Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure

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Note from the Editor:

In December 2010, the Federalist Society heard from a number of federal judges and civil procedure experts about amendments to the Federal Rules of Civil Procedure, including the process that would be undertaken to amend the rules and some proposed amendments that might be offered. Based on the comments and perspectives received, the Federalist Society determined that it could add value to the broader discussion over amending the rules by asking experts to flag issues or perceived problems with the rules as they currently exist, and to identify the range of solutions that are being offered to address these problems. This back-and-forth culminated in four papers, one of which follows. A version of these papers will appear in the Florida Law Review, and they are published here with permission.

Introduction

The Federal Rules of Civil Procedure are rapidly approaching their 75th birthday, which will come in the year 2013. 75 years is a long time, and while the Rules have of course been amended significantly at various points over the years, their basic structure remains largely the same as in their original formulation. When first promulgated in 1938, the Rules had an immediate and dramatic impact on civil adjudication by replacing long accepted procedural practices with very different methods of resolving disputes. There can be little question that the new system, spearheaded by the genius of Advisory Committee Reporter Charles Clark,[1] radically altered not only the actual procedures themselves, but also the underlying set of values that had previously rationalized our procedural system. The problem, right from the start, was that there was precious little articulation of either what the new value system was or why it was deemed preferable to the value structure underlying the old system.

To be sure, at the most basic level the stark differences between the two systems must have been obvious to all involved. In place of the draconian requirements of the demanding fact pleading standard, which required a plaintiff to know all of the circumstances surrounding his injury in detail at the time of the pleading, the new Federal Rules demanded considerably less at the pleading stage. The information that was unavailable at the pleading stage could now be gathered through a complex system of court-enforced discovery.[2] But exactly *why* this dramatic change was made was never fully clarified by any of the key actors. Thus, while it was clear that the change was premised in some sense on the notion that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation,"[3] the deep structure of the underlying value system was never satisfactorily articulated.

In part, this failure may have been due to the pressures imposed by narrow political considerations. In his scholarly work defending the new procedural system embodied in the Federal Rules, Judge Clark mystifyingly characterized the changes as merely the natural evolution of the preexisting process.[4] Yet that statement could not have been further from the truth. One can reasonably surmise that Judge Clark's characterization of the Rules' intended impact on existing procedural practices was largely a strategic effort to allay fears about the seemingly dramatic nature of the changes being adopted. However, it may also partially have been the result of the traditional failure of scholars to consider procedural issues from a "deep structural" perspective. By "deep structure" I refer to a synthesis of the fundamental social, moral, political and economic values which society seeks to foster in shaping its civil litigation process.[5] As a general matter, procedural scholarship focuses on what can be described as "second order" analysis, which refers to issues surrounding the shaping of specific procedural doctrines. Only rarely, however, have procedural scholars sought to tackle procedural questions as foundational as the intersection between procedure and democratic theory. This characterization is even more applicable to procedural scholarship at the time the Federal Rules were adopted, when legal scholars focused almost exclusively on narrow, even technical, issues of legal doctrine and analysis. Thus, although no one—including both those who agreed and those who disagreed with the changes brought about by the Federal Rules—could doubt the dramatic impact of Clark's revisions on our nation's sociopolitical and economic structure, it appears that absolutely no efforts were ever made at the time to view those changes through the lens of foundational political or economic theory.

This failure is truly unfortunate, since the choices made in shaping the Rules will necessarily impact our socio-economic and political structure, whether we are fully aware of that impact or not.

The rapid approach of the Rules' anniversary provides an appropriate opportunity to begin such a deep structural analysis with the benefit of almost 75 years of experience. The analytical inquiry appears to be timely for at least three additional reasons, as well. First, in two decisions over the last three years, *Bell Atlantic Corp. v. Twombly*[6] and *Ashcroft v. Iqbal*,[7] the Supreme Court caused an enormous stir—among judges, scholars and practitioners—over the proper pleading standard. Critics of these decisions (and there are almost too many to count) have mounted a variety of attacks on the Court's recent statements concerning the level of factual detail required in a complaint filed in federal court.[8] These pleading decisions have been criticized for improperly abandoning the notice-pleading standard embodied in Rule

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8(a) and the Court's famed decision of *Conley v. Gibson*,[9] for reintroducing the pre-Federal Rules "fact pleading" standard, and for improperly preventing plaintiffs from having their "day in court" as a means of vindicating their substantive rights.[10] On the other hand, scholarly defenses of the Court's decisions in *Twombly* and *Iqbal* have been relatively few and far between.[11] It would probably not be an overstatement to suggest that the combination of lower court confusion and intense scholarly controversy caused by two Supreme Court decisions concerning the Federal Rules over so short a time period is unprecedented.

The second reason that reconsideration of the theoretical foundations of our procedural system is timely is the elephant in the room that appears to have driven the Supreme Court's controversial pleading decisions: the Court's lingering concern over the serious burdens caused by the elaborate discovery process that represented the original Federal Rules' most significant innovation. Designed to enable litigants to gather the information necessary to facilitate accurate decision making and the effective vindication of substantive rights,[12] the discovery process has a dark side that seems to have been largely undervalued at the time of the Rules' framing. At least in an important category of litigation—those cases in which significant amounts of discovery are likely to take place—the costs and burdens inherent in the discovery process threaten to give rise both to serious inefficiencies in the adjudicatory process and to a potentially pathological and coercive skewing of the applicable substantive law being enforced.[13] The Court clearly reasoned in its recent pleading decisions that unless the pleading standards effectively perform some form of meaningful gatekeeping function, the harms caused by excessive and burdensome discovery could easily overwhelm the adjudication in much of modern high stakes litigation.[14] Yet even with the pleading standard performing this filtering function, the fact remains that in the cases that are allowed to proceed beyond the pleading stage, the burdens and costs of discovery are likely to continue to be substantial. The problems of excessive discovery, then, remain a significant concern.

