deck. If the dealer reveals a fair deck, then she can play the game with confidence. And if the dealer reveals a stacked deck, then she has no choice but to fold—but that is exactly what she wants to do, given that she's playing an unfair game. The early revelation of information ensures that she only risks her money when the deck is a fair deck.

* * *

A major concern with plausibility pleading is that the vague, loosely defined standard of "plausibility" invites or even requires the exercise of discretion by judges, who may exercise their discretion in a way that reflects bias, whether conscious or unconscious. To the extent these biases reflect hostility or incredulity toward the claims of certain plaintiffs, this could lead to those claims being dismissed—even if

such claims, objectively considered, deserve an opportunity for discovery and trial on the merits.¹²⁴

This is a powerful critique of the plausibility standard. But this critique looks only at the dismissal decision itself, ignoring the larger context in which a motion to dismiss takes place. A judge exercises discretion throughout a lawsuit, discretion that can profoundly affect the likely outcome of a trial or the value of a settlement. In other words, the problem that this critique identifies is not the plausibility standard—it is judicial bias.

As the poker analogy above makes clear, if one is facing a potentially biased decisionmaker, it is better to have the decisionmaker reveal his bias sooner rather than later. A judicial order revealing whether the judge considers plaintiff's claim plausible is a tremendously valuable piece of information to a plaintiff with an uncertain claim facing the prospect of spending tens of thousands of dollars on discovery and pre-trial motion practice.

To give a concrete example, let's say a plaintiff has a claim for a \$300,000 injury. Her lawyer believes that with an unbiased judge she has a 30 percent chance of winning at trial. But with a biased judge, she has only a 10 percent chance of winning at trial. Let's say that 1 out of every 5 judges are biased. Further, it costs \$10,000 to prepare a complaint, and another \$70,000 to take the case through discovery to trial. In a world without the plausibility standard, is this a case worth bringing?

The answer is no. With an unbiased judge, the expected payoff from filing suit is

$$\text{Prob. win} \times \text{Judgment amt.} - \text{Total cost} = \text{Payoff} \quad (8a)$$

$$30\% \times \$300,000 - \$80,000 = \$10,000 \quad (8b)$$

¹²⁴ See Bone, *Pleading Rules*, *supra* note 21, at 889 (noting that “critics fear that *Twombly* gives too much latitude to district judges, who are eager to screen cases and likely to read the opinion as granting permission to do so”); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 199–200 (2010) (“Indeed, an important function of the jury is to screen out [judge’s] institutional bias, making it even more disconcerting that the *Iqbal* decision gave judges more power to scrutinize facts at the pleading stage”) (internal footnotes omitted); Hoffman, *supra* note 5, at 1260 (noting that “imbuing courts with discretion to conduct factually sufficiency review of merits allegations is likely to lead to [] disparities in judicial practices at the pleading stage, across different categories of cases and different courts”).

With a biased judge, the expected payoff from filing suit is

$$10\% \times \$300,000 - \$80,000 = -\$50,000 \quad (9)$$

So without knowing whether the judge is biased or not, the plaintiff must weigh the 80 percent chance of an unbiased judge against the 20 percent chance of a biased judge. The net expected payoff is negative:

$$20\% \times (-\$50,000) + 80\% \times \$10,000 = -\$2,000 \quad (10)$$

But under a regime of plausibility pleading, a biased judge will dismiss the suit at the outset. The expected payoff with an unbiased judge is unchanged, but the expected loss from having a biased judge falls. With a biased judge, the suit is dismissed right away. This means that with a biased judge, the plaintiff's chance of winning falls to zero, but her costs are limited to the costs of preparing the complaint:

$$0\% \times \$300,000 - \$10,000 = -\$10,000 \quad (11)$$

Because the plaintiff's losses are limited when she gets a biased judge, it is now worthwhile to sue. Her net expected recovery is positive:

$$20\% \times (-\$10,000) + 80\% \times \$10,000 = \$6,000 \quad (12)$$

Of course, most cases will not be close to the margin of filing or not filing, nor close to the margin of dismissal. This is what the theory in Part II and the evidence in Part IV told us. But importantly, to the extent that cases are close to the margin, the plausibility standard *increases* the net expected value of claims when litigation is costly and judicial bias is a serious concern later in litigation, not just at the pleading stage.¹²⁵

The information value of an early signal from the judge is not limited to scenarios of potential judicial bias. More generally, if plaintiffs are unsure of their own assessment of the facts, or of the legal conse-

¹²⁵ In unreported results (available from author upon request), I show that this result is generally true for cases close to the margin of filing or not filing and close to the plausibility threshold. Of course, if litigation costs are very low, or judicial bias manifests itself only at the pleading stage, these results do not hold!

quences of those facts, the plausibility pleading standard serves as a safety valve. Rather than incurring the expense of litigating to summary judgment before getting a clear signal of the judge's view of the allegations, a plaintiff gets an early signal from the judge ruling on a motion to dismiss before having to bear the bulk of the costs of litigation. By creating an extra, early signal about the value of the plaintiff's claim, pleading standards increase the option value of borderline claims, because it disposes of the weakest claims before the plaintiff has to pay for further litigation. Given that litigation costs can be a deterrent for plaintiffs with otherwise worthy claims, a procedural device that reduces expected litigation costs serves, rather than deserves, the liberal ethos by providing plaintiffs a slightly more meaningful opportunity to bring claims.

