



# PENN STATE LAW REVIEW

## Getting a Clue: Two Stage Complaint Pleading as a Solution to the *Conley-Iqbal* Dilemma

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*[N]o system of pleading yet devised may be considered final, and . . . unless pleading rules are subject to constant examination and reevaluation, they petrify and become hindrances, not aids, to the administration of justice.<sup>1</sup>*

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1. Charles Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 545 (1925).

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## INTRODUCTION

Consider these scenarios:

While a commercial jet is in flight, both engines catch fire. Lacking propulsion, the plane crashes. All aboard are killed.

A consumer brings home a new appliance. When it is first plugged in and operated, it explodes. The consumer is seriously injured.

A fire breaks out in a crowded nightclub. Between the fire, the smoke and the ensuing panic, dozens of patrons die.

Prior to *Ashcroft v. Iqbal*<sup>2</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>3</sup> the plaintiff's path in each of these scenarios was clear: name every possibly culpable defendant and let discovery sort them out.<sup>4</sup> Under the liberal pleading rules of *Conley v. Gibson*,<sup>5</sup> so long as the defendant had fair notice of what the claim was about, and so long as the defendant's connection to the harmful event was not too attenuated, litigation could proceed.

The complaint naming these multiple defendants typically relied on conclusory allegations.<sup>6</sup> While the practice of naming all proximate parties—and often drawing innocent bystanders into expensive litigation—had its drawbacks, this was nonetheless understood to be in

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2. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

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

4. For example, in the litigation following a tragic night club fire in Rhode Island that began after a pyrotechnics display, the named defendants included not only the surviving band members, the night club owners and the pyrotechnics provider, but also all real estate partnerships with an ownership interest in the property, the insurance inspectors who allegedly negligently inspected the premises, the company that sold allegedly flammable sound proofing to the venue, all identifiable suppliers of all brands of foam sound proofing materials to that company, despite absence of proof as to which company's foam was actually used, the manufacturer and seller of the fire alarm system, and the radio stations that helped promote the concert. *See Gray v. Derderian*, 365 F.2d 218 (2005).

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

6. Conclusory allegations were allowed under *Conley* given the Court's interpretation of FED. R. CIV. P. 8(a)(2), which read the Federal Rules as applying a notice pleading approach. For example, in *Conley*, the Court stated that "[t]he decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (citing FED. R. CIV. P. 8(a)(2)).

accordance with both the letter and spirit of the Rules.<sup>7</sup> For example, Form 12, which satisfies federal requirements pursuant to Rule 84, provides a form for “When The Plaintiff Does Not Know Who Is Responsible” which includes conclusory allegations of negligence against multiple parties.<sup>8</sup>

*Iqbal* raises serious questions about whether this can continue. Under *Iqbal*, plaintiff must plead, with regard to each defendant, non-conclusory facts that give rise to a “plausible” belief that the defendant would be liable if the facts are proved.<sup>9</sup> In cases such as those in the scenarios above, such facts will not be easily obtained, especially before the statute of limitations runs.

*Iqbal* puts plaintiffs in these types of cases—which are garden variety cases familiar to many civil litigators—in a difficult situation. The plaintiff cannot, consistent with ethical obligations, simply make up facts to get past the fact pleading barrier and hope to find better ones later.<sup>10</sup> Neither can the plaintiff allege conclusory facts. However, if the plaintiff fails to name the truly culpable party, and the statute of limitations runs before discovery shows who should have been named, a suit that could have won on the merits cannot be brought.

Both *Conley* and *Iqbal* create flawed systems. Under *Conley*, blameless defendants are dragged through a lengthy and expensive discovery process. Under *Iqbal*, culpable defendants will be released at the pleading stage because of the inability of plaintiffs to get access to necessary information.

This article examines whether too much is asked of the single complaint and proposes a compromise approach: two stage complaint pleading sandwiched around a limited, express discovery phase. An initial *Conley* level complaint would allow a plaintiff to enter into a phase of defined, limited discovery, while allowing for the resolution of issues not necessarily related to factual development, such as justiciability. That discovery will produce the information most likely to reveal the most culpable parties. This information would support a second complaint at a higher pleading level, which would then define the issues and parties for discovery. The goal is to bring an 80-20 efficiency to the pleading level before the full discovery onslaught is unleashed.

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7. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 566 (2010) (“Justice Stevens and other scholars have pointed out that the judicial refusal to credit a conclusory allegation as true on a 12(b)(6) motion is seemingly inconsistent with the conclusory nature of the official forms following the FRCP, which suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”) (internal quotations omitted).

8. See FED. R. CIV. P. Form 12.

9. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

10. See FED. R. CIV. P. 11.

*IQBAL AND THE MULTIDEFENDANT SETTING*

Cases involving multiple defendants reveal flaws in our procedural regime that exist in single defendant cases as well. If multi-defendant cases are viewed as what they are—an aggregation of single defendant cases involving a common plaintiff and a common transaction—common assumptions about the behavior of either plaintiffs or defendants appear dubious. Plaintiffs might be more likely than otherwise thought to add uncertain claims bringing in an additional defendant; defendants might have less leverage and greater incentives to settle.

Multi-defendant cases make clear that truly injured plaintiffs, seeking a fair recovery, might have a real need to engage in post-filing fact finding in order to find their way to the correct target. At the same time, multi-defendant cases make clear that even clearly blameless defendants might fall victim to cost arbitrage based settlement demands.

*A. The Multi-defendant Scenario*

Much multi-defendant litigation resembles in broad strokes an Agatha Christie mystery or the mystery board game Clue.<sup>11</sup> In a remote country house a body lies dead in the library. Nobody knows for sure at first, but it seems likely that the death was not accidental, and someone must be at fault. That someone, conveniently, tends to be at the scene, one of a large but discrete cast of characters who had access to the country house at the critical time. Through a gradual unveiling of facts, the guilty party is identified.

Compare that scenario to an airplane crash or a product liability suit. Again, someone has been injured, and it often seems very likely that someone other than the plaintiff bears primary responsibility. The list of potential offenders might be large, but it is not infinite. Likely offenders tend to be those involved in the design, manufacture, maintenance or operation of the plane or product. Within that universe, discovery helps identify those for whom culpability is more likely.

The detective story and the multi-defendant scenario both have the same difficulty: identifying the culpable party at the outset. Even when a reasonable guess can be made as to the identity of the culpable party, the “how they did it” also often takes time to develop, and additional culpable “accomplices” may be revealed only gradually. Based on the facts available to the reader or the plaintiff at the outset, it is simply not possible to tell with accuracy who did it and how.

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11. See Clue Home Page, <http://www.hasbro.com/clue> (referenced on May 30, 2010).

*B. What the Multi-defendant Scenario Tells Us*

In the multi-defendant setting, a plaintiff can be genuinely, wrongly injured, yet unable to state with any degree of reasonableness who caused the harm. To the extent that an effort to identify the culpable party from a limited pool of candidates has value, a lawsuit cannot be termed frivolous. At the same time, the claim against any one of the joined defendants might be termed frivolous if it were brought alone, because evidence establishing any one party's fault simply is not available prior to discovery. While the multi-defendant setting makes clear that absence of proof at the outset against any given defendant does not amount to frivolousness, the same dynamic can occur in single defendant suits. In diverse settings, plaintiffs with winning claims will not be able to state at the outset exactly why a defendant ought to be held liable.

In the Clue setting, keeping all the potentially guilty parties at the country house for an extra day or two to sort through who killed Mr. Boddy does not impose extraordinary costs. In the complex litigation context, the party might continue for years and at a much higher cost. Striking the balance between forcing plaintiffs to premature choices and subjecting defendants to unfair burdens underlies much of the history of pleading.

#### THE HISTORY AND PURPOSES OF PLEADINGS

Much has been asked of pleadings. At times, such as under the common law, the pleading process served to define and narrow the case.<sup>12</sup> Under Code pleading, the pleadings set forth the essential facts and defined the contours of the case.<sup>13</sup> The complaint was required to set forth the facts supporting the cause of action, with those same facts acting as boundaries beyond which no proof could be introduced.<sup>14</sup> Under the Federal Rules of Civil Procedure, which shifted more of the burden of defining and shaping litigation to discovery, pleadings were asked first and foremost to provide notice.<sup>15</sup>

As Charles Clark summarized the shifting function of pleadings more than a decade before the adoption of the Federal Rules:

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12. See Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD, CENTENARY ESSAYS 58-59 (Allison Reppy ed., 2000) (1949) (stating that a litigant must plead his case in a manner which allows a person of normal intelligence to understand the nature of the claim).

13. *Id.* at 57 (indicating that of fundamental importance to code pleading was the acceptance of fact).

14. *Id.* (stating that by its nature, the acceptance of fact set the boundaries for a case).

15. See FED R. CIV. P. 8(a).

[T]he purpose especially emphasized has varied from time to time. Thus in common law pleading especial emphasis was placed upon the issue-formulating function of pleading; under the earlier code pleading like emphasis was placed upon stating the material, ultimate facts in the pleadings: while at the present time the emphasis seems to have shifted to the notice function of pleading.<sup>16</sup>

Even under the Federal Rules of Civil Procedure, the humble complaint must play multiple roles. Its filing supplies a start date for the litigation process.<sup>17</sup> It provides notice of the nature of the claims being asserted.<sup>18</sup> It identifies at least some of the relevant facts and sets the boundaries within which further facts may be developed during discovery.<sup>19</sup> In conjunction with the answer and any later amended complaints, it defines and narrows the issues that must be resolved at trial.<sup>20</sup> It provides a means for testing, and when appropriate dismissing,<sup>21</sup> claims without a legal basis<sup>22</sup> or for which jurisdiction does not lie.<sup>23</sup> When litigation has ended, the complaint helps identify, for purposes of issue and claim preclusion, which issues were and might have been litigated.<sup>24</sup>

A pleading standard that works brilliantly for one of these tasks—say, narrowing the issues for trial—might prove cumbersome for another, such as notice. In thinking about pleadings, it must be asked whether (and how much) pleadings should be used to resolve the

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16. Charles Clark, History, *Systems and Functions of Pleading*, *supra* note 1, at 518-19.

17. See FED R. CIV. P. 3.

18. See FED R. CIV. P. 8(a); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04[1][a] (3d ed. 2010) ("Under Rule 8, a party must 'provide a statement sufficient to put the opposing party on notice of the claim.'").

19. See FED R. CIV. P. 26(b); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.41[2][b] (3d ed. 2010) (stating that the limitation of discovery is designed to "[1] focus the attention of the parties and the court on the actual claims and defenses involved in the action; and [2] increasing the availability of judicial officers to resolve discovery disputes and securing more active involvement of the court in managing discovery.").

20. See FED R. CIV. P. 15; 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.02[1] (3d ed. 2010) ("Pleadings are not intended to be an end in themselves, but only a means to dispose of the controversy.").

21. See 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.02[1] (3d ed. 2010) ("Rule 12(b) also expressly allows the defendant to raise specific matters by motion filed before the answer, but only one such motion is allowed. This procedure, therefore, allows the defendant to test the merits of a claim.").

22. See FED R. CIV. P. 12(b)(6).

23. See FED R. CIV. P. 12(b)(1); FED R. CIV. P. 12(b)(2).

24. See FED R. CIV. P. 13; 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56 app. 200 [63] (3d ed. 2010) ("Under established principles of res judicata or collateral estoppel a valid judgment rendered in a prior action is binding on the parties and their privies in any subsequent action that involves matters previously adjudged.").

litigation, and how much it should be used just to set the stage for other modes of resolution. Because the nature of litigation has changed profoundly in light of the federal rules—in part because of the Rules' other innovations of easy joinder and expansive discovery—the time has come to ask anew what kind of pleading regime would best serve the goal of accurate, cost effective dispute resolution. It might be time for pleading to evolve again in light of changed circumstances.

A. *The Common Law and Code Eras: Narrowing and Defining the Case*

At one time, pleadings played a much more central role in developing litigation than they do today. In both the common law and code eras pleadings were used to narrow and define the case. Under equity, pleadings took on the additional role of providing evidence to the court, substituting in large part for the trial.<sup>25</sup> While these pleading regimes carried a cost—particularly in creating technical traps for the unwary and sometimes expanding the cost of the overall litigation—they did have the advantage of sometimes properly eliminating meritless cases and of simplifying and narrowing trial.<sup>26</sup>

1. Common Law Pleading

In the Common Law era, pleading practice focused on narrowing and defining the case.<sup>27</sup> It did not rely on the opening document to achieve that function, but achieved case definition through an extensive exchange of pleadings.<sup>28</sup> The initial writ provided notice, some statement of the facts underlying the claim, and indication of the legal theory.<sup>29</sup> Then commenced a complex dance of response and counter-response. The defendant denied or admitted the facts alleged, challenged the legal sufficiency of the allegations through demurrers, or presented defenses that would defeat the claim even given the truth of plaintiff's allegations.<sup>30</sup> The exchange of pleadings could proceed through several iterations, with each new round providing traps for the unwary.

Common law pleading practice possessed one cardinal virtue—it simplified trial. The goal of the complex exchange of pleadings was to

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25. See C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 94 (2d Cambridge: Charles W. Sever and Company 1883) (1877).

26. *Id.* at 25.

27. See Charles Clark, *History, Systems, and Functions of Pleading*, *supra* note 1, at 526.

28. *Id.*

29. *Id.*

30. *Id.*



narrow the case to a single issue of fact or law that could be decided at trial.<sup>31</sup> Compared to modern trials, the common law trial was a straightforward affair. Disputes could be tried in days, if not hours, and typically presented non-technical issues that a jury of common folk could readily comprehend.<sup>32</sup>

The path to the trial, however, imposed substantial costs. Much depended on technicalities. Perhaps the most fundamental of these, until abolished, were the ancient forms of action. In part procedural, in part substantive, the forms provided for a certain kind of remedy for a certain kind of harm.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right, an assize of novel disseisin or of mort d'ancestor, a writ of entry sur disseisin in the per and cui, a writ of besaiel, of quare impedit, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds.<sup>33</sup>

At the outset of the lawsuit, the plaintiff faced irrevocable and consequential choices. Each form of action carried with it procedural anomalies—such as how jurisdiction over the defendant might be obtained, and which remedies would be available. Each also corresponded to certain kinds of facts, but not, however closely related, to others. Choosing a not-quite-right form of action meant dismissal. “The plaintiff must sue either in case or in trespass, and upon the accuracy of his claim depended the success of his action.”<sup>34</sup>

Choosing the right form of action was only the first of many pleading choices fraught with danger. For example, a defendant could not deny the legal basis for the claim while challenging the facts; a

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31. *Id.*; see also Ellen E. Sward, *Special Issue on the History of the Trial: A History of the Civil Trial in the United States*, 51 KAN. L. REV. 347, 350 (2003) (“The pleadings were quite important, as they were designed to reduce the dispute to a single issue of fact or law.”).