The final reason that a reconsideration of the foundations of modern civil procedure is now timely is that both Congress[15] and the Rules Advisory Committee[16] are presently contemplating the possibility of major changes in the Rules. It could be disastrous if either the Committee or Congress were to alter the current adjudicatory structure without first exploring and articulating a coherent perception of the foundational political and socio-economic underpinnings of the procedural system they seek to fashion. The purpose of this Article is to begin that important undertaking.

In this Article, I first articulate my understanding of the basic value structure that is appropriately deemed to underlie our procedural system. In doing so, I seek to fashion the deep structure of modern procedure—what I refer to as "the litigation matrix."[17] In the following section, I consider how modern pleading standards need to be shaped in order to implement that matrix of underlying values most effectively. In so doing, I seek to explain why, despite some unfortunate and largely unnecessary confusion caused by the Court's opinions in *Twombly* and *Iqbal,* the "plausibility" approach the Court attempted to fashion in those decisions actually represents a wise balance of all of the competing and complementary underlying values.[18] In this Article, I will explain why, despite the torrent of criticism to which it has been subjected, the *Twombly-Iqbal* "plausibility" standard represents the fairest and most efficient resolution of the conflicting interests.

In Section III, I turn to an issue inextricably intertwined with the pleading controversy, the troublesome questions surrounding discovery reform. I believe that foundational precepts of economic, moral and political theory dictate a dramatic ex ante change in the structural operation of the discovery process which, if implemented, would undoubtedly reduce the costs and burdens of the process while preserving the bulk of its beneficial functions. That change, simply put, would be to recognize that the costs of discovery are, from the outset, properly attributed to the requesting party, rather than the responding party. Indeed, classic notions of quantum meruit—long recognized as an indisputable moral and legal dictate in the law of contracts—permit no other conclusion.[19] Were this alteration in the nature of the discovery process to be implemented, an immediate economic externality—one that currently plagues all discovery requests—would be removed. As a result, the discovery system would be relieved of most forms of even non-abusive "excessive" discovery requests—discovery that is simply not justified on the basis of a rational cost-benefit analysis.[20] It may also be necessary to consider imposition of direct structural limits on the nature and scope of discovery, though exactly how those limits should be framed will not be free from controversy. In the final section, I consider alternative ways the current Federal Rules could be amended in order to implement these insights.

I should emphasize that in shaping and applying the litigation matrix to the questions of pleading and discovery, I in no way intend to imply that either the factors to be included in that matrix or the manner in which they interact is free from debate or controversy. Nor do I intend to imply that even were we able to develop a consensus as to the abstract normative elements to be included within the matrix, determining how that matrix should apply to individual situations would always be free from controversy. The goal of this Article, rather, is merely to shift the nature of the ongoing debate about the nature and scope of the Federal Rules of Civil Procedure to an inquiry into the moral, economic and political factors that are properly deemed to provide the theoretical foundations of modern procedure.

I. Exploring the Deep Structure of Modern Procedure: Shaping the Litigation Matrix

There exists no officially recognized list of values which our procedural system is appropriately deemed to foster or achieve. Approximately a decade ago, however, I suggested what I considered to be a consensus grouping of broad normative goals that, when synthesized appropriately, make up the normative deep structure of modern procedural theory. "Some of these goals," I noted at the time, "are affirmative, goals the procedural system should accomplish. Others are negative, goals that attempt to limit the dangers to which the procedural system may give rise."[21] At that time, I included

six elements within my foundational litigation matrix: "(1) decision making accuracy; (2) adjudicatory efficiency; (3) political legitimacy; (4) maintenance of the substantive-procedural balance; (5) predictability; and (6) fundamental fairness."[22] Some 10 years later, I see no reason to depart from this broad framework as my normative theoretical anchor for a critical analysis of the modern procedural system.

On one level, it could be argued that decision making accuracy appears so obvious a consideration that it hardly requires explanation. It is nevertheless helpful to articulate the foundational rationales for inclusion of this factor. They are both systemic and individualist. From the perspective of the individual litigant (either plaintiff or defendant) whose rights have been substantively distorted because of inaccuracy in the fact-finding in her individual suit, the procedural system loses most or all of its political legitimacy. From a systemic perspective, absent decision making accuracy in the individual case it is impossible to ensure implementation and vindication of the substantive legal framework enacted by the democratic society. As modes of implementing its chosen framework, governing authorities often vest substantive rights in private individuals.[23] Without the accurate finding of facts in the individual suit, it is highly likely that the substantive law will either be over-enforced (in cases in which the facts are found incorrectly against the defendant) or under-enforced (in cases in which the facts are found incorrectly against the plaintiff). Either way, the underlying substantive law has been subverted by the procedural system.

It is also necessary, however, to recognize the existence of important competing socioeconomic goals. In certain contexts, the unbending pursuit of factual accuracy will give rise to prohibitive costs which, in turn, will lead to an impact far more harmful than beneficial on the rest of society. These costs may be conceptualized as either "internal" or "external."[24] The former category includes the burdens to which the truth-finding process gives rise directly—i.e., the costs and burdens suffered by the litigants as a result of the devices and structures adopted to achieve fact-finding accuracy. In shaping its procedural due process standards, the Supreme Court has long recognized the need for some utilitarian balance that needs to be struck between the search for truth and the financial and structural burdens required to attain the truth.[25] Even where the burdens are not so great as to reach the level of a constitutional violation, however, purely as a matter of social policy those structuring the procedural system must take this concern into account in shaping the devices designed to lead to the finding of truth. At some point, it will simply be too costly for all concerned to take every conceivable step toward truth finding.

In contrast to these "internal" costs, "external" costs include losses incurred by society beyond the scope of the individualized adjudicatory process. In certain situations, use of a particular procedure designed to attain factual accuracy will impose costs that extend beyond the four walls of the courtroom, thereby undermining substantive interests which society has chosen to protect. Evidentiary testimonial privileges provide a perfect illustration of situations in which the system has made a choice to value external interests over truth-finding.