To be clear, we should expect this benefit to be small. I expect that most judges are essentially unbiased, and that most plaintiff's attorneys have a good sense of the strength of the claim before filing. Further, a defendant need not file a motion to dismiss, and as a matter of strategy, a defendant will forgo filing a motion to dismiss if it benefits the plaintiff more than the defendant. Thus, it should be little surprise that, as I have already noted, motions to dismiss remain relatively uncommon events, even after *Twombly* and *Iqbal*. The fact that plaintiffs can benefit from motions to dismiss by getting an early signal of the court's inclinations creates a natural check on their overuse by defendants.

VI. CONCLUSION

Imagining what pleading would look like in a world with *no* pleading standard allows us to take a fresh look at plausibility pleading. What we find is that the seemingly stark doctrinal change wrought by *Twombly* and *Iqbal* may have had an attenuated effect in practice, precisely because the kind of factually detailed, plausible pleadings that these cases require are what plaintiffs would file anyway—and were what plaintiffs *did* file before *Twombly*. Equally importantly, even before *Twombly* and *Iqbal*, plaintiffs who were unable to draft plausible pleadings simply did not file suit.

Of course, *requiring* plausible pleadings will surely have *some* effect. In this respect, my thought experiment helps distinguish which plaintiffs may be adversely affected, unaffected, or even aided by *Twombly* and *Iqbal*. There is widespread concern about plaintiffs with claims involving information asymmetries facing a “paradox of pleading.” But plausibility pleading has little or no adverse effect on such claims. These claimants *do* face a serious disadvantage, but it is the

same disadvantage they faced before *Twombly* and *Iqbal*: litigation is simply too expensive relative to their expected recovery.

On the other hand, we might expect to see more *pro se* and *in forma pauperis* plaintiffs turned away after *Twombly* and *Iqbal*, at least if the courts do not sufficiently heed the counsel of *Erickson*. Other, less sympathetic, categories of cases may be affected as well, such as cases driven by spite or low-merit, shoot-the-moon lawsuits.

Some plaintiffs may even gain from plausibility pleading standards. Litigation is risky and expensive, and an early signal from the judge that resolves uncertainty—whether about the state of the law or simply the bias of the judge—is valuable. A poker player would rather learn that the deck is stacked against him when he still has a chance to fold than after going “all in.” Losing a case on a motion to dismiss is bad, but losing for the same reasons after spending tens of thousands of dollars on discovery is worse.

In sum, while most cases are unaffected by plausibility pleading standards, we can identify several limited sets of plaintiffs that may be affected. The potential effects for these plaintiffs, however, point in different directions. Thus, while plausibility pleading may have little or no net effect on the volume of litigation or the rate of dismissals, it may slightly shift the composition of cases that reach discovery.

Finally, while it has been taken for granted that plausibility pleading represents a retreat from the “liberal ethos” of the Federal Rules, this view deserves to be reexamined. The “liberal ethos” ideals of full discovery and trial were never realized under notice pleading; plausibility pleading does nothing to change this. But the “liberal ethos” goal of resolving cases on the merits is largely served, rather than diserved, by plausibility pleading. Resolving cases on the merits—even with considerable inaccuracy—at the pleading stage must be judged against the alternative, which is settling cases. Settlement on the merits is surely preferable to dismissal, but settlement not on the merits is worse. By leaving most cases unaffected, but affecting (at least on the margin) cases driven by non-merits factors such as nuisance value, spite, or lottery-ticket stakes, plausibility pleading promotes the ideal of resolution on the merits in a world where the ideal of trial on the merits is usually little more than an aspiration.

There is one last wrinkle. We might expect that cases with plausible claims will settle on the merits, and cases with very high stakes or asymmetrical litigation costs will settle not the merits. But “cases with plausible claims” and “cases with very high stakes or asymmetrical discovery costs” are not exclusive categories. A case can be

both.¹²⁶ And while cases with a mix of plausible merit, high stakes, and asymmetrical costs are likely a small set of all filed cases, they may have a disproportionate impact on federal civil litigation as a whole.¹²⁷ How to deal with litigation that is driven both by merit and asymmetric litigation costs remains a critical policy question for civil procedure.

¹²⁶ See Marcus, *supra* note 10, at 479 (“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.”); Spencer, *Plausibility Pleading*, *supra* note 3, at 452 (noting that “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”).

¹²⁷ See William H.J. Hubbard, *The Discovery Sombrero, and Other Metaphors for Litigation*, 64 CATHOLIC UNIV. L. REV., at 32 (forthcoming 2015) (noting that 5 percent of cases account for about 60 percent of litigation costs).

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