32. See Clark, *History, Systems and Functions of Pleading*, *supra* note 1.

33. F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 1, (A.H. Chaytor and W.J. Whittaker ed.) (1909) (emphasis added).

34. *Id.* at 55; R. ROSS PERRY, *COMMON LAW PLEADING: ITS HISTORY AND PRINCIPLES* 227-28 (1897); CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 31-34 (2nd ed. 1947) (1928).

choice had to be made between a demurrer and a denial.<sup>35</sup> Once a choice was made, there was no going back for a do-over.

As time went on, the defects of common law pleading became increasingly clear. The pleading phase of the case could take a long time and cost a lot of money, pushing off the resolution of the case on the merits and pricing some litigants out of court.<sup>36</sup> Worse than that, the pitfalls of pleading meant that some cases could be resolved on grounds that had nothing to do with the merits.<sup>37</sup>

## 2. Equity Pleading

Pleading in equity followed its own distinct course, but also served to narrow and define the case.<sup>38</sup> A suit in equity was commenced by filing a bill of complaint. The bill of complaint set forth the facts of the case along with a prayer for relief.<sup>39</sup> The bill of equity included interrogatories to the opposing party, and as pleadings were exchanged much of the proof in the case was submitted through the pleadings themselves.<sup>40</sup>

Fact pleading also was the rule in equity. The bill, which was used to initiate proceedings in Chancery, required as an essential element a listing of the facts which the plaintiff expected to prove, to which the defendant was required to respond with either admissions or denials under oath.<sup>41</sup> While much of practice under the modern rules—such as joinder of parties and claims—derives from equity practice,<sup>42</sup> modern notice pleading does not.

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35. See MAITLAND, *supra* note 33.

36. See R. David Donoghue, *The Uneven Application of Twombly in Patent Cases: an Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 4 (2009) (“The [common law pleading] system was designed to narrow the issues and reduce costs, but in practice it became an excruciatingly slow, expensive, and unworkable system.”) (citing 5 CHARLES ALLAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d. ed. 2004) (internal quotations omitted)).

37. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986) (“Nevertheless, the defendant could take comfort in the prospect that the plaintiff could ultimately lose because his lawyer bungled the pleading war.”).

38. See Sward, *supra* note 31, at 360.

39. *Id.* at 359.

40. *Id.* at 360.

41. See LANGDELL, *supra* note 25, at 53.

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

### 3. Code Pleading

With the industrial revolution well under way, the arcane and treacherous intricacies of common law pleading must have seemed as out of date as a torch lit medieval workshop. In an era that broke new ground in industrial efficiency and productivity, it was only natural that reformers wished the same for legal processes. The sometimes absurd technicalities of the common law looked ripe for replacement by a rationally engineered replacement.

The most influential of the U.S.<sup>43</sup> reform efforts,<sup>44</sup> the Field Code, sought to remedy the flaws of common law pleading by substituting “fact” pleading that diminished the importance of the causes of action.<sup>45</sup> The complaint in code pleading dispensed with naming the cause of action in favor of a document setting forth the facts of the case. The goal was in part to simplify the process, and in part to reduce the ability of judges to act capriciously.<sup>46</sup>

This new approach soon revealed problems of its own. Two merit mentioning. First, distinctions between “facts” and “ultimate facts” proved not so simple in application.<sup>47</sup> Second, in order to avoid surprise and discipline the pleading process, the proof offered at trial could not go beyond the allegations of the complaint.<sup>48</sup> The disputes over what constituted proper pleading of facts enabled expensive wrangling over the pleadings,<sup>49</sup> while the limitation on proof beyond the pleadings,

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43. A parallel reform movement was also operating in England at this time. Spurred in significant part by the work of Jeremy Bentham, English courts also adopted a series of reforms aimed at rationalizing pleading. See Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 529-30 (1925); Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926)

44. The Field Code was not the only American alternative developed to common law pleading. In the state of Virginia, for example, a more informal procedure known as “Notice of Motion” arose that operated alongside code pleading. Under this procedure, which operated at the election of counsel, a relatively informal notice could be filed by counsel identifying the nature of the claim; the defendant had the option of preparing a formal answer under the Common Law or responding more informally. This process lacked the joinder and discovery provisions of the Federal Rules, but it did allow an informal initiation of a law suit. This process was gradually expanded via legislation, and by the 1930s was used to initiate a large percentage of litigation. See Henry H. Fowler, *Virginia Notice of Motion Procedure: A Case Study in Procedural Reform*, 24 VA. L. REV. 711 (1938).

45. See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of An Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988).

46. See Subrin, *How Equity Conquered Common Law*, *supra* note 42, at 936-37.

47. See Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260-68 (1926).

48. See CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, *supra* note 34, at 261.

49. See Donoghue, *supra* note 36, at 5 (“[C]ode pleading, just like its common law predecessor, became immensely technical and expensive.”).

coupled with restrictions on amending the complaint, sometimes made difficult adapting the case to factual developments.<sup>50</sup>

*B. 20th Century American Innovation: Notice Pleading*

By the early 20th century it had become clear that neither code pleading nor common law pleading was the ideal solution to launching a lawsuit. Perhaps because lawyers of the era were so thoroughly steeped in common law traditions,<sup>51</sup> technicalities proved resilient in legal practice. A new reform movement arose, this time directed at resolving cases on the merits rather than on technicalities. To achieve this, it seemed clear to some that the role of pleadings should be diminished.

An early advocate for reform was Roscoe Pound, then dean of the law school at the University of Nebraska. In a famous 1906 address to the American Bar Association, he decried what he saw as the “sporting theory of justice” where lawyerly skill mattered more than the merits and pushed for a new approach.<sup>52</sup> For Pound, “the sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries.”<sup>53</sup>

Notice pleading quickly attracted adherents.<sup>54</sup> In the 30 years following Pound’s speech, a theory of notice pleading developed. This theory would diminish the role pleading might play in narrowing and resolving the case;<sup>55</sup> at the same time, litigants would no longer need to

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50. See CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, *supra* note 34, at 261, 708-712.

51. See Sward, *supra* note 31, at 383 (“Pleading had been a critical and complicated stage of a common law case, and it apparently was hard to let that complexity—and the learning behind it—go.”).

52. See Roscoe Pound, Speech at the American Bar Association Annual Meeting: The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 29, 1906).

53. See, e.g., Pound, *Appendix E, Principles of Practice Reform*, 35 A.B.A. REP. 635-48 (1910) [hereinafter *1910 Comm. of Fifteen Sub-Comm. Report*] (Pound writing for a Subcommittee of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation); Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438 (1910); *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 588-602 (1909); 33 A.B.A. REP. 542-50 (1908).

54. The first academic article proposing a notice pleading system appears to be by Clarke B. Whittier. See Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501 (1918).

55. See James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1179 (1938) (“The generality of allegation contemplated by the [Federal] Rules indicated the influence of the newer concept of notice pleading.”).

fear pleading as a trap.<sup>56</sup> So long as the function of notice was served, the litigation could proceed to resolution on the merits, with the expectation that merits resolution would yield more accurate and more respected results.<sup>57</sup>

### C. *Pleading Under the Federal Rules*

In the latter part of the 1930s, a confluence of events enabled a dramatic change in American federal court procedure. The passage of the Rules Enabling Act created two possibilities: merging equity and common law in the federal courts and the codification of federal procedure.<sup>58</sup> This moved notice pleading from an academic concept to reality.

Charles Clark, a pleading expert and the principal draftsman of the Federal Rules of Civil Procedure, was a believer in simplified notice pleading. Largely as a result of Clark's influence, notice pleading was incorporated in the new Federal Rules of Civil Procedure adopted in 1938.<sup>59</sup> Under this approach, the plaintiff was required only to provide "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>60</sup> Pleading formalities, whether of facts or causes of action, were out; getting to the facts through discovery and resolving the claims on the merits was in.<sup>61</sup>

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56. The notice pleading theory became a reality with the adoption of the FRCP. The FRCP introduced several new devices to serve purposes previously served by pleading, such as case definition and factual development. These devices were a new pre-trial hearing, motions for certainty, and a completely renovated procedure for deposition and discovery. The combination of the new devices, in combination with the generality of the allegations, no longer made pleading a trap. *Id.* at 1179-80.

57. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) ("While there are exceptions under the [Federal] Rules requiring pleading with greater factual detail, these heightened pleading situations are narrow.").

58. 28 U.S.C. § 2072 (1990). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

59. While the FED. R. CIV. P. 8(a)(2) does not use the word "notice," up until *Twombly* the Supreme Court had consistently held that it embodied a notice pleading standard. See *Hickman v. Taylor*, 329 U.S. 495, 500 (1947); see also *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002) ("a notice pleading system"); *Leatherman v. Tarrant County Narcotics Intell. & Coordination Unit*, 507 U.S. 163, 168 (1993) ("the liberal system of 'notice pleading' set up by the Federal Rules"); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("simplified 'notice pleading'").

60. FED. R. CIV. P. 8(a)(2).

61. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1448796> ("Under the Rules, then, pleading was a pervious gate. Its main task became the giving of fair notice of the pleader's contentions to the adversary (and the court and the public). It passed most of the screening function on to later stages of litigation. This postponement of screening constituted a fundamental choice in procedural design, a choice that is surely debatable.").

The adoption of such minimal notice pleading was an American innovation. No modern pleading regime had required so little. Even today, pleading systems worldwide typically require fact pleading—often at a level far beyond what Americans think of as fact pleading.<sup>62</sup>

### 1. Liberal Pleading in the Context of Other FRCP Innovations

Notice pleading was far from the only innovation in the new federal rules. For our purposes, two stand out—liberal joinder and expansive discovery. Along with notice pleading, these innovations changed the nature of what constituted a lawsuit.<sup>63</sup>

Liberal joinder of claims and parties, an approach modeled on equity procedure,<sup>64</sup> expanded the scope of lawsuits. Under the common law, a writ by its nature stated a single cause of action.<sup>65</sup> A case arose from and was linked conceptually to the specific legal right asserted. Under fact pleading, the facts laid out in the complaint circumscribed the litigation, and the plaintiff could not easily develop a case different from the alleged facts.<sup>66</sup>

That changed under the federal rules. Under the federal rules, the contours of a case or controversy are no longer linked to the legal right asserted. Rather, the federal rules model looks to the “transaction or occurrence” from which the dispute arose.<sup>67</sup> Multiple and inconsistent causes of action can be asserted based on the common transaction or

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62. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 443 (2010) (“[C]ivil law countries . . . require detailed fact pleading and often evidentiary support at the outset”); FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, Appendix A at 2. Spain, for example, requires not only that the facts be pled, but that any documents that will be relied upon be attached to the pleading; failure to attach them can lead to their being barred from evidence. *Id.* Nor is this a historical artifact, likely to be abandoned once word of notice pleading reaches them. During a recent effort to devise a common procedural regime that could be used worldwide, the non-U.S. systems insisted on fact pleading as a feature of the regime. THE AMERICAN LAW INSTITUTE AND UNIDROIT, PRINCIPLES OF TRANSNATIONAL PROCEDURE 30 (2004) (Principle 11.3 states, “In the pleading phase the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations.”). The comment to this provision notes that it is in contrast to U.S. notice pleading. *Id.* at 31.

63. See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989).

64. See Subrin, *supra* note 42, at 914-21.

65. See Clark, *Systems and Functions of Pleading*, *supra* note 1, at 526.

66. See CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, *supra* note 35, at 261 (“[s]o far as the plaintiff’s theory involves a particular set of facts, he is bound by those he alleged.”).

67. See FED. R. CIV. P. 13.

occurrence;<sup>68</sup> claims and counterclaims that are part of the transaction and occurrence complained of will be barred in future litigation the same as if they had been tried and lost.<sup>69</sup> The goal was efficient and equitable handling of the underlying dispute without undue regard to technicalities.

This change allowed multiple defendants to be joined in a single action, so that complete justice could be done in one trial. It also allowed the assertion of multiple legal theories, so that plaintiffs need not fear losing a meritorious case because the wrong legal theory was asserted. This inclusive approach drew upon equitable tradition, and deferred until later in the case the task of narrowing the parties and issues involved.

The new rules also allowed an unprecedented amount of pretrial discovery.<sup>70</sup> While pretrial discovery was known, to a limited degree, in code pleading and to a greater degree in equity practice, the new rules provided for a range of discovery tools that exceeded in scope anything that had previously existed in any one system.<sup>71</sup>

That the federal rules marked a bold new step in legal procedure was clear at the time. What was perhaps less clear was exactly how the process of litigation would change as lawyers became familiar with the new tools provided. As this article will show, the combination of liberal joinder, expansive discovery and scant pleading opened the way to a new kind of litigation centered less on either pleadings or trial than had been the case in the past.

## 2. *Conley*: Notice Pleading Confirmed

While the Federal Rules clearly marked a change in direction, the rules left room for interpretation. In particular, the exact nature of what constituted adequate pleading was inherently a bit hazy under Rule 8, given the rule's careful avoidance of either of the words "fact" or "notice."<sup>72</sup> While Clark clearly favored a liberal notice pleading regime requiring little in the way of fact pleading, other scholars, as well as

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68. See FED R. CIV. P. 20.

69. See 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56 app. 200 [63] (3d ed. 2010) ("Under established principles of res judicata or collateral estoppel a valid judgment rendered in a prior action is binding on the parties and their privies in any subsequent action that involves matters previously adjudged.").

70. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

71. *Id.* at 719.

72. David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 419-20 (1980) ("In requiring a 'short and plain statement of the claim showing that the pleader is entitled to relief,' rule 8(a)(2) is almost as fuzzy as the older code standard. What, for example, must one plead in order to *show* that he is *entitled* to relief? Abstract logic could produce a construction as strict as that existing under the codes.").

some judges and attorneys, preferred a more restrictive pleading regime.<sup>73</sup> For nearly 20 years after the adoption of the rules, uncertainty remained about just how much factual detail was required under Rule 8's "short and plain statement" of the case.