These external costs link the goal of utilitarian limits on the truth-finding process to the fourth foundational goal of a procedural system: maintenance of the substantive-procedural balance. This factor is premised on the recognition that procedural rules will often have an inescapable collateral impact on interests that exist well beyond the walls of the courthouse—in other words, on the substantive concerns and goals society has sought to foster and implement. It would be a serious mistake to ignore these collateral impacts, because they will occur whether or not we acknowledge their existence. How a society shapes its procedural system will inevitably risk over- or under-enforcing its substantive law. Moreover, such "back door" procedural alteration of governing substantive law is especially invidious in a democratic society because it constitutes a change in the DNA of applicable substantive law, not through the transparent democratic processes of legislative modification (with all of the attendant controls of democratic representation and accountability) but rather through furtive or indirect means. Thus, though it may not always be possible to achieve the proper balance, the goal in fashioning procedural rules must be, to the extent reasonably possible, neither to over- or under-enforce substantive law as a result.

While the substantive-procedural interaction focuses primarily on the shaping of citizens' "primary conduct"[26] (i.e., their non-litigation behavior), the foundational goal of predictability focuses on the concern that litigants receive clear and consistent messages as to how they should prepare for litigation. To avoid this uncertainty, it is necessary, to the extent feasible, to establish governing rules that provide litigants with a clear understanding of what is expected from them. It is important to comprehend, however, that it would be counterproductive to adopt, in the name of predictability, narrow, mechanistic rules of procedure. The most one can reasonably expect is for generally framed rules to provide broad guidance that will be fleshed out through the inductive process of case-by-case development.

While the final element in the litigation matrix, fundamental fairness, is essential to the foundational analysis, it is simultaneously fraught with danger. On the one hand, any system that fails to include at least some concern for dictates of fundamental fairness in the procedural system's treatment of the litigants ignores important elements of the social contract between government and citizen that is necessarily implicit in a democratic society. On the other hand, the concept of fundamental fairness is, at least at its outer limits, so vague and malleable that it can far too easily be invoked conclusorily for manipulative or hidden purposes. Thus, to the extent the foundational moral calculus underlying modern procedure includes considerations of fundamental fairness the inquiry must be confined to situations where one is able to articulate specific and logically defensible inferences from explicit normative premises.

II. Pleading and the Litigation Matrix

A. Pleading and the Risk of the Wrong Guess

With the promulgation of the Federal Rules of Civil Procedure in 1938, the federal judicial system dramatically altered the prevailing theory of pleading, and in doing

so significantly modified the nature of the relationship between procedure and the substantive law it is created to implement. It has been thought by many, however, that the Supreme Court in its 2007 decision in *Bell Atlantic Corp. v. Twombly*[27] substantially reinterpreted and restructured the pleading requirements that had been included in the original Federal Rules in ways that dangerously undermined the core philosophical precepts underlying those Rules.[28] The Court followed its decision in *Twombly* two years later in *Ashcroft v. Iqbal*,[29] and once again many considered the decision to be inconsistent with the original Rules.

There is little doubt that a procedural system's chosen pleading standard can have a significant impact on the implementation of underlying substantive law. At one extreme, pleading standards that require a plaintiff to supply detailed facts about defendants' illegal behavior at a point in the process at which it would be difficult for the plaintiff to know that information could result in serious under-enforcement of substantive rights and proscriptions; legitimate suits would be filtered out at an early stage of the process. At the other extreme, overly lax pleading standards that enable a plaintiff to get past the pleading stage asserting nothing more than vague and unsupported legal conclusions could invite so-called "strike suits," frivolous claims brought solely to coerce defendants into making unjustified settlements to avoid the burdens and costs of the discovery process.

In choosing a generally-applicable pleading standard, it is difficult to walk this procedural tightrope. Whichever pleading standard is ultimately adopted, there will always exist a serious risk that in a significant percentage of cases the result would either be over- or under-deterrence of substantively proscribed behavior. Either result would upset the delicate balance between substance and procedure that is central to the smooth functioning of a constitutional democracy. The question then becomes, on which side of the equation are we willing to risk being wrong? We have seen such a form of weighing in other legal contexts. For example, the criminal system has made the categorical ex ante judgment that we would prefer to let a guilty person go free rather than send an innocent person to prison.[30] In the pleading context, the task is to fashion a workable standard under which the risks are allocated in a manner that optimizes the symbiotic interaction between procedure and the substantive law it is designed to enforce. I refer to this effort as a search for the party on whom to impose "the risk of the wrong guess." In the pleading context, where the court of course lacks perfect knowledge of the facts, the question at the time of the motion to dismiss is to determine whether it is likely more fair and efficient to risk dismissing a deserving plaintiff on the one hand or imposing the burdens of the pre-trial process on a defendant who would ultimately prevail on the merits.

On the civil side, whether one chooses a pleading system that risks pushing deserving plaintiffs out of court prematurely or instead selects a system that risks over-deterrence of defendant behavior (as well as the resulting internal and external economic inefficiencies) depends on certain foundational substantive assumptions about economic and political theory. If one begins with a strong presumption in favor of the value of wealth redistribution and an overriding concern that laws regulating corporate or governmental behavior be enforced, then one is likely to choose a pleading system that demands less of plaintiffs, thereby placing a risk of over-enforcement on defendants. If, on the other hand, one were to begin with an overriding substantive concern about the costs and harms of over-deterrence and the possible waste of litigation resources and believe that courts should not transfer wealth absent a strong and clear reason to do so, then we are far more likely to adopt a more demanding pleading standard. Such a standard would place the risk of deciding incorrectly more on the plaintiffs who are seeking to enforce the law.[31]

Throughout its history, the nation has made very different choices about which party should bear the risk of the wrong guess at the pleading stage. In the following section, I explore these alternatives and the shifts from one to another presumption at different points in the nation's history. In so doing, I will explore the inherent intersection between the pleading standard and the enforcement of controlling substantive law.

B. The Evolution of Pleading in the Federal Courts

1. The Shift from Fact Pleading

Prior to the adoption of the Federal Rules in 1938, the generally accepted pleading standard was "code pleading," named because of its origins in the reform statutory codes of the nineteenth century, particularly the Field Code in New York, which had been designed to replace the common law writ system. It was adopted in an effort to democratize the litigation system by making it more understandable and therefore more accessible to the common person.[32] Instead of focusing on the conceptual niceties of legal pigeonholing that had characterized common law pleading, the codes shunned the pleading of legal conclusions in favor of an intensive emphasis on the need for detailed facts.[33] Demurrers to the face of complaints on grounds of a lack of factual specificity were commonplace, and as a result the pleading stage played a significant role in the litigation process. Not surprisingly, this focus on factually detailed allegations often made it difficult for plaintiffs to proceed past the pleading stage, since at the outset of the case they often lacked access to key information concerning defendant's specific behavior, that was not readily available to them or under the control of the defendant.

Under the intellectual leadership of Charles Clark, the Federal Rules dramatically altered the prevailing pleading dynamic.[34] Instead of demanding facts that stated a cause of action, the Rules now demanded only that the pleadings provide "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[35] Under this system, the motion to dismiss was to play a far smaller role than had the demurrer in code pleading jurisdictions.[36] Instead, the plaintiff was to have access to an array of elaborate discovery devices,[37] enforceable by the court,[38] to enable him to acquire the information needed to pursue the case to trial. The only exceptions to this substantially softened pleading standard were cases of fraud and mistake, which, pursuant to Rule 9(b), remained subject to fact pleading requirements.[39]

As opponents of the Rules were quick to point out, the obvious dangers in this system were the invitation to meritless suits brought solely for purposes of seeking coercive settlements or engaging in fishing expeditions. Elaborate discovery devices often require substantial investments of time, effort and money on the part of litigants. Once the motion to dismiss is effectively eliminated as a filter, there is nothing to stop plaintiffs from initiating the process and quickly obtaining access to potentially burdensome and expensive discovery.[40] But whatever the legitimacy of the concern was at the time of the Rules' adoption, with the development of modern products liability law and class action procedure, in at least a certain category of complex cases the problem of discovery abuse has evolved into a real danger.[41] While the Rules drafters over the years have undertaken a number of significant and often controversial measures to reduce the frequency of such abuse,[42] in *Twombly* Justice Souter pointed out that their success had been, to say the least, less than consistent.[43]

2. Understanding the Pleading Standard of the Federal Rules

The task facing both the drafters of the Rules and the courts asked to interpret and enforce them is to devise a method that, to the extent feasible at the outset of a litigation, imposes the risk of the wrong guess on the party most likely (as best we can predict at the pleading stage) to be arguing the factually incorrect position. In this way, we will reduce the costs of over- or under-deterrence as best we can. Thus, where a complaint alleges non-conclusory facts which, if true, make the court believe that the complaint "plausibly" alleges a valid claim—i.e., there is a reasonable likelihood that a legally cognizable wrong has been committed—it is appropriate to permit the complaint to proceed, even though the court or jury may ultimately determine that no wrong was actually committed. On the other hand, where no reasonable basis exists, on the face of the complaint's factual allegations, to plausibly suspect that a legal wrong has been committed, the risk of under-deterrence of the substantive law must be placed on the plaintiff. To be sure, the difference between these two will not always amount to the difference between night and day. There will no doubt be many close cases. But that difficulty rarely disqualifies a legal standard, nor should it here.

It is important to note that use of this standard should not be considered either a doctrinal innovation or a departure from the drafters' intent underlying Rule 8(a) when it was originally adopted in 1938. The so-called notice pleading system, when properly construed, should not—nor, I believe, was it ever intended to—serve as an "Open, Sesame" to plaintiffs seeking to engage in the equivalent of legalized blackmail or to conduct fishing expeditions through the wasteful and inefficient use of the discovery process. Indeed, anyone who would reject this "plausibility" standard[44] as overly restrictive and under-protective of a plaintiff's substantive and procedural rights should be required to articulate the elements of the less demanding standard with which they would replace it. The only conceivably less restrictive alternative is a standard that would permit a plaintiff merely to allege, in the most vague and conclusory manner, that a defendant had committed a violation of law. While presumably the plaintiff would need to assert violation of a specific right, that requirement hardly provides either the defendant or the system with meaningful protection against waste or abuse (both internal and external) due to the delay and burdens of what turns out to have been wasted discovery. It is simply too easy for a plaintiff to camouflage a total absence of any real basis for suit under a conclusory allegation of law violation. The realistic alternative to a standard grounded in an assessment of a complaint's plausibility, then, is not this substantially less demanding version of notice pleading (what can be appropriately described as "notice pleading minus"); use of such a standard would amount to the imposition of no standard at all and an invitation to procedural chaos. The only even arguably viable alternative to an approach grounded in reasonable suspicion is therefore the even *more* demanding fact pleading standard of the pre-Federal Rules days—a standard the Rules' drafters wisely rejected in all but the narrowest category of exceptions.[45]

It is important to understand that this plausibility standard (which can properly be viewed as a "notice pleading plus" standard) significantly differs from the considerably more demanding fact pleading standard employed in both the pre-Federal Rules codes and currently in Rule 9(b) for allegations of fraud or mistake.[46] This can be conclusively demonstrated by hypothetically applying both standards to the important post-Federal Rules pleading decision, *Conley v. Gibson*.[47] There the Supreme Court overturned a dismissal of the complaint in a suit by African-American union members who accused their union of conspiracy with their employer to engage in racial discrimination, in violation of applicable federal labor laws. Though the complaint included no specific or direct factual allegations describing the nature of the alleged discriminatory conspiracy, it did allege that the railroad for which they had worked abolished 45 jobs held by African-Americans and secretly filled all those jobs with whites. It further alleged that despite repeated pleas, "the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees."[48] If the allegation that the plaintiffs' union made no efforts on plaintiffs' behalf despite the fact that they all had been replaced by white workers was not in and of itself sufficient to make a reasonable observer suspect of defendant's behavior, the complaint also alleged a history of past discriminatory acts on the part of the union.[49]

Who could reasonably dispute that the *Conley* plaintiffs had alleged far more than enough to make a reasonable observer conclude that unlawful behavior on the part of the defendants had been plausibly alleged? To be sure, it may turn out that proof at trial of the truth of the complaint's non-conclusory factual allegations, standing alone, would not have amounted to evidence sufficient to reach a jury. But that is not the question that the plausibility standard should be deemed to ask at the pleading stage. Rather, plausibility demands only that the complaint's non-conclusory factual allegations make a reasonable observer believe that the defendant likely violated plaintiff's rights and that discovery might well reveal confirming evidence of that fact. But if the adoption of the Federal Rules' revised pleading standard altered the pre-

existing fact pleading standard in any meaningful way, surely the complaint in *Conley* must be found to have alleged enough to allow plaintiffs to invoke the Federal Rules' discovery devices in search of the evidence they would need at trial.