The haziness was cleared in the landmark case of *Conley v. Gibson*.<sup>74</sup> In this case, African American railroad workers brought a pro se claim that they had not been represented fairly by their union.<sup>75</sup> The claim was dismissed by the lower courts for failure to state a claim, but the Supreme Court reversed.<sup>76</sup> In language that opened the doors of the courthouse wide, the Court held that a complaint was sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief."<sup>77</sup> The Court further held that so long as the defendant was on notice of the nature of the claim, specific facts need not be pleaded.<sup>78</sup>

*Conley* was not briefed as a sufficiency of the pleadings case,<sup>79</sup> and its sweeping language can be read as speaking to a demurrer type issue (do plaintiffs have a legal right?) as opposed to the sufficiency of the facts. Nonetheless, for a generation, *Conley* was understood to mean that the federal rules required far less than fact pleading.<sup>80</sup>

*Conley* made hurdling the pleading barrier extraordinarily easy. Neoplatonic disputes about facts versus ultimate facts went away; technical failures in setting forth the claim rarely proved fatal. Within broad limits, plaintiffs got their day in court.

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73. Richard L. Marcus, *The Revival of Fact Pleading Under The Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445 (1986) ("[I]n the early 1950s, . . . the Ninth Circuit, in what has been described as a "guerrilla attack" on simplified pleading, urged that Rule 8(a)(2) be amended to revive code pleading by requiring the plaintiff to allege 'the facts constituting a cause of action.' During the same period, several district judges in the Southern District of New York were engaged in what Clark himself characterized as 'something bordering on a revolt' against the existing rule.").

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

75. *Id.* at 42.

76. *Id.* at 43-45.

77. *Id.* at 45-46.

78. *Id.* at 47-48.

79. See Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295 (Kevin M. Clermont ed., 2d ed. 2008).

80. See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 111-12 (2009) ("*Conley* quickly became the dominant case interpreting modern pleading doctrine. And though it was cited extensively for its general approach to notice pleading, tens of thousands of briefs and lower court opinions also expressly cite the "no set of facts" proposition. By the turn of the twentieth century *Conley* had become a cornerstone of civil procedure casebooks; before 2007, *Conley* had evolved into procedural holy writ or something very like it.").



### 3. The Evolution of Litigation Under the Federal Rules

Taken in conjunction with the changes in joinder and discovery, notice pleading, as affirmed in *Conley*, ushered in a new era in how law suits were handled. Notice pleading made it easier for plaintiffs to launch the litigation process.<sup>81</sup> The other reforms embodied in the Rules expanded the scope of that same litigation process. Unlike in times gone by, joinder allowed the inclusion of multiple defendants and multiple claims.<sup>82</sup> Discovery became a new phase of litigation that absorbed massive amounts of lawyer time and client funds.<sup>83</sup>

Pleading no longer served to define or control this process. Common law pleading had limited the subsequent litigation process to the precise legal issue identified at the outset;<sup>84</sup> fact pleading set bounds on the facts that could be developed or proved.<sup>85</sup> Notice pleading did not set comparable limits on the litigation process;<sup>86</sup> indeed, the spirit of the Rules was to remove such constraints in order to allow parties to proceed into discovery and on to merits resolution.<sup>87</sup>

In reducing the role of pleading, Clark seems to have expected that the path to the merits would prove short and efficient.<sup>88</sup> Contrary to expectations, the path to merits resolution often proved long and expensive. The invention of photocopy machines and computers vastly expanded the scope of documents accessible to discovery requests. At first, the number and scope of interrogatories were limited only by the

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81. Under the Federal Rules, a plaintiff must merely provide a short and plain statement of claim sufficient to put the other party on notice. FED. R. CIV. P. 8(a).

82. See FED. R. CIV. P. 18.

83. In 1980, the American Bar Association stated that “discovery in large case litigation is in serious trouble . . . . [A] great many big case lawyers vented intense feelings of anger and frustration toward the discovery process. . . . [Some] complained that the system was grossly inefficient, often failed to achieve its primary purposes, and was unfairly expensive to clients.” Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 870 (1980).

84. See Clark, History *supra* note 1, at 526 (“Since the facts were passed upon by a body of laymen, not by a trained judge, it was felt necessary to ascertain clearly the points of dispute between the parties before the trial was ‘begun.’”).

85. See CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, *supra* note 34, at 261 (“So far as the plaintiff’s theory involves a particular set of facts, he is bound by those he alleged.”).

86. See FED. R. CIV. P. 8(a); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

87. *Id.* (The pleading threshold under the Federal Rules of Civil Procedure is easy to pass).

88. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, HISTORICAL BACKGROUND TO THE FEDERAL RULES OF PROCEDURE 5 (2009) (“[Clark’s] personal philosophy was that procedure should be a handmaid of justice, not mistress—in other words, that procedure should be subservient to substance.”)

imagination of the litigating attorneys or the active intervention of judges, with no limits set by the rules themselves.<sup>89</sup> Depositions similarly were unconstrained, subject to a judge choosing to intervene.<sup>90</sup>

Over time, rather than being preparation to litigation, the discovery phase became the litigation.<sup>91</sup> Trials became the exception, rather than the norm. Attorneys could spend their entire careers as “litigators” handling matters in federal court yet rarely, if ever, try a case.

As it happened, lawyers did not abandon the “sporting theory” of litigation and were quick to take advantage of the new playing field created by the extended discovery phase. The temptation to engage in “sporting” litigation was only increased because this contest, unlike pleadings or trial itself, largely took place away from the supervision or even active awareness of the supervising judge.<sup>92</sup>

Defendants joined in a proceeding were locked into a discovery process that often proved long and expensive, even when the defendant’s connection to the dispute was tangential.<sup>93</sup> Discovery in a typical case includes interrogatories, document production and review, depositions and expert discovery.<sup>94</sup> In multi-defendant cases, this pattern repeats across all defendants, and typically each defendant must not only engage in discovery related to itself and the plaintiff, but devote additional resources to monitor the discovery directed at its codefendants. Even if a tangential defendant is only along for the ride and can expect to win on the merits, it can be a high priced ticket.

To a significant extent, the evolution of federal practice since the 1970s has involved attempts to rein in this expansive discovery process.<sup>95</sup> The “abuse” of discovery has been condemned.<sup>96</sup> Judges have been

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89. FED. R. CIV. P. 33 was amended in 1993, setting a limit on the number of interrogatories for the first time.

90. FED. R. CIV. P. 30 was amended in 1993 and 2000, setting a presumptive limit on the number and length of depositions for the first time; prior to those amendments, there were no limitations in the rules.

91. See Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1568127> (“[T]he pretrial process effectively functions as the trial in the overwhelming majority of civil lawsuits.”).

92. See Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 638 (1989).

93. *Id.*

94. Another cost of being named a defendant is that the defendant must bring as counterclaims any claims arising from the same transaction and occurrence of the original action. FED. R. CIV. P. 13(a)(1). Absent the complaint being filed first, the defendant, as plaintiff, would have been able to select the forum.

95. See Nagareda, *supra* note 91.

96. See, e.g., FED. R. CIV. P. 26 (1983) (Advisory Committee on the Civil Rules decreeing that the “spirit” of the discovery process is “violated when advocates attempt to use discovery tools as tactical weapons rather than to expose facts and illuminate issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses”

encouraged to take a more active role in case management, with case conferences and discovery plans made the norm.<sup>97</sup> Summary judgment, largely an innovative procedure at the times the Rules were established, took on greater prominence following the Trilogy cases.<sup>98</sup> Default limits on the amount of discovery were imposed, both in limiting the default number of interrogatories and depositions,<sup>99</sup> and in dialing back the scope of what was discoverable.<sup>100</sup>

Even so, the process can remain long and costly. For defendants, the first option for court ordered exit in a well pleaded case comes at summary judgment. Summary judgment presents, at best, a partial solution. The summary judgment stage typically is reached after the long and winding road of fact and expert discovery has been concluded,<sup>101</sup> an expensive process (for cases that get into discovery, one study cited by the Twombly court shows that 90 percent of litigation costs were spent in the discovery process).<sup>102</sup>

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and that “this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.”).

97. Among other initiatives, FED. R. CIV. P. 16 was amended in 1983 to enhance the judge’s role in management of the pretrial process.

98. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (addressing the burden placed on the party moving for summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (equating the standard of proof for summary judgment to the equivalent of the standard for a directed verdict); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (requiring plausible proof for a claim that economically was implausible); see generally Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the Litigation Explosion, Liability Crisis, and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

99. See FED. R. CIV. P. 30(a)(2)(a)(i) (amended 1993) (set presumptive limit of 10 depositions), FED. R. CIV. P. 30(d) (amended 2000) (set presumptive deposition time limit of one day of seven hours); FED. R. CIV. P. 33(a)(1) (amended 1993) (set presumptive limit of 25 written interrogatories, including all discrete subparts).

100. See FED. R. CIV. P. 26(B)(1) (amended 2000) (changed scope to “relevant to any party’s claim or defense” from the previous “relevant to the subject matter involved in the pending action.”).

101. Technically, summary judgment motions can be filed at any time. FED. R. CIV. P. 54(b). On occasion, summary judgment motions are filed early, as when the developing facts uncontestedly establish a defense such as statutes of limitations or negate an essential part of the plaintiff’s case. However, in a *Celotex* “absence of evidence” type summary judgment motion, it is difficult to show an absence of evidence before the discovery record is complete. See Scott A. Moss, *Litigation Discovery Cannot be Optimal But Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 929 (2009) (stating that summary judgment motions typically made at the end of discovery).

102. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F. R. D. 354, 357 (2000)).

Reviewing an extensive record and preparing a summary judgment motion can also involve substantial expense. Since the judge cannot weigh the evidence in the place of the jury, even unpersuasive or conflicting evidence could suffice to keep a defendant in the case,<sup>103</sup> and in complex cases confused witnesses or stray documents can create the kind of free floating factoids that might suffice to meet the summary judgment burden. Because denial of summary judgment is usually non-reviewable,<sup>104</sup> some judges are reluctant to grant even meritorious summary judgment motions, preferring to let the parties make the case go away in settlement rather than risk reversal.<sup>105</sup>

Of course, court ordered resolutions are not the only ways a defendant can be removed from a lawsuit. If discovery shows a defendant has no culpability, a plaintiff can voluntarily dismiss that defendant.<sup>106</sup> On occasion, this happens. A plaintiff might prefer not to muddy its narrative by including excess defendants, or might wish to preserve credibility before a tribunal by releasing those clearly not liable. To the extent retaining a defendant in a lawsuit imposes financial costs, the plaintiff might wish to terminate those costs.

The most common way for lawsuits to be resolved, however, is not through voluntary dismissal but through settlement, in which some payment is made to the plaintiff in connection with securing a dismissal.<sup>107</sup> Plaintiffs can seek to extract settlement payments from

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103. See, e.g., *Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 736 (5th Cir. 2010) (“This situation suggests the presence of arguable factual contradictions that must be resolved by a fact finder, an exercise proscribed at the summary judgment stage of the case.”) (internal quotation marks omitted).

104. 28 U.S.C. § 1291 (2000).

105. An active body of legal scholarship recognizes and examines the extent to which judicial actions are motivated by strategic interests of the judge, such as avoiding reversal, as opposed to accurate and efficient resolution of the cases on the merits. See, e.g., David A. Hoffman, Alan J. Izenman, and Jeffrey R. Lidicker, *Docketology, District Courts and Doctrine*, 85 WASH. U. L. REV. 681 (2007); Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, U of Chicago Law & Economics, Olin Working Paper No. 508, NYU Law and Economics Research Paper No. 10-06, available at SSRN-id1116751.pdf

106. FED. R. CIV. P. 41(A)(1)(a)(i).

107. While precise statistics are difficult to come by, it has been estimated that as many as two thirds of all cases filed settle. See Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986); see also Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994). The percentage also seems to vary by type of case, with tort cases having higher settlement rates than other types of cases. See Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* (Nov. 21, 2008). Cornell Legal Studies Research Paper No. 08-30 at 17, available at <http://ssrn.com/abstract=1276383>.

defendants who have been wrongly joined.<sup>108</sup> Plaintiffs and defendants in multi-defendant litigation have a marked asymmetry of costs.<sup>109</sup> For the plaintiff, marginal costs may not increase proportionally with the number of defendants. The plaintiff can amortize its investment across multiple defendants; a defendant must bear the cost of full litigation. At depositions, for example, the plaintiff only needs to send one attorney. By contrast, for any important deposition, each defendant might send an attorney, even if it is not their witness and even if they plan to ask no questions. In some multi-defendant cases, each deposition might involve a dozen attorneys, with only one representing the plaintiff, and the rest representing various defendants.

#### 4. The 90's and Beyond

Either side of the turn of the century saw extensive criticism, from academics, judges, legislators and practicing lawyers, of the litigation system spawned by the rules.<sup>110</sup> The 1980s saw many federal judges imposing heightened pleading standards on selected cases.<sup>111</sup> Spurred on by media coverage of a perhaps mythical litigation crisis, significant changes were made in the Rules to control discovery, and Congress

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108. Cost arbitrage also can occur in settings where the plaintiff's claim passes not only the pleading hurdle but also the burden of production hurdle of summary judgment. Imagine cases, for example, where plaintiff meets the burden of production but must rely on a witness likely to be viewed skeptically by a factfinder, or where the plaintiff might be able to show a winning case on the merits but only trivial damages. In both cases, the principal settlement value for the plaintiff might be linked to cost arbitrage as opposed to likely trial outcomes.

109. Settlement can be motivated by factors other than costs, of course. In the context of class actions, for example, concerns about the ability of juries to return accurate verdicts combined with staggering liability in the event of an adverse verdict might spur a settlement, even though the defendant might believe strongly that an accurate assessment would lead to a defense victory. A lively academic literature has debated whether class action settlements are motivated by such concerns to the point that the settlements approach blackmail. See, e.g., Charles Silver, *We're Scared to Death: Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003), George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1379 (2000); Warren F. Schwartz, *Long Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 LEGAL THEORY 297, 297-98 (2002).

110. See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238 (1989) ("[T]he objection to the depth of discovery may have more weight than it has been accorded in most discourse on the Federal Rules. . . .").