In striking contrast to the plausibility standard, fact pleading requires the allegation of substantial factual detail in describing defendant's unlawful behavior: who did what, with or to whom, and when they did it.[50] In a fact pleading system the plaintiff is expected to know, prior to filing suit, exactly what happened. For example, under a fact pleading regime plaintiffs would not be allowed simply to allege, in a conclusory manner, that their union had conspired to discriminate against them, as was basically true of the complaint in *Conley*.[51] Rather, under a fact pleading regime the plaintiffs would have had to allege specifically at what point the union had conspired and with whom, and elaborate on the detailed nature of the conspiracy—something most plaintiffs who had been the victims of a conspiracy would be unable to do without access to discovery, even if they had suffered its consequences.

The plausibility standard, in contrast, does not demand that the plaintiffs possess knowledge of facts which they could not reasonably be expected to know at the litigation's outset. Rather, it demands merely that the description of the facts plaintiffs do know—i.e., the events that plaintiff knows to have taken place—give rise to the plausible claim that what took place resulted from unlawful behavior.[52] Thus, under the plausibility standard, in certain situations the plaintiff may still be permitted to plead in terms of legal conclusions, something that is foreign to a fact pleading system. For example, under a plausibility standard a plaintiff may plead using such legally-conclusory terms as "conspiracy," or "negligence," without explaining in detail exactly how the defendants' behavior qualifies for such descriptions, as long as the plaintiff's description of what consequences he suffered or of the manner in which the surrounding situation has been altered by defendant's actions is reasonably suggestive of unlawful behavior. Plaintiffs will be permitted to rely on conclusory allegations where it appears doubtful that the situation described factually in the complaint would have taken place absent some departure from the legally-required norm. Thus, while the *Conley* complaint survives under a plausibility standard, it fails the far more demanding fact pleading standard.

Properly understood, the plausibility standard asks merely whether the allegations contained in the complaint describe a situation that on its face gives rise to a finding of sufficient suspicion of unlawful behavior by defendant to justify taking the case to the discovery stage. The inquiry can be thought of in terms of "risk-reward": the more suspicious the circumstances alleged, the more likely it is that the risks associated with incurring the costs of discovery will be justified, because the more likely it is that use of the discovery process will bear fruit. The plausibility standard, then, is simply a matter of playing the odds as best they can be assessed with the limited knowledge the court possesses at the point at which a complaint is filed. Thus, the inquiry a court is to make under an approach grounded in an inquiry into the plausibility of the complaint's allegations of unlawful behavior differs significantly in its expectations of what the plaintiff must provide at the pleading stage from its expectations of what the plaintiff must be able to prove at trial.

A standard grounded in an effort to ascertain plausibility at the pleading stage is fully justified by the socio-political values that make up the underlying litigation matrix.[53] The approach strikes an appropriate balance between competing interests. Any standard less demanding would be far too lax in allowing plaintiffs with questionable claims to proceed to discovery, with all of its accompanying inefficiencies and undue burdens. Similarly, a more factually-demanding standard would, in most cases, risk skewing the substantive-procedural balance in the opposite direction.

It is certainly true that under a plausibility standard erroneous dismissal of a certain number of meritorious suits will occur. Judges are human and therefore fallible; at this early stage of the litigation, with an absence of complete information, even educated guesses still remain, at some level, guesses. Thus there will always exist the risk that pleading requirements will, in an individual case, under-enforce the underlying substantive law. However, the Rules' adoption of the plausibility standard represents the logical outgrowth of the common sense conclusion that we should be willing to risk a certain degree of under-enforcement. Incurring such a risk is necessary to avoid the burdens and inefficiencies that would be caused by the significantly greater amount of over-enforcement that would flow from a less demanding pleading standard.

Plausibility is thus far more consistent with a "notice pleading" standard than it is with a fact pleading standard. However, it is appropriately distinguished from a standard that demands nothing more from a plaintiff than a wholly unsupported, conclusory allegation of a legal wrong. Both could, I suppose, be described as "notice pleading," but plausibility is properly labeled "notice pleading plus," while the absurdly lax standard is appropriately described as "notice pleading minus."

C. Explaining the Supreme Court's Recent Pleading Decisions

1. *Twombly*

Twombly was the first decision to expressly articulate Rule 8(a)'s pleading standard in terms of plausibility. However, as we shall see, the standard is consistent with the holdings of all major pleading precedents.

The case involved an allegation of a conspiracy in violation of Section I of the Sherman Act. The Supreme Court has long made clear that in order to violate the Sherman Act's prohibition of "contracts, combinations or conspiracies in restraint of trade," the defendants must have actually conspired; mere "conscious parallelism," whereby the defendants intentionally act in a parallel manner absent any communication among them, is not actionable.[54] Of course, a pattern of parallel behavior is certainly consistent with the existence of an actual conspiracy, so the question arises whether an allegation of consciously parallel behavior combined with a conclusory assertion of conspiracy suffices to satisfy Rule 8(a). In *Twombly*, the Court considered whether a complaint that conclusorily alleged the existence of an actual

controversy on the basis of defendant's parallel anti-competitive behavior can defeat a motion to dismiss. In holding that an antitrust complaint failed to satisfy the requirements of Rule 8(a), the Court reasoned that "[w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ."[55] To satisfy the notice pleading standard imposed by Rule 8(a) (the "plus" version of that standard, it should be noted), the Court concluded, a claim under section 1 of the Sherman Act must provide "enough factual matter (taken as true) to suggest that an agreement was made." Justice Souter, speaking for the Court, emphasized that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[56] The Court drew a distinction between allegations "plausibly suggesting" unlawful behavior on the one hand, and those "merely consistent with" such behavior on the other. The former satisfy pleading requirements; the latter do not.[57]