111. See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 899 (2009); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444-51 (1986).

imposed special heightened pleading requirements in securities cases. Almost beneath the radar, lower federal courts developed doctrines that had the effect of imposing heightened pleading requirements on certain types of cases.<sup>112</sup>

*D. Supreme Court Response To the Problems of Conley*

In general, the Supreme Court remained a bulwark against changing pleading standards and on occasion reversed lower court rulings that sought to impose greater pleading requirements. In *Leatherman*,<sup>113</sup> the Court, speaking through Chief Justice Rehnquist, declined to impose higher pleading standards for suits against municipalities in § 1983 cases. In *Swierkiewicz*,<sup>114</sup> the Court, speaking through Justice Thomas, rebuffed an attempt to create a higher pleading standard in employment discrimination cases.<sup>115</sup> Perhaps ironically, in light of later events, the Court stressed in these opinions that changes in pleading standards should come through the rule making process, and not through judge made common law.<sup>116</sup>

1. *Twombly*: No Harm, No Case

The tide turned in *Bell Atlantic Corp. v. Twombly*.<sup>117</sup> *Twombly* “retired” the standard of *Conley v. Gibson*,<sup>118</sup> but failed to make clear what standard was to be employed going forward. In *Twombly*, plaintiffs had alleged a pattern of parallel conduct by defendants, which they alleged indicated the existence of a price fixing conspiracy.<sup>119</sup> The Supreme Court noted that such parallel conduct could be as easily explained by perfectly legal market behavior.<sup>120</sup> In the absence of something extra—beside a “conclusory” allegation of conspiracy—indicating plausibly that illegal behavior had occurred, the court held that the complaint did not meet Rule 8(a)’s requirements.<sup>121</sup>

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112. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Richard L. Marcus, *Federal Practice and Procedure Symposium Honoring Charles Alan Wright: The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

113. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

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

115. *Id.* at 508.

116. *Id.* at 515 (citing *Leatherman*, 507 U.S. at 168).

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

118. *Id.* at 560-63.

119. *Id.* at 550.

120. *Id.* at 566.

121. *Id.* at 570.

One way to look at *Twombly* is that what was missing was clear evidence of injury. Given that the defendants might have been responding independently to market forces, there was no evidence of antitrust injury or harm to consumers.<sup>122</sup> Colonel Mustard might be absent from the premises, but it was at least as likely that he had gone shopping in town as that he was the victim of foul play.

*Twombly* left many issues unresolved. First and foremost was whether *Twombly* was limited to the antitrust conspiracy setting of its facts; some read *Twombly* as merely extending to the pleading stage an interpretation of antitrust conspiracy that had long been applied at the summary judgment stage.<sup>123</sup> Second, even if a new trans-substantive pleading era was dawning, it was unclear to what extent the Court intended to upend pleading traditions.<sup>124</sup>

## 2. *Iqbal*: Pleading Enough Facts for Plausibility

*Ashcroft v. Iqbal* resolved some of the uncertainty created by *Twombly*, but created just as many new issues. In contrast to *Twombly*, the pleaded facts in *Iqbal* tell a story of a plaintiff who suffered grievous injuries. Under our Agatha Christie analogy, not only was there a corpse on the library floor, but the victim had been worked over at length before

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122. For example, in *Twombly*, the Court stated “nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.” *Id.* at 566.

123. See Richard A. Epstein, *Access to Justice: The Social Responsibility of Lawyers: Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007).

124. These uncertainties were explored in a flurry of law review articles. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535 (2009); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 131 (2009); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes*, 82 ST. JOHN’S L. REV. 893 (2008); Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Suja Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Richard A. Epstein, *Twombly, After Two Years: The Procedural Revolution in Antitrust That Wasn’t*, GCP ONLINE MAG FOR GLOBAL POL’Y (NO. 2), July 2009; 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, 1223–24 (2008); Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 BYU L. REV. 1057 (2008); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN’S L. REV. 849 (2008); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007); Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007); Allen Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 604–605 (2007).

expiring. The parties proximate to the event might have alibis or legal justifications for their conduct, but the no harm, no foul scenario of *Twombly* did not apply.

In this setting, plaintiff Javaid Iqbal, who had been detained following September 11 on immigration charges, brought a complaint alleging that he was mistreated while in custody. The complaint named a variety of defendants. Two high ranking government defendants were charged with masterminding the scheme and had moved for dismissal.<sup>125</sup> The District Court found the complaint stated a claim against these defendants, and this ruling was affirmed by the Court of Appeals.<sup>126</sup> In an opinion by Justice Kennedy, the Court reversed.<sup>127</sup>

Like *Twombly*, the *Iqbal* court looked to whether the allegations were “plausible.” The Court made clear that plausibility was not some abstract, logical test, but depended upon both the messy facts and the individual perspective of the judge.<sup>128</sup> “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>129</sup> The court also made clear that factual gaps could not be bridged by “conclusory” allegations.<sup>130</sup> “It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”<sup>131</sup> Last but not least, the Court made clear that its new pleading standards were transubstantive, applying to all Rule 8(a) pleadings.<sup>132</sup>

*Iqbal* has vices that are not inherent in a heightened pleading regime. Most pertinently, its deference to the experience and perspectives of the judge invite a pleading system that varies according to which courtroom litigants find themselves in. This approval of judge-specific standards also insulates from review decisions bearing on what the pleading standard should be.

But for the explicit statement that the new standard applied to all cases and was not limited by the facts of the present case, *Iqbal* might have been seen as applying only where qualified immunity applied, or, more broadly, where a case invoked significant separation of powers issues. It would not be a departure for the Court to insist on particularized pleading where the case would draw the Court into a

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125. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

126. *Id.*

127. *Id.* at 1954.

128. *Id.* at 1950.

129. *Id.*

130. *Id.* at 1951.

131. *Id.*

132. *Id.* at 1954.



potential conflict with the executive branch. In the standing context, for example, the court has often *de facto* imposed a fact pleading requirement on standing allegations where separation of powers issues existed.<sup>133</sup>

*Iqbal* did not make clear exactly how high the new pleading standard is. At times, it appears to require fact pleading analogous to the Field Code, with a supposed line between “facts” and “conclusory facts.”<sup>134</sup> At other times, it seems to require “*Conley Plus Something*,” with the exact “Something” that will be required unknown—and given the emphasis on both context and experience, perhaps unknowable until a given judge applies her own prejudices to the case.<sup>135</sup>

In the context of complex multi-defendant cases, however, *Iqbal* makes clear that a plaintiff will have trouble meeting the new pleading regime. In *Iqbal*, there was a setting in which injury occurred, and the dismissed defendants had a real connection to that setting.<sup>136</sup> Mere proximity did not suffice to even get to discovery, and the court was clear that the case did not turn on the improbability of the defendants being personally involved or the presence of an immunity defense.<sup>137</sup>

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133. See *Warth v. Seldin*, 422 U.S. 490, 501, 503, 508-09 (1975) (rejecting plaintiff’s allegations as insufficient because they were not supported by “particularized allegations of fact” and “specific, concrete facts” showing harm to plaintiffs); *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (reversing the dismissal of an anti-trust case and instructing the district court to require plaintiff to plead with particularity, finding that “in a case of this magnitude, a district court must retain the power to insist upon some specificity of pleading before allowing a potentially massive factual controversy to proceed.”); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 408 (1980) (In discussing the revival of fact pleading, Roberts stated that “[g]iving further substantive definition to injury in fact, the [(Supreme)] Court developed the notion that it had to be “specific,” “particularized,” and “concrete,” not merely an “abstract injury” common to the public generally.”).

134. See *Iqbal*, 129 S. Ct. at 1949-50 (“Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true legal conclusions couched as factual allegation.”) (internal quotations omitted).

135. *Id.* at 1950 (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

136. The Plaintiff, *Iqbal*, was one of the “high-interest” detainees who “were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.” *Id.* at 1943. The Defendants, John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the FBI, were responsible for the policy of holding post September 11th detainees in the restrictive conditions. *Id.* at 1944. Clearly, there was a connection between the plaintiff and the defendants, as the policy adopted because of the defendants resulted in the plaintiff’s injury.

137. For example, the Court stated that “even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of

What was missing, and what will presumably be required in future cases, were non-conclusory facts in the complaint at least suggesting, if not fully explicating, actionable wrongdoing by the individual defendants who moved for dismissal.

In a typical multi-defendant case, where all the plaintiff knows at the outset is which parties were connected to the event, pleading a claim that meets the requirements of *Iqbal* will often be impossible. Where a plaintiff only knows that someone within a given group probably caused the injury, *Iqbal* seems to require dismissal of any defendants who can only be brought in by use of “conclusory” claims. This appears to require more than Form 12 provides, since Form 12 relies on conclusory claims of negligence.<sup>138</sup> If *Iqbal* does require more than Form 12 would require, it may be that no defendant can be properly named in some initially uncertain multiple actor situations.

*Iqbal*, like *Conley*, involves an asymmetry, but this time of information, not costs. At the outset, many plaintiffs may not have the information necessary to prepare the kind of complaint required by *Iqbal*; the necessary information may lie only in the hands of the aggregated potential defendants.

This asymmetry is not easily fixed. The federal rules offer very limited opportunities for pre-filing discovery, with what is allowed principally aimed at the preservation of evidence that might be lost.<sup>139</sup> If a valid complaint can be brought against one defendant, the prospect of third party discovery opens up,<sup>140</sup> but this also presents problems. The third party discovery process can be cumbersome. Evidence gathered prior to the time a defendant is brought into a suit might not be admissible against that defendant at trial<sup>141</sup> and might not be easily re-obtained after the defendant is joined. Statutes of limitations—as short as two years for some personal injury claims<sup>142</sup>—also present a problem. By the time evidence sufficient for *Iqbal* is gained through third party or pre-filing discovery, the statute may have run, and the relation back provisions of Rule 15 do not reach situations where the plaintiff was not joined because sufficient facts had not been gathered.<sup>143</sup>

*Iqbal* will lead to the dismissal of claims that are somewhat more than the dreaded “fishing expeditions” in search of a wrong, but

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unconstitutional discrimination, that inference alone would not entitle respondents to relief.” *Iqbal*, 129 S. Ct. at 1952.

138. See FED. R. CIV. P. Form 12.

139. See FED. R. CIV. P. 27(a)(1).

140. See FED. R. CIV. P. 45(d).

141. See FED. R. CIV. P. 32.

142. See, e.g., KY. REV. STAT. ANN. § 44.110(3) (stating that no claim for personal injury shall be filed later than two years after the negligent incident occurred).

143. See FED. R. CIV. P. 15.

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something less than a fully formed set of facts showing why one defendant rather than another bears culpability. In effect, the Court seems to be replacing a regime that was sometimes unfair to defendants with one that is sometimes unfair to plaintiffs. In doing so, moreover, the Court creates a problem of exactly the type the FRCP was designed to prevent: valid claims will be dismissed and worthy plaintiffs will go without recovery because of a defect at the pleading stage that might have been cured had more inquiry into the merits been allowed.

### 3. Two Approaches Without a Solution

As Judge Clark himself recognized, no system of procedure can work forever.<sup>144</sup> The Federal Rules have been around about as long as it took the Field Code to run its course and like the Field Code have gradually revealed problems with pleading that appear intractable. *Conley* and *Iqbal* stake out the two competing positions. Each approach has serious problems.

Under *Conley*, plaintiffs can easily bring an action against defendants.<sup>145</sup> Once joined, however, defendants find themselves without an exit, even if justice would be served by letting them go.<sup>146</sup> The procedural narrative and economic incentives combine to help plaintiffs extract arbitrage cost settlements—effectively ransoms—from non-blameworthy defendants who erred only by being too near the scene of the injury.

*Iqbal* presents opposite but equally pernicious problems. *Iqbal* requires non-conclusory facts from plaintiffs,<sup>147</sup> but fails to acknowledge that in many cases plaintiffs will not be able to find those facts absent some discovery. Since discovery may not proceed without a well pleaded complaint,<sup>148</sup> plaintiffs can be left without a remedy even though it might be clear that someone within a definable group injured the plaintiff.

These problems are most clearly seen in the context of multi-defendant actions. A valid lawsuit, based upon a real injury, may nonetheless include claims against specific defendants which will prove to be baseless. Moreover, it often will be impossible at the outset to know which of many potential defendants connected to the injury will prove blameless and which will prove culpable. Such multi-defendant cases are not rarities, but are an appreciable percentage of federal

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144. See Clark, History, *supra* note 1, at 545.

145. See text at nn. 72-80 *supra*.

146. See text at nn. 89-106 *supra*.

147. See text at nn. 125-135 *supra*.

148. See text at nn. 136-138 *supra*.

practice and occur in settings ranging from medical malpractice to product liability to toxic torts to construction defects. While more readily revealed in the multi-defendant setting, the flaws revealed in the litigation process can bedevil single defendant claims as well.

So long as the Rules contemplate no other stations on the route between the complaint and summary judgment, the flaws of either *Conley* or *Iqbal* seem inevitable. Either the defendant is put on the discovery train, and is on for the full ride, or else the plaintiff is left standing on the platform. This is true whether the defendant has the company of co-defendants, or is on the ride alone.

#### ACADEMIC RESPONSES TO *TWOMBLY* AND *IQBAL*

The academic response to *Twombly* and *Iqbal* has been prolific.<sup>149</sup> Articles, symposia such as this one, and less formal exchanges through

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149. For responses after *Twombly*, see *supra* n. 124. For responses after *Iqbal*, see Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1477519>; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. (forthcoming 2010); Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1452875>; Stephen Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1469638>; Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1467799>; Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. (forthcoming 2010) available at <http://ssrn.com/abstract=1525642>; Robin J. Effron, *The Plaintiff Neutrality Pleading Principle: Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1522171>; Scott Dodson, *Federal Pleading and State Pursuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010), available at <http://ssrn.com/abstract=1448796>; Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go From Here*, 95 IOWA L. REV. BULLETIN (2010); Scott Dodson, *Pleading and State Pursuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010); Suzette M. Malveaux, *How Pre-Dissmissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Tung Yin, *"I Do Not Think [Implausible] Means What You Think It Means": Iqbal v. Ashcroft and Judicial Vouching for Government Officials*, 14 LEWIS & CLARK L. REV. 203 (2010); Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217 (2010); Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231 (2010); Stephen I. Vladeck, *National Security and Bivens after Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279 (2010); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 378 (2010); Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENNUMBRA 141 (2009)

blogs have all responded strongly to the Court's change in direction regarding pleading. While it is fair to say that few have praised the decisions, the responses do diverge. Some seek a way to return to the golden days of *Conley*;<sup>150</sup> others argue that if there is a flaw to be fixed there are better approaches than the hazy and judge specific plausibility standard advanced by the Court.<sup>151</sup>

#### A. *Return to Conley*

Many academic commentators have urged a return to the *Conley* standard.<sup>152</sup> This approach has also been taken up at a political level, and bills that would mandate *Conley* as the required pleading standard have been introduced.<sup>153</sup> For a return to *Conley* to make sense, it should not be enough that *Twombly* and *Iqbal* be imperfect. It should require a conclusion that the *Conley* approach is the best solution available. To address this requires a careful look at whether the *Conley* approach has problems baked in that warrant a new approach, albeit one different from *Twombly* or *Iqbal*.

##### 1. Is *Conley* an Inherently Flawed System?

At a popular culture, anecdotal level, it is clear that many share a common opinion: the American system of civil justice, a system that has grown up under the Rules and *Conley*, is out of control. Politicians, pundits and self proclaimed experts all rage against the American culture

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(online debate between pro-*Twombly* and *Iqbal* defense side lawyers and pro-*Conley* academic); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009); Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 94 MINN. L. REV. 505 (2009).

150. See text *infra* at nn 152-153.

151. See text *infra* at nn. 204-221.

152. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 50), available at <http://ssrn.com/abstract=1448796>; Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535 (2009).

153. See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009) ("A court shall not dismiss a complaint under [Rule 12] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible. . . ."); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) ("Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).").

of litigation.<sup>154</sup> While little of this criticism rises to the level of sophistication or detail that would involve an attack on modes of pleading, the themes of frivolous suits imposing excessive expense in discovery sound familiar notes.

Almost lost amongst the background chatter, however, are some notable facts. The rates of dissatisfaction are highest among the most educated and those with the most direct contact with the system.<sup>155</sup> Surveys of those involved in litigation repeatedly reflect dissatisfaction.<sup>156</sup> Most recently, a survey of the membership of the American College of Trial Lawyers, a group of active plaintiff and defense trial lawyers with perhaps more litigation and courtroom experience than any other group, reflected broad dissatisfaction, especially with the notice pleading and the discovery process.<sup>157</sup>

The ACTL report draws a connection between discovery abuse and lax notice pleading:

One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute. In our survey, 61 percent of the respondents said that notice pleading led to more discovery in order to narrow the claims and 64 percent said that fact pleading can narrow the scope of discovery. Forty-eight percent of our respondents said that frivolous claims and defenses are more prevalent than they were five years ago.<sup>158</sup>

The ACTL report recommends, among other reforms, a switch to a fact pleading regime.<sup>159</sup>

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154. For a discussion of some of the popular and academic literature on this point, see Charles Keckler, *Lawyered Up*, available on SSRN at <http://ssrn.com/abstract=1467183>.

155. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS* 196 (1991) (stating that “[T]hose with higher incomes, and more education, and more direct experience with the legal system” tend to have the most negative views.).

156. See LOUIS HARRIS & ASSOCIATES, INC., *PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM* iii (Humphrey Taylor and Gary L. Schmermund, Project No. 881023 (Mar. 1989) (reporting dissatisfaction among lawyers and judges); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives Opinions*, 3 HARV. NEGOT. L. REV. 1, 25-26 (1998) (Only one third of in-house counsel reporting satisfaction with litigation they had been involved in).

157. See AMERICAN COLLEGE OF TRIAL LAWYERS, *FINAL REPORT ON THE JOINT PROJECT OF THE TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM* (2009) available at [http://www.actl.com/AM/Template.cfm?Section=Press\\_Releases&CONTENTID=4053&TEMPLATE=/CM/ContentDisplay.cfm](http://www.actl.com/AM/Template.cfm?Section=Press_Releases&CONTENTID=4053&TEMPLATE=/CM/ContentDisplay.cfm).

158. *Id.* at 5. Unlike some critics of the current system, the ACTL report does not focus only on plaintiffs. It recommends, for example, that the pleading of answers also be addressed, with specific criticism of the practice of issuing blanket denials. *Id.*

159. *Id.* at 5-6.

Widespread anecdotal criticism of the *Conley* regime does not necessarily imply, of course, that the *Conley* approach deserves the criticism. Going back to ancient times, litigants have criticized the expense and delays attendant to litigation.<sup>160</sup> Both common law and code pleading generated widespread criticism as well.<sup>161</sup> It may be that, despite expressed dissatisfaction, the *Conley* approach works as well as could be hoped. To determine whether the popular dissatisfaction has a kernel of merit, or just echoes perennial unhappiness at being involved in a dispute, requires looking at the work of those who have attempted more rigorous examinations.

a. Change in Litigation Since Rules Were Enacted

One background fact deserves note: litigation has changed since the Federal Rules were enacted and *Conley* was decided. The Federal Rules were intended to change the way litigation proceeds and in that regard they have succeeded. What was once a process centered on trial has become, increasingly, centered on the pretrial motion and discovery process.<sup>162</sup>

In many respects, the changes have proved uncontroversial. For example, liberal joinder of claims and parties, while not without controversy at the time, would find few opponents today. Other changes remain controversial. Pre-trial discovery, in particular, attracts persistent criticism.<sup>163</sup>

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160. The responses to delays in litigation in ancient times on occasion took forms that make changes in pleading rules or today's versions of sanctions seem like very mild medicine. In the time of Visigothic king Theodoric, for example, a lady in his court named Juvenalia complained about how long a piece of litigation had taken (accounts vary as to whether the litigation had dragged on for three or thirty years). Theodoric summoned the lawyers before him, and told them that if the matter were not resolved in two days, their decapitation would follow. Within those two days, the lawyers reported that the case was resolved. Theodoric was not satisfied, but rather irate that the lawyers proved so readily able to resolve in two days what had otherwise continued for years, Theodoric called the lawyers back before him, and had two on each side executed. A.H.M. JONES, *LATER ROMAN EMPIRE* 494 (1986); JOHN GEORGE PHILLIMORE, *INTRODUCTION TO THE STUDY AND HISTORY OF THE ROMAN LAW* 280 n.a. (1848).

161. See, e.g., Clarke B. Whitter, *Notice Pleading*, 31 *HARV. L. REV.* 501, 505-506 (1918).

162. See Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 *DEPAUL L. REV.* (forthcoming 2010) available at <http://ssrn.com/abstract=1568127> (“[T]he pretrial process effectively functions as the trial in the overwhelming majority of civil lawsuits”).

163. See Easterbrook, *Discovery as Abuse*, *supra* note 92, at 636-37, 639; AM. COLL. OF TRIAL LAWYERS, *FINAL REPORT*, *supra* note 157, at 8 (“Especially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse.”).

Notice pleading and extensive discovery are, of course, inherently related. Clark's vision was to remove pleading technicalities as a barrier to getting to the merits, and to allow discovery in place of pleading exchanges as the most reliable and efficient method of getting to a merits resolution.<sup>164</sup> In this, he seemed to envision a short path to trial.

As it happened, discovery has not always proved a short path. Discovery, like pleading, offers ample opportunities for lawyers devoted to a "sporting theory of justice." Beyond that, technological advances,<sup>165</sup> changes in the substantive law<sup>166</sup> and changes in business structures<sup>167</sup> have all made discovery both more necessary and more attainable.

b. Theories on Why Notice Pleading Might Have Inherent Problems

In looking for rigorous evaluations of our litigation system, one place to start would be empirical studies. Despite the enormous promise of and increased recent interest in empirical study of the civil process, to date empirical studies have not succeeded in resolving the issue.<sup>168</sup> In part, that has to do with surprising gaps in the unambiguous data on what actually happens in the federal court system. Even determining how many cases settle for consideration, and how many are abandoned,

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164. See Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 289 (1941).

165. Photocopy machines, mainframe computers and distributed personal computers have in turn opened up new frontiers in what could be discoverable.

166. For example, the expansion in products liability has led to inquiries into how products were designed that are highly discovery dependent.

167. Growth in business size and the resultant internalization of many business processes means that events and processes that in past times might have involved external partners—and witnesses—now take place within walls of corporate confidentiality. Even adjusted for inflation, the total revenues of the Fortune 500 today are roughly ten times as high as for the Fortune 500 in 1954, the first year the list was released. While this reflects other factors such as what kinds of firms are included in the Fortune 500, it significantly reflects increased concentration in the economy.

168. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) ("We know remarkably little about frivolous litigation. Reliable empirical data is extremely limited, and casual anecdotal evidence highly unreliable."). An early review of the problems involved in conducting empirical research into civil litigation can be found at Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, L. & CONTEMP. PROBS., Summer 1988, at 55. For a recent review of empirical research into civil procedure, see Carrie Menkel-Meadow & Bryant Garth, *Process, People, Power and Policy: Empirical Studies of Civil Procedure and Courts*, Georgetown University Law Center Faculty Publications, Public Law & Legal Theory Research Paper Series, Paper No. 10-04 and University of California, Irvine Law School Legal Studies Research Paper Series Paper No. 2010-5, forthcoming in OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES, (P.Cane & H. Kritzer eds.).



proves to be a thorny problem.<sup>169</sup> When one goes beyond events reflected in dockets to the largely unsupervised world of discovery, sources reflecting the time, cost and scope of discovery are not readily available.<sup>170</sup>

Another problem arises from the qualitative nature of the problem. No one contends that no cases should be filed or that we should abandon all pretrial discovery. The claim instead is that, somehow, too many non-meritorious cases make it into court and too much unproductive discovery takes place. Such qualitative claims are hard to measure empirically—even if data existed, for example, showing that a deposition extended over multiple days, that fact alone would tell little about whether the deposition was unnecessary or taken in an inefficient manner.<sup>171</sup>

The problem is not solved by the type of surveys noted earlier. Surveys can show what those closest to the process believe. While that can provide interesting information, it is unlikely to be dispositive. Opinions are at best a step away from the actual situation, and opinion surveys are highly sensitive to methodological error.<sup>172</sup>

When empirical results are not available, economic and other theoretical models provide another route for examining the sufficiency of the current system. As it happens, in recent years much work has been done with economic and financial models.<sup>173</sup> These address a charge often made by those with anecdotal experience—the current system enables plaintiffs with weak claims to extract settlements based not on the merits, but on artifacts of the procedural system. To a significant extent, these efforts to model current litigation lend support to the claim

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169. Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* (Nov. 21, 2008). Cornell Legal Studies Research Paper No. 08-30, available at <http://ssrn.com/abstract=1276383>.

170. See Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 807 (1998) (“Research that describes the amount, type and cost of discovery activity can help evaluate whether as some rule proposals assume, discovery-intense or discovery-problematic cases can be identified early in the litigation process from tracking purposes. Additional research is needed to determine whether the differential management of discovery-intense cases curbs discovery problems without causing or exacerbating other problems in the system.”).

171. In minimizing the impact of this issue, it doesn’t help that many of those conducting empirical research have started with an agenda to advance. See Menkel-Meadow and Garth, *supra* note 168.

172. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

173. See Bone, *supra* note 168, at 522-23 (Relying on then extant economic models “[b]ecause reliable data is scarce and obstacles to empirical work severe.”).

that our current procedural system can reward plaintiffs with weak claims.<sup>174</sup>

i. Game Theoretic Analysis

One of the puzzles of frivolous litigation has been why a plaintiff would ever saddle up to bring a frivolous suit. Under rational choice theory, a rational plaintiff would normally not bring a claim which will yield less in recovery than the costs of litigation.<sup>175</sup> Despite this expectation, it seems to observers that negative expected value (NEV) claims have been brought by sophisticated parties. This has yielded a literature attempting to explain why.<sup>176</sup>

One body of literature employs game theory to explore the conundrum. This literature looks not only at the terminal value of the litigation, but at the costs that must be borne by both parties during the litigation and the best choices available at different stages of the litigation. Bargaining strategies take into account these factors, and game theory helps illuminate the choices rational parties in this setting might make.

Consider a case, for example, where the plaintiff has a claim that, if the plaintiff prevails, will yield a verdict for \$1,000. The plaintiff's chances of winning, however, are only 10%. Using the standard model of valuing litigation, the claim has a probability adjusted value of \$100.<sup>177</sup>

If the plaintiff's cost to litigate the claim to judgment will be \$200, it would not be economically rational to pursue the claim. The net value to the plaintiff of pursuing the claim to verdict would be -\$100. A rational plaintiff would choose not to file.

Game theory changes the analysis from the standard model by also looking at the defendant's costs of litigation and at the choices a rational

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174. *Id.* at 542-43.

175. It is important to distinguish between NEV and frivolous suits. Frivolous suits, while difficult to define precisely, are generally considered to involve only suits where the plaintiff has no reasonable expectation of prevailing on the merits, with no consideration of the costs of getting to the merits. *Id.* at 529. NEV suits include meritorious suits where the high costs of litigation make pursuing the claim a poor investment. *Id.* at 537. In some cases, dignitary or other considerations make it desirable and appropriate for a plaintiff to pursue a NEV suit even though the financial rewards are exceeded by the financial costs.

176. Much of the economic literature has been collected at Lucian A. Bebchuk and Alon Klement, *Negative-Expected-Value Suits*, Forthcoming, ELGAR ENCYCLOPEDIA OF LAW AND ECONOMICS (2ND EDITION), available at <http://ssrn.com/abstract=1534703>.

177. For an explanation of the standard model, see Robert G. Bone, *supra* note 168, at 529. See also ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 20-40 (2003); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 392-99 (4th ed. 2004); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 563-606 (6th ed. 2003).

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defendant will make when confronted with plaintiff's claim, taking those costs into account. One way to do this is through a technique called reverse induction.

Assume a case in which a plaintiff has no chance of winning at trial and costs of \$500 to get to verdict, but where the cost to the defendant to get to a point where the case can be dismissed is \$1200. Assume further that the defendant will suffer external costs of \$300—such as damage to reputation, costs of copycat suits, etc.—if a settlement is paid to the plaintiff. In this scenario, the defendant would rationally settle for any amount below \$900 (or \$1200 - \$300).