Applying its plausibility standard to the facts alleged in Twombly's complaint, the Court found that "without some further factual enhancement [beyond the mere assertion of parallel conduct by defendants], [the complaint] stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"[58] This was because "nothing contained in the complaint invests either the action or inaction [on the part of the defendants] alleged with a plausible suggestion of conspiracy."[59]

2. *Iqbal*

Plaintiff in *Iqbal*, a Muslim and a citizen of Pakistan, was arrested on criminal charges by federal officials after the attacks of September 11, 2001. He alleged that he had been arrested and abused while in custody as part of a sweeping policy established by defendants Ashcroft and Mueller—at the time, respectively Attorney General and Director of the Federal Bureau of Investigation—to detain Muslims such as plaintiff in highly-restrictive conditions, for no reason other than their religion.[60]

In dismissing the complaint, the Court applied *Twombly*'s "plausibility" standard. "A claim has facial plausibility," wrote Justice Kennedy on behalf of the majority, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[61] The Court added: "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'"[62] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," Justice Kennedy noted, "do not suffice."[63]

Applying these dictates to plaintiff's complaint, the Court found the allegations wanting. His claims, Justice Kennedy concluded, are "bare assertions" that "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[64] Plaintiff's allegations provided no basis, Justice Kennedy reasoned, on which to surmise that either Ashcroft or Mueller had been a part of any scheme against Muslim men on the basis of nothing more than their religion.

D. Explaining Twombly *and* Iqbal

As previously noted, the large majority of scholarly commentary on both of these decisions has been mercilessly critical.[65] The view of many commentators is that in both *Twombly* and *Iqbal,* the Court abandoned the salutary goals of the notice pleading system adopted in the original Federal Rules in 1938. Despite all the critical commentary surrounding the Court's opinions, however, a closer look reveals that in *Twombly* and *Iqbal* the Court in reality did nothing more than impose the pleading standard that should be deemed to have been in force since the original adoption of Rule 8(a) in 1938. To be sure, its use of the label, "plausibility," was new. The substance of the standard, however, was not. The key advance in these decisions was that while the governing standard had always been plagued by ambiguity as to exactly how lenient its demands of factual detail actually were, after *Twombly* and *Iqbal* all uncertainty was removed.

The manner in which all of the Court's pleading decisions may be reconciled is by understanding Rule 8(a)'s pleading standard as the imposition of a requirement consistent with the "risk-of-the-wrong guess" analysis described previously.[66] Pursuant to that analysis, the complaint must allege facts sufficient to justify the imposition on defendant of the risk of a mistaken decision on its motion to dismiss.

To satisfy this standard, the allegations must amount to more than simply the unsupported and conclusory assertion of law violation. But that does not mean that a plaintiff's reliance on the pleading of a legal conclusion, in and of itself, will automatically lead to a complaint's dismissal. The issue is far more complicated than such an all-or-nothing approach would suggest. In certain situations, a complaint's allegations do not necessarily have to include claims of specific facts concerning the commission of unlawful acts on the part of the defendant. Rather, in a manner conceptually analogous to the evidentiary doctrine of *res ipsa loquitur* at trial, it is conceivable that a description of nothing more than the circumstances, as plaintiff knows them to be at the time of the filing of the complaint, could permit an objective observer to reasonably suspect that unlawful behavior might have occurred. The observer could reach this conclusion by reasoning that the results described in the complaint are unlikely to have occurred absent unlawful behavior, and that discovery could provide evidentiary support for the complaint's allegations.

While the Court's opinions in *Twombly* and *Iqbal* may at some levels be susceptible to confusing and inconsistent misinterpretation, when properly understood those decisions should actually reduce, rather than increase, doctrinal

confusion. After *Twombly* and *Iqbal,* complaints lacking specific detail should be deemed sufficient to allow the pleader to proceed to discovery when and only when they allege nonconclusory facts which render the allegation of legal wrongdoing "plausible." Under this standard, where factual gaps exist in plaintiff's allegations, the complaint will be deemed valid when and only when (1) the very allegation of the resulting harm to plaintiff and its surrounding circumstances gives rise to reasonable suspicion of unlawful behavior on the part of one of the participants in the relevant events, and (2) it is reasonable to believe that use of discovery devices will allow plaintiff to fill in sufficient evidentiary detail to get past a summary judgment motion and to proceed to trial.

F. Reconciling the Prior Pleading Decisions

The *Twombly* Court did not need to heighten the existing pleading standard from "notice pleading" (at least the "plus" version of that test)[67] to plausibility, because since its inception the standard of Rule 8(a) had generally been construed to demand that something approaching a reasonable plausibility standard be satisfied. Close examination of the leading pleading decisions since the inception of the Federal Rules reveals that existing doctrine is consistent with—if not inexorably dictated by—the "suspect circumstances" or "plausibility" version of notice pleading.

"Plausibility," then, is simply a new description of an established approach. As already demonstrated, the poster child for notice pleading, *Conley v. Gibson,* quite clearly qualifies under a plausibility standard.[68] The second-most-famous notice pleading decision of the period, authored by Judge Charles Clark, is the Second Circuit's decision in *Dioguardi v. Durning*.[69] There, an immigrant alleged in a self-drafted complaint that two cases of his "tonics" being shipped through customs had mysteriously disappeared.[70] While he provided nothing in the way of supporting detail, there was no reason to expect that he could supply it without having access to discovery. Judge Clark, invoking the revised pleading philosophy of the Federal Rules, rejected a motion to dismiss.[71] The complaint in *Dioguardi* clearly satisfied the plausibility standard as it has been explained in this Article. At the very least, one could reasonably conclude that the situation warranted further investigation through resort to the Federal Rules' discovery processes. In short, there existed enough suspicion to shift the risk of the wrong guess to defendants.