Under a reverse induction game theoretic analysis, the best choices available to both the plaintiff and defendant can be analyzed. Under this approach, it becomes apparent that both plaintiff and defendant can benefit from a settlement where plaintiff's cost of litigation are lower than defendant's costs of litigation. The size of the settlement will be defined by the difference between the plaintiff's costs and the defendant's costs. In effect, the plaintiff arbitrages its lower cost of litigation and thereby extracts a settlement.

One careful game theoretic inquiry into cost arbitrage<sup>178</sup> identifies four factors that favor cost arbitrage: (1) low internal costs of litigation for the plaintiff; (2) low external costs for the plaintiff of filing a frivolous claim; (3) high internal costs of litigation for the defendant; and (4) low external costs of settlement for the defendant (e.g., no loss of reputation as being a fierce defender if a settlement claim is paid out.)<sup>179</sup>

In the context of the multi-defendant case, the opportunities for cost arbitrage seem somewhat greater than in the single defendant case. The plaintiff already has saddled up, pursuing a claim that in its entirety promised a positive return. Because of uncertainty as to who is at fault, multiple parties are joined with the expectation that some of them will be culpable and others perhaps not. When assessing at the outset whether to add an additional party, the plaintiff only has to pay those limited marginal costs related to having one more defendant in the case (and, even then, the additional cost of having the defendant in as a defendant as opposed to not quite in as a third party provider of evidence). The joined defendant has to pay full costs of its own defense as well as of monitoring the entire litigation. In terms of reputational costs, the plaintiff's reputational costs are likely to be impacted as much by the merit of the lawsuit as a whole—that is, whether a good claim lies

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178. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 131 (2009).

179. *Id.* at 148-50.

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against anyone—as by whether the claim against a specific defendant appears strong at the outset.

In multi-defendant litigation, under the *Conley* approach, the cost arbitrage decision of most interest occurs not at the beginning of litigation, but when the plaintiff has conducted some discovery and is deciding which defendants to keep in the case. The decision whether to file has long since passed; initial discovery is now a sunk cost. The plaintiff must choose whether to voluntarily non-suit against those with scant chance of liability or keep them in the case through summary judgment.

At least three of the four factors favor cost arbitrage. In terms of the plaintiff's internal costs, the plaintiff's own production costs are largely fixed by the "serious" defendants; the plaintiff can control how much affirmative discovery will be taken of the fringe defendants and can keep these costs relatively low. In terms of external costs, so long as the case overall appears valid, keeping in an additional defendant through the conclusion of discovery will have little reputational impact, and, similarly, plaintiffs suffer little or no reputational loss for making colorable responses to summary judgment motions. In terms of defendant's internal costs, these can be surprisingly high in a multi-defendant case, as even a frugal defendant must at least monitor discovery as it proceeds into all the other parties.

This asymmetry of costs gives the plaintiff leverage to extract a settlement offer, even when the claim against a given defendant would be of negative expected value standing alone. Under the reverse induction game theoretic model, plaintiff's low costs and defendant's high costs allow plaintiff to extract a settlement somewhere below the sum of defendant's risk adjusted probable loss plus litigation costs.

## ii. Real Options Analysis

The plaintiff's leverage appears even greater when we move from the standard model to an approach that recognizes that litigation expenditures need not be made all at once, but can be made in stages. Both the standard model of litigation value<sup>180</sup> and the game theoretic approach analyzed above treat the litigation as a one step process. This differs from reality because litigation occurs in stages, with the plaintiff normally having the option to drop the case in the face of adverse developing information.

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180. The standard model of litigation analysis weighs the value of the claim versus the probability of success minus the costs of litigation.

The standard model of litigation value resembles in kind a method for analyzing potential investments called the net present value approach, which similarly treats an investment decision as a single stage process.<sup>181</sup> For many investments, as in litigation, this approach misstates reality by ignoring multistage nature of investments and by not including the value of an option to cease further investment after a certain stage.

In the world of investments, the multi-period reality has been addressed by a technique called “real” or “embedded” options analysis, which recognizes that investments occur in stages, and that there is positive value in the option to defer until later a decision to invest further or drop the project.<sup>182</sup> This approach draws on insights from the Black-Scholes Options pricing model well known from the world of fixed term financial instruments,<sup>183</sup> but differs due to its application to settings where factors that can be fixed in financial markets remain flexible.<sup>184</sup>

In litigation, the process of investment is defined in large part by the rules of procedure. As a result, “[p]rocedural rules can have an enormous impact on option value.”<sup>185</sup> Real options analysis helps show how value can be created—or destroyed—not just by substantive law, but by the rules of procedure.

Lucian Bebchuk’s multistage analysis, and more recent work analyzing claims through the prism of embedded or “real” options analysis, shows that in a multistage process, plaintiff can extract a settlement so long as the plaintiff credibly portrays an intent to proceed with a case that will impose costs on the defendant. In the context of multi-defendant litigation where trial against someone is likely, this hurdle is set low.

(a) *Bebchuk Model*

Lucien Bebchuk’s 1996 two stage model moves beyond the standard model to portray a two stage process, with an option to drop

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181. See Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1272-1273 (2006).

182. *Id.* at 1273-1275.

183. *Id.* at 1326, n.162 (citing Fisher Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. & ECON. 637 (1973)).

184. *Id.*

185. Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63, 104 (2003); see also Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173, 184 (1990) (“Legal procedure also can affect the value of litigation options directly. Litigation options derive their value from the choices they give the plaintiff. The more such choices a plaintiff has, the greater the total value of his litigation options.”).

after first phase, and with costs sunk when entering second stage.<sup>186</sup> Bebchuk does not style his approach as a real options approach. He also, contrary to the normal real options approach, assumes perfect information from the beginning. However, because it is multistage the Bebchuk model actually works as a special case of the embedded option approach.<sup>187</sup> Bebchuk shows that within his model so long as plaintiff can credibly threaten to proceed to next round defendant will maximize value by settling a NEV suit (as measured at the outset) for positive value.<sup>188</sup>

Bebchuk posits a situation where the plaintiff has a claim with a probability adjusted value of 100.<sup>189</sup> From inception to judgment, the cost to each party of litigating this claim is 140. Applying the standard model, the value of the claim for the plaintiff would be -40. A plaintiff applying the standard litigation value model would conclude that such a claim should not be brought.

Bebchuk's innovation involves in looking at what happens if the process is broken up into two stages, with each stage costing 70. The claim still has a probability adjusted value of 100; the costs from inception to verdict remain at 140. Nonetheless, Bebchuk shows why a defendant facing this situation, under the rules of the game he posits, would nonetheless pay in settlement to be released from the litigation.<sup>190</sup>

He does this by using reverse induction—but without looking at the impact of cost arbitrage.<sup>191</sup> He looks simply at the credibility of the plaintiff's proceeding with the case and at the best response available to the defendant at each stage.<sup>192</sup> Using reverse induction, he starts at the final stage and works back.<sup>193</sup>

Here, at the final stage, the plaintiff will face costs of 70 to take the case to verdict, at which point she will win a verdict of 100. For this phase, there is a positive value to the plaintiff of 30 of pursuing the litigation. The defendant will spend 70 in litigation costs, plus 100 in payment of the verdict, for a total cost of 170. Assuming equal bargaining power, the parties facing this situation will settle for 100.

The analysis then proceeds to the first stage. Taking into account the analysis of the second stage, both parties know that if the plaintiff gets to the beginning of the second stage, she will receive a settlement of

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186. See Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996).

187. See Joseph A. Grundfest & Peter H. Huang, *supra* note 181, at 1309.

188. See Bebchuk, *supra* note 186, at 14.

189. *Id.* at 5.

190. *Id.* at 5-7.

191. *Id.*

192. *Id.*

193. *Id.*

100. She will spend the 70 in first phase litigation costs to get to this payoff, for a net benefit of 30. The defendant, once again, will face 70 in litigation costs, plus 100 in settlement costs. Once again, assuming equal bargaining power, the parties will settle at the start of the first round for 100.

Bebchuk's model, unlike Stancil's, does not rely on unequal costs of litigation. Assuming equal costs, the plaintiff should be able to negotiate a settlement so long as she can credibly show intent to proceed to the next round at each round of the litigation.

(b) *Grundfest Huang Model*

Bebchuk helped introduce the concept of periodization to litigation claim analysis; in 2009, Joseph Grundfest and Peter Huang provided a rigorous real options analysis.<sup>194</sup> Unlike Bebchuk's model, which posits full knowledge at the outset of the decisions that could be made at later stages, the Grundfest/Huang model incorporates the value implicit in being able to change investment strategies as more information becomes available.<sup>195</sup> Under their analysis, "a NEV lawsuit is merely an out-of-the-money call option that a plaintiff will rationally pursue as long as the cost of acquiring the option is less than the option's value."<sup>196</sup>

Grundfest and Huang analogize to a situation where a pharmaceutical company is considering investing in a new drug. An initial R&D investment of \$3 million would be required, with a ten percent chance of developing a marketable drug.<sup>197</sup> In addition, the company expects that the FDA might approve the drug for over the counter sales, with a discounted present value of \$160 million and an equal chance that the FDA would only approve it for prescription use, with a discounted present value of \$40 million. To take the drug from the R&D phase to the production phase would require, however, an investment of \$80 million in manufacturing facilities.

Under traditional net present value analysis, this project would not justify investment. The cost to go forward would be \$3 million, against a projected net present value of \$2 million.  $((\$160 \text{ mil} + \$40 \text{ mil})/2) * .10$ . Under a net present value analysis, the project has a negative value of \$1 million.<sup>198</sup>

Real options analysis, however, takes into account the option to abandon the project after seeing if the development was successful and

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194. See Joseph A. Grundfest & Peter H. Huang, *supra* note 181.

195. *Id.* at 1275.

196. *Id.* at 1277.

197. *Id.* at 1283.

198. *Id.* at 1284.

learning of the FDA's decision. If the project is successful in the sense of producing an approvable drug, there is still a 50% chance it would be abandoned, because the \$40 million value in a prescription only drug would not justify building the plant. At the start of the second stage, the value of the project would be \$4 million— $((.50 * \$80 \text{ mil}) * .1)$ , giving the option a positive value of \$1 million.<sup>199</sup> This analysis translates directly to decisions taken in the course of litigation—the initial R&D phase could reflect the cost to file a complaint, with the later scenarios reflecting the costs and benefits of full litigation once discovery has revealed more information about the likelihood of success.

Based on these insights, Grundfest and Huang have constructed a rigorous two stage real options model for litigation. While deconstructing the model is beyond the scope of this article, some of its insights bear repeating. First, variance (the range between the highest and lowest litigable values) carries a huge importance. The greater the variance, the more likely the plaintiff can project credibility and hence win a settlement; indeed, given enough variance a plaintiff can render any NEV suit worthy of settlement.<sup>200</sup> In the real world, variance is partially a result of legal rules (e.g., the availability of punitive damages or of a jury trial) but also of imperfect information. Second, not only is the scope of litigation costs important, but so is their timing. In general, a plaintiff's option decreases in value with greater litigation costs to the plaintiff, as might be expected, but decreases more rapidly if those costs are front loaded.<sup>201</sup> Finally, while not every PEV suit has positive settlement value, the implications of the options analysis are that most PEV suits will have positive option value, as will some NEV suits depending upon the range of the variance and periodization.

## 2. Conclusion: *Conley* Has Deep Flaws

The implications of both the game theoretic and real options analysis should be obvious: plaintiffs allowed into the litigation under *Conley* can often extract a settlement that is based on the process, not on a likelihood of success on the merits. Game theory teaches that

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199. *Id.*

200. *Id.* at 1316.

201. *Id.* at 1312. This implies, of course, that the more expenditure on case development plaintiffs are forced to do under the rules of procedure before filing, the less valuable their claim will be at the inception. The reduction in value is not primarily a function of the costs themselves—which would need to be borne at some stage of the litigation—but in the reduction of the value of the option because of the acceleration of expenditure to an earlier phase. Brought home, the higher pleading standards of *Twombly* and *Iqbal* directly devalue the claims of prospective plaintiffs, at a level that is not limited to the costs of pre-filing investigation.



asymmetries in discovery costs alone might generate settlements.<sup>202</sup> Real options analysis suggests that a remote chance of a large verdict also has settlement value.<sup>203</sup> Both forms of analysis are driven by the long and expensive path between pleading and fact finding, which imposes high transaction costs worth avoiding and creates variance that amplifies the value of the plaintiff's claim.

The conclusion becomes more compelling when one realizes that the two approaches can work together. Grundfest and Huang base their analysis on a setting where the payoff results only from a win on the merits in litigation. As the game theoretic analysis shows, that is not the whole story. Positive value can attach to the option not just because of a favorable verdict, but because of the ability to extract payments based on cost arbitrage. Plaintiffs have, in effect, two options: one based on the merits and one based on discovery cost arbitrage.

The rigorous models echo the anecdotal complaints. Both suggest the costs imposed by the *Conley* approach are not incidental, and not easily addressed within the *Conley* framework. Under permissive notice pleading, any narrowing of the case is addressed after pleading and after discovery. Because of the costs of discovery and the risk of adverse developments, defendants with meritorious defenses will have incentives to settle based on non-merits factors. This suggests that a return to the *Conley* approach should not be reflexively pursued.

### B. *Changing Pleading Standards*

Some scholars propose changing the level of pleading from the *Conley* level—or, at least, the broad “any set of facts” level—but not to the somewhat murky “plausibility” standard set forth in *Twombly* and *Iqbal*. One proposal, following up on the American College of Trial Lawyers study, proposes shifting to fact pleading.<sup>204</sup> Another article urges an approach called “plain pleading.”<sup>205</sup>

Changing the pleading standard leaves unaddressed the principal problem—the lack of a sure and quick means to exit litigation once some factual discovery shows a claim is not well founded, on the one hand, and the sure opportunity to get some factual discovery before dismissal, on the other. Tweaking the pleading standard can solve one problem or the other, but not both.

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202. Text *supra* at nn. 177-179.

203. Text *supra* at nn. 180-201.

204. See Rebecca Love Kourlis, Jordan M. Singer and Natalie Knowlton, *Reinvigorating Pleading*, 87 DEN. U. L. REV. 245 (2010).

205. Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1442786](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442786).

### C. *Structural Changes*

Still other scholars have proposed making structural changes in the way litigation proceeds. These approaches attempt to address the problems inherent in the *Conley* approach, at least in those settings where the problems are the greatest. Rather than simply tweaking pleading standards, these approaches consider more fundamental changes in the way the civil process works.