The most recent major decision in which the Supreme Court applied the precepts of notice pleading prior to *Twombly* was *Swierkiewicz v. Sorema, N.A.*,[72] a decision that was expressly reaffirmed in *Twombly*. The plaintiff, a 53-year-old native of Hungary, sued his former employer, a reinsurance company headquartered in New York and principally owned and controlled by a French parent corporation, for discrimination on the basis of national origin pursuant to Title VII of the 1964 Civil Rights Act[73] and on the basis of age pursuant to the Age Discrimination in Employment Act of 1967.[74] He had served as the company's chief underwriting officer, until being replaced by a much younger individual with only one year of underwriting experience at the time he was promoted. In contrast, plaintiff at the time had 26 years of experience. The district court dismissed the complaint because plaintiff "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination."[75]

In rejecting the defendant's motion to dismiss, the Supreme Court made clear that the complaint was not to be judged by the strict fact pleading standard of Rule 9(b), which is textually reserved for allegations of fraud or mistake.[76] A complaint controlled by Rule 8(a) need not include facts establishing a prima facie case of discrimination, the Court held. Unhelpfully, in its explanation the Court did little more than repeat the language of Rule 8(a) by stating that the complaint "must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' "[77] The Court pointed to the Federal Rules' system of "simplified notice pleading" that "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[78] Because the plaintiff's complaint "gives [defendant] fair notice of the basis" for his claims, the motion to dismiss should be denied.[79]

Focusing solely on this language, it would seem arguable that *Swierkiewicz* is in conflict with both *Twombly* and *Iqbal*, despite the *Twombly* Court's insistence that *Swierkiewicz* is reconcilable with its plausibility standard.[80] After all, as vague as its allegations may have been, it is true that the complaint in *Twombly* gave the defendant "fair notice" of the type of conspiracy that plaintiffs were alleging.[81] But if one examines closely the situation in *Swierkeiwicz,* one can see that the facts pleaded in the complaint actually do satisfy a plausibility standard. The complaint alleged that (1) the plaintiff was of an age where age discrimination was a reasonable possibility, and (2) the plaintiff was far more qualified to serve in his position than the younger individual who replaced him. These allegations give rise to more than the mere possibility that age discrimination had occurred. At the very least, they give rise to a suspicion of unlawful conduct sufficient to allow plaintiff to get to the next stage of the process, discovery, to ascertain whether there was fire behind the smoke.

Whether the complaint's allegations, if supported by evidence at trial, would have been sufficient to resist a summary judgment motion is open to question. Under the standard of proof for trial established in *McDonnell Douglas Corp. v. Green*,[82] an employment discrimination suit at trial must evidentiarily establish a prima facie case, meaning that plaintiff must present evidence that supports an inference of discrimination."[83] If, at trial, a plaintiff presented evidence that did nothing more than establish that he qualified for protection against discrimination and that he was considerably more qualified for the position than his replacement, a jury could quite probably infer discrimination on the part of defendant.[84] In any event, at the very least *Swierkiewicz* appears to stand for the proposition that all a plaintiff must do is satisfy suspect circumstances, rather than allege the specific elements of a prima facie case. Thus, to the extent *Twombly* is ambiguous on the point, it is reasonable to choose to construe it, in accordance with *Swierkiewicz* (which the *Twombly* Court deemed to still be good law), as satisfying the requirements of the plausibility standard.

In the post-*Twombly* decision of *Erickson v. Pardus*, the Court once again appeared mysteriously to return to the rhetoric of the lax version of notice pleading (what I have called "notice pleading minus"). In his civil rights complaint, a prisoner alleged that he had been removed from a year-long treatment plan for hepatitis C, and that as a result his illness worsened.[85] It is true that the Court in a per curiam opinion mysteriously spoke in terms strongly reminiscent of the deferential notice pleading minus standard, under which a plaintiff is allowed to plead legal conclusions as long as he provides notice to the defendant of what it is alleged he had done unlawfully, and did so without any effort to distinguish *Twombly*.[86] Yet the two decisions are easily reconcilable on the basis of the *Twombly* Court's plausibility standard. We have already seen that in *Twombly* the Court found that in a complaint alleging an unlawful conspiracy in restraint of trade although an allegation of parallelism was *consistent with* illegal conspiracy, it was equally consistent with purely lawful behavior on defendants' part.[87] In contrast, in *Erickson,* according to the complaint, the plaintiff, who suffered from hepatitis C, had been removed from a one-year treatment plan by prison officials, and his illness worsened. It is, of course, possible that his illness would have worsened anyway had the treatment ultimately failed. But at the pleading stage, at least, it is reasonable to infer that if prison doctors had chosen the plaintiff on this extended treatment plan in the first place, there was at least a legitimate chance that it would have beneficial effect on plaintiff's medical condition. Otherwise, we would have to assume that prison officials had chosen to waste taxpayers' money and medical resources in a wholly worthless effort.

Whether a causal relationship in fact existed between removal from treatment and worsening of the illness would be an issue to be resolved at a later point in the proceeding (either on summary judgment or at trial). But surely it would be difficult to deny that such a link was "plausible." Under the circumstances, the risk of making a wrong decision could appropriately be shifted to the defendant.[88]

III. Discovery and the Litigation Matrix

A. Discovery and the Substantive-Procedural Balance

Discovery, as I have long argued, is reminiscent of the invention of fire. Like fire, if used with proper restraint discovery can be enormously valuable to achievement of the goals of the litigation matrix. But also like fire, if used carelessly or recklessly discovery can give rise to serious harm and destruction.

As explained in earlier sections, the concepts of revised pleading and discovery went hand in hand in the procedural model implemented in the original Federal Rules. It was quite clear that by simultaneously reducing the barriers imposed by the fact pleading requirement and establishing a complex set of court-enforced information gathering devices, Judge Clark and the rest of the Advisory Committee were attempting both to increase procedural fairness to plaintiffs and employ procedure as a more effective means of implementing substantive law. To illustrate, one need only point to the facts of *Conley*.[89] Recall that the plaintiffs there could never have satisfied the requirements of fact pleading; they of course had no way of knowing the specific details of their union's conspiratorial involvement with their employer at the outset of the litigation, since such conspiracies are by their nature secret. Yet to have denied them the opportunity to employ the discovery devices provided for in the Federal Rules under those circumstances would almost surely have been fundamentally unfair to those plaintiffs and a disruption of the enforcement of applicable substantive law. The availability of discovery, then, was essential to the procedural vindication of the *Conley* plaintiffs' substantive rights; the process thus restored the substantive-procedural balance, which rightfully plays such an important role in the shaping of the underlying litigation matrix of values.