#### 1. Abandoning Transsubstantive Pleading

The Federal Rules currently offer a one size fits all procedure. An auto accident coming into federal court under diversity follows the same procedural rules as a massive antitrust conspiracy claim such as *Twombly*. A suit in equity to vindicate constitutional rights shares the rulebook with a garden variety securities claim.

Even before *Twombly*, scholars had questioned the wisdom of the trans-substantive approach,<sup>206</sup> and close examination of lower court opinions suggested that many lower court judges were tailoring pleading requirements to the type of case.<sup>207</sup> The notion that the transsubstantive approach was one possible source of the problem recurred when the Court erected higher pleading standards for all cases, based on the exceptional facts of *Twombly* and *Iqbal* where the systemic and financial costs of proceeding to discovery were higher than normal.<sup>208</sup>

The obvious problem with abandoning the transsubstantive approach is the Rules Enabling Act.<sup>209</sup> By its terms, it requires that any

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206. See Robert M. Covert, *For James Win. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-33 (1975) (suggesting rules should not be trans-substantive); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989) (“[J]udicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future.”); Geoffrey C. Hazard, Jr., *Discovery Vices and Transsubstantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989) (“This critique contemplates separate sets of rules for civil rights cases, antitrust cases, routine automobile cases, and so on.”).

207. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

208. See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535 (2009) (questioning whether the trans-substantive approach adds unnecessary expense to smaller cases); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010), available at <http://ssrn.com/abstract=1448796> (“One possibility would be by revising Rule 9 to include more classes of cases, while abrogating *Twombly* and *Iqbal*.”).

209. 28 U.S.C. §§ 2071-2077 (LEXIS 2006).

rules of procedure “shall not abridge, enlarge or modify any substantive right.”<sup>210</sup> This would seem either to require a change to the Rules Enabling Act or to provide in the substantive law a different pleading standard when that is deemed desirable.

To some extent, special procedures for specific statutes have already been employed by Congress. The principal example would be the Private Securities Litigation Reform Act of 1995 (PSLRA).<sup>211</sup> The PSLRA set higher pleading standards for securities fraud cases and requires courts to hold off on discovery until after any motions to dismiss are decided.<sup>212</sup>

The common law experience suggests another problem with abandoning the transsubstantive approach. Tying the process to the cause of action is a path already taken, and it did not prove trouble free. It implicitly requires election of a cause of action at the outset, with the procedure dependent upon that election. This raises the stakes at the outset for the selection of the right cause of action, as many common law litigants learned.

Other problems arise in the context of the modern rules, which allow liberal joinder of claims and parties. It might seem to make sense, for example, to provide different procedural regimes for antitrust, common law fraud, and breach of contract. Antitrust cases have been known to involve staggering amounts of discovery,<sup>213</sup> while higher pleading requirements for fraud are already embodied in the rules.<sup>214</sup> Under the Federal Rules, however, a distributor or retailer who has been terminated for excessive discounting might join all of these and perhaps other state causes of action in a suit to either recover damages or the franchise. Is there to be a different procedure for each claim?<sup>215</sup>

To some extent, this kind of issue has already arisen in PSLRA cases, which stay discovery until after a motion to dismiss on the

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210. 28 U.S.C. § 2072(b) (LEXIS 2006).

211. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in sections of 15 U.S.C.).

212. See 15 U.S.C. § 78u-4(b) (2006).

213. This was a factor in *Twombly*. The court observed: “It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.” *Bell Atl. Corp. v. Twombly* 550 U.S. 544, 558-559 (2007).

214. See FED. R. CIV. P. 9(b).

215. Another way to address the problems caused by trans-substantiality would be not to vary the rules by cause of action, but by the size and complexity of the action. Stephen N. Subrin, *The Limitations of Trans-substantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DEN. L. REV. 377, 378 (2010). To some extent, the current rules allow this, as reflected in the Manual for Complex Litigation. The proposal in this article would fit into that approach by allowing a different procedure not based on the cause of action but on the nature of the suit.

pleadings has been decided. Courts have confronted cases where PSLRA claims have been joined with state law or other non PSLRA claims, and have had to decide whether discovery can proceed on the other claims while the motion to dismiss the PSLRA claim was pending.<sup>216</sup>

## 2. Bond

One proposal would make fact pleading the default rule, but would allow notice pleading when a plaintiff posts a bond related to the discovery costs imposed.<sup>217</sup> The objective would be to discourage plaintiffs from filing suits based on cost arbitrage by shifting back to plaintiffs the risk of discovery costs when plaintiffs are not able to meet fact pleading standards. Recognizing the possibility of information asymmetries, this approach would allow plaintiffs to proceed in some cases even though they lack facts at the outset that they reasonably believe they can obtain later.

While this is an interesting proposal, it presents problems of its own. First, the bonding process threatens to be fact intensive and expensive. To set an appropriate bond requires investigation into—and perhaps mini-litigation about—the likely scope and costs of discovery. Second, as with any approach that threatens to shift the costs incurred by defendants to the plaintiffs, it will deter some plaintiffs from pursuing their claims. Because the cost of the bond would be frontloaded, the chilling effect might be even greater than an approach such as the English rule that shifts costs at the conclusion of litigation. As Grundfest and Huang show, frontloading costs diminishes the option value,<sup>218</sup> and both the expense of the bond and the expense of the bond setting proceeding would be frontloaded.

## 3. Non Pleading Responses

Some who see a problem, or potential problem, arising from the ease with which the *Conley* regime allows lawsuits to start do not see the solution in a change to pleading rules. Instead, they believe other tools are better suited to address the problem. In particular, tools such as

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216. See, e.g., *In re Trump Hotel Shareholder Derivative Litig.*, No. 96-7820, 1997 U.S. Dist. LEXIS 11353 (S.D.N.Y. Aug. 5, 1997). In rejecting the argument that application of PLSRA stay would penalize plaintiffs for alleging a federal securities claim in conjunction with their state law claims, the court found that plaintiffs are necessarily subject to the PSLRA. *Id.* at 5. The court denied plaintiff's motion to compel discovery on a third party in relation to a state law claim until the resolution of PLSRA motion to dismiss. *Id.* at 6.

217. See Stancil, *supra* note 178, at 150.

218. See Grundfest & Huang, *supra* note 181.

greater use of sanctions and cost shifting would serve better than pleading to discipline the system.<sup>219</sup> These approaches would not cut off access to the courts and would target only selected plaintiffs.

It may be that responses aside from a change in pleading will be called for in order to address the issues identified by the various economic models. Cost shifting would reduce the opportunity for cost arbitrage, and sanctions would impose a termination fee on options that would reduce the value of a frivolous claim. That said, the potential to employ other tools does not, by itself, argue against addressing the pleading stage as well, especially since such approaches have, to date, proved largely ineffectual.

#### D. *Presuit Discovery*

Another proposal would employ presuit discovery to investigate claims before suit is filed. Some state courts, notably in Texas, allow the use of the coercive power of the courts to require discovery even when no action is pending or identified.<sup>220</sup> The proposal would either export this system to the federal courts, or encourage litigants to seek discovery through state pre-filing discovery to build out cases really aimed at federal court.<sup>221</sup>

##### 1. Presuit Discovery in State Courts

As noted, some state courts allow presuit discovery. Even before a complaint is filed, litigants can compel potential opponents to provide information. Texas, which has the broadest investigative discovery rules, allows discovery before filing of a complaint in order to “to investigate a potential claim or suit.”<sup>222</sup>

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219. See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) (suggesting reliance on increased sanctions, fee shifting or revision of class action rules instead of changes in pleading standards); see also Suzette M. Malveaux, *Front Loading and Heavy Lifting: The Evolving Role of Discovery in Contemporary Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 65 (2010).

220. See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J. L. REFORM 217 (2007) (providing a thorough discussion of presuit discovery, primarily in Texas but also in other states).

221. See Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. (forthcoming 2010) available at <http://ssrn.com/abstract=1525642> (“Elsewhere, I have explored ways in which state presuit discovery mechanisms could provide potential federal plaintiffs with the information they need, but for reasons that I discuss below, the better option would be to make such discovery available in federal court.”) (footnote omitted) (at page 4 in SSRN).

222. TEX. R. CIV. P. 202.1(a)-(b).

From an abstract perspective, presuit discovery—coupled with notice to the potentially adverse parties—can serve useful purposes. It can allow plaintiff's attorneys to perform a thorough investigation before filing a suit. A plaintiff's decision to forego a lawsuit – or an attorney's decision to withdraw from representation—can sometimes be more easily made before the initiation of a lawsuit formalizes the conflict. Even if a lawsuit is to proceed, pre-filing discovery can help narrow it with regard to both issues and parties.

## 2. Jurisdictional and Justiciability Issues of Presuit Discovery in Federal Court

Despite the potential benefits of presuit discovery, significant barriers exist to employing it as an investigative tool in federal court. Federal courts, unlike most state courts, are not courts of general jurisdiction.<sup>223</sup> Federal courts cannot, by default, entertain any cause of action that comes before them. Two limitations, both rooted in the Constitution, restrict the reach of federal courts—subject matter jurisdiction<sup>224</sup> and the Case and Controversy requirement.<sup>225</sup> These limitations will impede the use of broad, investigative presuit discovery in federal court.

To bring a suit in federal court, the court itself must have federal subject matter jurisdiction.<sup>226</sup> When a suit is at an investigative stage, it may not be clear whether such jurisdiction exists. The elements required to establish a federal cause of action might not be known; the identities of the likely culpable parties may bear on whether diversity jurisdiction can be established. Without an established and declared jurisdictional

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223. See U.S. CONST. art. 3, § 2. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, (1999) (“Subject matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed.”); LINDA MULLENIX, MARTIN REDISH, AND GEORGENE VARAIO, *UNDERSTANDING FEDERAL COURTS AND JURISDICTION* 268 (1998) (“The federal courts are courts of limited subject matter jurisdiction. They may hear cases only when empowered to do so by the Constitution and by act of Congress.”).

224. See U.S. CONST. art 3, § 2; *Norton v. Larney*, 266 U.S. 511, 515-16 (1925) (“[T]he jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings.”); *Ex Parte Smith*, 94 U.S. 455, 456 (1877) (“There are no presumptions in favor of the jurisdiction of the courts of the United States.”).

225. See U.S. CONST. art 3, § 2; *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (“As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to cases and controversies. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.”).

226. See 28 U.S.C § 1331 (2006) (“The District Court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

basis, however, a federal court has no power to act.<sup>227</sup> Indeed, one of the few requirements for pleading in a federal complaint is that the basis for federal jurisdiction be set forth plainly on the face of the complaint.<sup>228</sup>

For a court to require an entity to respond to discovery requests represents an exercise of judicial power. To proceed to the exercise of judicial power before jurisdiction has been established raises both statutory and Constitutional issues. Similar issues were raised by the doctrine of “hypothetical jurisdiction,” which allowed courts to proceed to merits issues even when jurisdiction had not been established. Justice Scalia observed spoke for the Court in rejecting the doctrine in *Steel Co. v. Citizens for a Better Environment*,<sup>229</sup>

Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.<sup>230</sup>

It is hard to see how it would be acceptable for a court to proceed to imposing discovery burdens on unwilling parties, when it would be unacceptable to proceed to dismissal of the case on substantive grounds.

This bleeds over to the case and controversy requirement. A critical limitation on the power of the federal courts, the case and controversy requirement restricts the federal courts to actual—not prospective or hypothetical—disputes.<sup>231</sup> It is not clear that exercising judicial power to compel discovery before filing, when by definition there is genuine doubt as to whether a federal complaint could ever be filed in good faith, would satisfy this requirement.<sup>232</sup>

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227. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) (holding that courts that act without establishing basis for jurisdiction first act ultra vires.).

228. FED. R. CIV. P. 8(a)(1) (requiring a short and plain statement of the grounds for the court's jurisdiction).

229. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

230. *Id.* at 101-102 (internal citations and quotation marks omitted).

231. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975).

232. The justiciability issues would in some ways resemble those faced in declaratory judgment actions, where justiciability often becomes an issue. The issue has arisen at least once in a declaratory judgment action involving presuit discovery issues. In *Texas v. City of Frisco*, 2008 U.S. Dist. LEXIS 24353 (E.D. Tex. Mar. 27, 2008), the court held

It might fairly be asked whether it elevates form over substance to assert that pre filing discovery invokes jurisdictional and justiciability issues in a way that filing a *Conley* style complaint does not. If a live dispute exists, and if it will likely involve federal subject matter jurisdiction, with the only issue being whether sufficient facts can be found to make out the claim, is there any reason to await a formal complaint? Is there anything in the filing of a complaint that creates jurisdiction or a justiciable controversy? Isn't the Constitutional concern focused on the presence of jurisdiction and the existence of a case or controversy, and not on the form of paper used to initiate the court's involvement?

Perhaps. But even if that is so, a federal court must test and establish subject matter jurisdiction and justiciability before it can proceed. Being a court of limited jurisdiction, it cannot exert its coercive powers, whether in discovery or adjudication, without a proper basis.

The filing of a complaint of any type invokes time tested procedures for testing jurisdiction and justiciability. Throughout the *Conley* era, courts have tested cases against these doctrines based on notice pleading. The Court's approach—which at times has involved required pleading of “specific concrete facts” to meet this burden—suggests that this is one area where the Court especially requires precise statements.<sup>233</sup>

That being so, pre-filing discovery will require some system for establishing and testing, through adversary processes, jurisdiction and justiciability. In all likelihood, that system will require, at a minimum, the equivalent of a *Conley* style complaint, identifying all the parties and basic nature of the claim. To the extent that something other than familiar complaint is relied upon, a shadow system of procedure will necessarily evolve as issues relating to jurisdiction, justiciability, and the legitimacy of using the court's power for a purpose not clearly related to resolving a pending dispute.

Second, and perhaps more fundamentally, there is a subtle but important difference relevant to this inquiry when a court shifts its focus from resolving a controversy to helping a party determine whether a

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it was without power to address discovery issues when a complaint had not been filed. In that case, the City of Frisco had sent a letter warning the state of Texas to preserve documents due to anticipated litigation. The court held it lacked power to hear a declaratory judgment action relating to the duty to preserve documents because the matter was not ripe.

233. See, e.g., Justice Powell's opinion in *Warth v. Seldin*. “We hold only that a plaintiff who seeks to challenge exclusionary zoning practices *must allege specific, concrete facts* demonstrating that the challenged practices harmed *him*, and that he personally would benefit in a tangible way from the court's intervention.” *Warth*, 422 U.S. at 508 (emphasis added) (1975). See generally David M. Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390 (1979).



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litigable controversy exists. When a court launches into fact discovery and development unconnected to a pending case, the court takes on a role more like an administrative agency or an executive department. It is not resolving the case; it is overseeing a survey of the situation to see if a case should exist. A core limitation on the power of the court—that it be constrained in its reach by the reach of the case before it—drops away when a court employs its coercive powers in search of turning up new judicial business.

*Iqbal* itself provides an example of separation of powers issues that could arise from pre-filing discovery. In *Iqbal*, the suit was against high level government officials.<sup>234</sup> Policy arguments for immunity invoke, in part, separation of power concerns. To the extent that executive branch officials were to be burdened with litigation, existing and carefully developed doctrines such as immunity limit the interbranch conflict.<sup>235</sup> Were a court to be faced with an *Iqbal* type situation, and to require the executive branch to answer intrusive questions and provide otherwise confidential documents, all outside the context of immediate resolution of a pending dispute, difficult questions would arise as to the legitimacy of the court's actions.

Even aside from the Constitutional issues, the notion of presuit discovery raises issues as to the institutional competence of the courts to embark on such a task. Managerial judging is hard enough when a court has all the carrots and sticks related to its power over a live case. Managing parties when the matter may never arrive in court adds dimensions of difficulty. When presuit discovery is allowed, there can be no guarantee that justiciable litigation will be brought and no guarantee that, if it is brought, it will be pursued in the jurisdiction that allowed pre suit discovery. In such a context, it is not entirely clear how a court would effectively manage discovery abuse by either plaintiffs or defendants.<sup>236</sup>

#### THE PROPOSAL

The solution lies in creating a stop on the line somewhere between the initial complaint and summary judgment. This article proposes creating that additional station by bifurcating complaint pleading. It

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234. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1942 (2009).

235. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that a former president has absolute immunity for official acts taken while in office).

236. As it is, some lawyers are critical of the common practice of handing discovery management over to federal magistrates, because of the problems that can arise when the judge handling discovery will not be the judge on the merits. See ACTL at 18. This problem would only be aggravated when the case might ultimately be filed and proceed in a totally different forum.

proposes two complaints, the first at a *Conley* level, to be replaced by a second at an enhanced pleading—perhaps *Iqbal*—level.

A. *The First Complaint*

As an initial matter, plaintiffs should be allowed to bring a complaint and get jurisdiction over the parties, according to the *Conley* approach. At this stage, no answer should be required. The complaint should show that injury was incurred, but not be required to show with certainty who caused it. Motions to dismiss at this stage should be limited to those going to the power of the court to hear the case, such as jurisdictional issues, or for those arguing that the complaint fails to allege any legally cognizable harm at all.<sup>237</sup> These threshold issues of judicial authority must be addressable before the coercive powers of the court are employed.<sup>238</sup>

In some cases—perhaps many, or even most cases—the plaintiff will be able and willing to start with a pleading that meets fact pleading standards and would prefer to do so rather than engage in an extra round of process. The minimal requirements of Rule 8(a)(2) have never been the only consideration before a plaintiff when a complaint is drafted. The complaint allows the plaintiff to tell the story of the case to the judge and the opposing party, and when facts allow plaintiffs are likely to exceed minimal pleading standards as a matter of case strategy. In such a case, the plaintiff should be able to opt out of the first complaint.

By the same token, some defendants, even when confronted with a *Conley* level complaint, might prefer to get straight to an answer, counterclaims and discovery. In such cases, the defendant should be able, by foregoing challenges dependent on facts that might be obtained during express discovery phase, to proceed straight to merits resolution.

In these situations, filing of a declaration waiving the express discovery phase should suffice. A plaintiff filing such a declaration would accept that any complaint would be judge by heightened standards, without access to discovery before the motion to dismiss is filed. A defendant filing such a motion would give up the right to challenge a complaint for not providing adequate factual allegations. Similarly, a judge who is content that the initial pleading meets fact pleading standards should be empowered to skip the express discovery phase and move straight to merits discovery.

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237. In broad concept, the kind of opposition allowed here would be similar to a demurrer under the common law.

238. Which is why, as discussed above at 233 to 236, amending Rule 17 to allow pre-filing discovery does not provide a satisfactory solution.

### B. *Express Discovery*

The first complaint should be followed by a limited discovery phase. In order not to rely overly much on the managerial abilities of federal judges,<sup>239</sup> the default scope of this discovery should be defined. Judges should have power to vary from the normal proscribed course, but should not be expected to design a new system for each litigation.

Judges could, of course, achieve much the same result by allowing limited discovery before ruling on a motion to dismiss under the current rules.<sup>240</sup> The problem with this approach—and it mirrors a core problem with *Iqbal*<sup>241</sup>—is that this depends entirely on the inclinations of the individual judge and cannot be predicted systematically in advance. A judge in one courtroom may routinely allow such discovery; a judge across the hall may routinely deny it. A system of justice in which having minimal access to the courts depends on which judge is drawn has profound structural flaws.<sup>242</sup>

The two complaint system shifts the decision from the judge to the parties, presumptively allowing limited discovery in cases where key facts are unobtainable before pleading. The judge can control the scope and duration of the discovery, but the two complaint process would limit the power of the judge to deny the plaintiff at least a limited day in court. While this imposes burdens on defendants in some cases, the cost is mitigated by making that discovery limited and proportional.

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239. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427 (1982) (“[J]udges with supervisory obligations may gain stakes in the cases they manage. Their prestige may ride on efficient management, as calculated by the speed and number of dispositions. Competition and peer pressure may tempt them judges to rush litigants because of reasons unrelated to the merits disputed.”) (internal quotation marks omitted); Note, *The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 VA. ENV'T L.J. 249, 256-57 (2004) (“Due to the absence of legislation correcting the mass toxic tort problem, courts have essentially been forced to create non-traditional and often controversial judicial management techniques to decrease the potential these kinds of cases have to paralyze dockets.”).

240. One response to *Iqbal* would amend Rule 12 to create a structured process requiring a judge to determine whether additional facts would matter to a 12(b)(6) motion to dismiss, and, if they might, to determine whether additional discovery would be likely to produce them. The judge would be required to state her reasoning on the record. In formalizing the inquiry, this approach would be a step forward from the current rules.

241. See Clermont & Yeazell, *supra* note 61, at 152 (a core problem with *Iqbal* is its unpredictability).

242. Given the inherent unpredictability of the *Iqbal* analysis, it should not be surprising that effectively identical cases already are reaching quite different outcomes in terms of courtroom access. See *Adams v. I-Flow Corp.*, 2010 U.S. Dist. LEXIS 33066 (C.D. Cal. March 30, 2010) (dismissing under *Twombly/Iqbal* where, with manufacturer of medical pump that allegedly caused injury unknown at time of filing, plaintiff only alleges possibility of wrongdoing); *Jozwiak v. Stryker Corp.*, 2010 WL 743834 (M.D. Fla., Feb. 26, 2010) (allowing similar case to proceed, finding that allegations that each of many manufacturers manufactured the one pump sufficed).

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The express discovery contemplated would proceed in stages:

1. Phase One: Interrogatories

Plaintiffs would be able to serve interrogatories on all defendants. These would inquire not only into the target defendant, but that defendant's knowledge of what other defendants might have done to contribute to the injury. These also would normally inquire into the kind of documents and witnesses in the defendant's control, as well as into what document and witnesses other parties might be expected to control.

2. Phase Two: Rule 30(b)(6) Depositions

Depositions taken under Rule 30(b)(6) are by their nature limited to specified areas of inquiry.<sup>243</sup> In this scenario, the 30(b)(6) depositions should be limited in scope to which people were involved and how and where documents are kept, as well as to whether the defendant could assert another party was at fault and, if so, why.

3. Phase Three: Document Requests.

Unlike interrogatories and Rule 30(b)(6) depositions, the search for and production of documents can quickly generate major expense, especially in an age of e-discovery. At the same time, document requests are harder to game successfully than interrogatories and 30(b)(6) depositions. Documents provide a paper trail of a party's involvement and generally, if liability is likely, provide a guide to how that liability might arise. In the multiparty setting, document requests are especially hard to game, because in many cases the same document is held by multiple parties and, if not that, multiple parties have documents describing the same meetings or events. Failures to disclose responsive documents are thus more easily revealed.

Because of their high probative value, document requests should be allowed, but because of the possibility of high costs, mechanisms should be employed to keep the scope appropriate to the task of identifying parties with sufficient ties to the incident to be appropriate defendants. Blanket requests for all documents related to a product or a transaction should be disallowed; the scope of the requests should be demonstrably related to the information needed. In addition, one option may be to impose for this phase (perhaps in the discretion of the court), where appropriate defendants are still being identified but costs are potentially

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243. See FED. R. CIV. P. 30(b)(6) (stating that a complaint "must describe with reasonable particularity the matters for examination.").

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high, cost shifting or cost sharing on just this phase of discovery, leaving in place for other aspects of discovery the normal rule that defendants bear their own costs. Cost shifting or sharing could inject discipline into plaintiff's requests for documents at this phase, forestalling more comprehensive requests until later in the case when the cast of characters has been narrowed.

#### 4. Phase Four: Depositions.

Depositions also can become very expensive, and should be avoided until the proper defendants have been identified. However, in some cases, a deposition of a given deponent might clarify whether or not a defendant credibly might bear some responsibility. In those cases, with leave of court, depositions should be allowed to proceed.

#### 5. Express Discovery Generalities

This abbreviated, express discovery should suffice in most cases to identify which parties belong in the lawsuit. As with most 80/20 processes, perfect accuracy will not be achieved, but the accuracy must be balanced against cost. The case will not be ready for trial, but this discovery phase is aimed not at trial, but at identifying who should be kept in the lawsuit.

This phase should not include expert discovery. Based on the documents and interrogatories, a plaintiff can hire its own expert and submit affidavits to bolster its complaint; discovery and cross examination of defense experts can wait until after the pleading stage is complete.

There should be a default time period for this discovery process, with three to six months as a reasonable range, subject to expansion or reduction by the judge in extraordinary cases. Absolute, non-waivable time limits should be avoided, as absolute time limits invite gamesmanship by defendants.

Observers have noted that discovery practice in general has been subject to much gamesmanship;<sup>244</sup> it can be expected that the temptation will be felt in this express discovery phase as well. Sanctions, of a sort that might be readily applied by judges, should be employed to guard against that. Perhaps the most appropriate would be for a defendant to lose its right to file a Rule 12(b)(6) motion to dismiss if the judge is

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244. See Andrew Schouten, *Review of Selected 2007 California Legislation: Family: Breaking Up Is No Longer Hard to Do: The Collaborative Family Law Act*, 38 MCGEORGE L. REV. 125, 125-26 (2007) ("Existing antagonisms between the parties are made worse by the costly, protracted, and frustrating aspects of civil litigation, notably a dearth of civility, discovery abuse, and gamesmanship.").

persuaded the defendant has not been fully forthcoming during express discovery. The sanction would not be a death penalty—the defendant could still file for summary judgment and could still defend on the merits at trial—but losing the chance for a quick exit would be an appropriate remedy for behavior that frustrates the purpose of this bifurcated pleading system.

The goal of this limited discovery phase is to reveal enough facts to allow knowledgeable pleading. The case will not be remotely ready for trial at the end of this brief process, but the plaintiff should have enough factual information to assess who most likely bears culpability. At this stage, the plaintiff should either be able to plead a more detailed complaint, or seek extraordinary leave from the court for additional discovery on a narrow range of inquiry so as to acquire those facts. For many defendants, the initial round will show that they had no real involvement and should not be part of the litigation.

### *C. Second Complaint*

At the end of this phase, there should be a mandatory repleading of the complaint. For the second complaint, an enhanced pleading standard should be applied. Because it is a pleading, Rule 11 will apply, and plaintiffs will need to have a sufficient basis for pleading a defendant. Those defendants who were joined initially but as to whom no facts indicating culpability have surfaced should be dropped from the case (subject to being rejoined, with relation back and no right to exclude evidence developed in their absence based on their not being present, if it develops that they failed to respond fairly to discovery requests).

The level of enhanced pleading that should be required can be debated. The vague “plausibility” standard of *Iqbal* should be avoided in favor of some version of fact pleading, as used in some states and in most non-US jurisdictions. Other nations have seemed to avoid the technicalities that brought down Code pleading, while narrowing the case at the pleading stage. Adoption of such a standard would also bring US pleading in line with international norms after the express discovery phase is over. The enhanced pleading standard should be enough to establish a theory of fault tied to developable evidence, even if every single element is not specifically pleaded.

Just as some defendants can be expected to game discovery, some plaintiffs can be expected to replead defendants even though the express discovery process has produced no evidence of wrongdoing, or even negated the possibility of wrongdoing. In these situations, at a minimum, upon a successful motion to dismiss, plaintiffs should be required to pay the discovery costs of those defendants. While such cost shifting might

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be unfair when applied to plaintiffs who have not yet entered the courthouse doors, it seems fair when applied to plaintiffs who have had a look at the available evidence and still proceed with a bad claim. As always, sanctions under Rule 11 are possible.

#### CONCLUSION

The current pleading debate presents litigants with two unacceptable options. Like Scylla and Charybdis, *Conley* and *Iqbal* sit on opposite shores ready to wreck unfortunate litigants. Neither provides a fair way to deal with cost and information asymmetries.

The contribution of this article is to recognize that pleading need not occur in one stage. By splitting pleading into two phases, it allows different pleading phases to serve different roles, thereby providing a means of case control now lacking. The first pleading, consistent with the federal rules, provides notice as to the nature of the case. The second phase, consistent with the role served by common law pleading and fact pleading, helps to narrow and define the litigation so the full discovery phase can proceed in a more controlled and economical fashion.

The proposal in this article will not lead to a perfect solution, but to a solution less imperfect than either *Conley* or *Iqbal*. Plaintiffs will get just enough discovery to allow them to plead a valid complaint against the obvious parties, while blameless defendants can avoid a journey through the long and dreary valley of discovery.