We have already seen, however, that because of the potential burdens of discovery, an unduly lax pleading standard cannot be imposed without seriously skewing the substantive-procedural balance toward pathological over-enforcement of the substantive law.[90] As important a role as discovery is designed to play—and does play—in the effective procedural implementation of substantive law, the very same danger of pathological over-enforcement exists with regard to discovery.

B. Discovery and the Remaining Elements of the Litigation Matrix

As significant as a focus on the substantive-procedural balance is in order to fully understand the impact of the litigation matrix on discovery, it is equally important to recognize the relevance of the remaining elements of the litigation matrix to the analysis of discovery's potential risks and rewards. No matter how restrictively employed, of course, discovery will come at a cost: in the narrow and immediate sense, the costs imposed on the litigants and the system will be greater when discovery is employed than when it is not. The decision that such inherent costs were to be borne, of course, was made by the drafters of the Rules in 1938 when they inserted Rules 26-36. As a purely theoretical matter, at least, this seems to have been a wise call. Court-enforced information gathering devices can play a vitally-important role in enabling individuals intended to be protected by the substantive law to enforce their rights; simultaneously, they may also play a significant role in enabling defendants to protect themselves against illegitimate judgments or over-enforcement of substantive restrictions on their behavior.

It does not necessarily follow, however, that discovery should be free from significant restriction or control. To the contrary, if left wholly unregulated discovery can give rise to numerous procedural and substantive pathologies. In its most extreme form, intentionally abusive discovery effectively transforms the adjudicatory system into a means of facilitating legalized blackmail and extortion. The very threat of costly discovery likely induces rationally self-interested defendants to settle even non-meritorious suits for an amount smaller than the projected costs of discovery. Requests for wholly unnecessary discovery could thus function in an extortionate manner, financially coercing a defendant into settling unjustified claims. It should therefore hardly be surprising

that abusive discovery contravenes virtually all of the elements of the litigation matrix—fundamental fairness, efficiency, and maintenance of the substantive-procedural balance. It is fundamentally unfair to a defendant to allow the adjudicatory system to be employed against him as a weapon of coercion.

No one, presumably, would openly sanction or condone what is unambiguously and intentionally abusive discovery. The problem, of course, is to find ways to control such pathological discovery without either effectively destroying the beneficial effects of the discovery process or establishing control methods that are as economically inefficient as the abusive discovery itself. This has proven to be far more difficult a task than one might have hoped. It is to consideration of this difficult issue that the analysis now turns.

C. Controlling Discovery: The Alternative Models

The most frustrating aspect of the long and sad history of discovery control, however, is the Rule makers' total failure even to recognize, much less implement, a model of discovery control that (1) would curb not only intentionally-abusive discovery, but the probably more pervasive category of "excessive" discovery as well, and (2) would do so with only a relatively limited increase in the impact on the level of procedural costs and burdens imposed on the adjudicatory system. This method of discovery control, which is most appropriately called "the cost-allocation" model, is for the most part a self-executing system. In this sense, the model can be contrasted to four other variants, what can be called the "direct interventionist" model, the "direct restrictive" model, the "interventionist prophylactic" model and the "automatic prophylactic" model. The first and second of these alternative models involve direct restrictions on litigants' ability to engage in discovery, while the third and fourth alternative models involve efforts to prevent discovery abuse before it happens. The third alternative model is designed to deter discovery abuse through the establishment of judicially managed structure, while the fourth alternative seeks to prophylacticly prevent abuse through the use of purely litigant-based procedures.

1. The "Direct Interventionist" Model

The "direct interventionist" model can be described as "managerial," in the sense that it requires the court to directly involve itself in the control of discovery. The model is manifested in two different ways in the Federal Rules. One version, generally referred to as the "proportionality" requirement, is currently implemented through Rule 26(b)(2). The provision requires the court—either on motion of a party or on its own—to restrict discovery when, on the basis of a balancing of specified factors, it determines that discovery is unwarranted.[91] The second version of this model is embodied in Rule 26(c)'s authorization of a judicial protective order, designed to prevent or stop specific abusive practices.[92] The latter provision is the one method of discovery control that has existed since the Rules' original adoption in 1938. It stands as the last line of defense against specific instances of abusive or unjustified discovery. It was designed to provide trial courts with an additional method of intervening to prevent unjustified discovery.

Both of the rule-based versions of this model arguably perform legitimate roles in the control of unwarranted discovery. Rule 26(c) does so by leaving the court with virtually unlimited discretion to make individualized judgment calls. Rule 26(b)(2), on the other hand, is arguably more problematic, because it purports to provide a level of objectivity that simply fails to comport with the realities of the test. Far from providing any sort of objective guidance, the test necessarily requires the court to balance factors that are inherently subjective, without the slightest guidance as to how they are to be measured or how they are to be weighed against each other. At the very least, the process threatens to undermine the predictability element of the litigation matrix.[93] In a sense, both versions of the model pose a prima facie threat to the internal efficiency element of the litigation matrix,[94] because they are inherently labor-intensive—for the court, as well as for the litigants.

The primary problem with this method of discovery control, however, is neither its lack of predictability nor its potential inefficiencies. It is, rather, simply its failure to do an effective job of controlling discovery abuse. This does not mean that the methods should be abandoned. To the contrary, at the very least the Rule 26(c) protective order provision provides an enormously valuable method of controlling abusive discovery in the individual instance. It means, rather, that the direct interventionist model must be significantly supplemented if unwarranted discovery is to be controlled effectively.

2. The "Direct Restrictive" Model

At first glance, the direct restrictive model appears to be far less labor-intensive than the various versions of the direct interventionist model, because its different manifestations are, on their face, self-executing. These rule-based manifestations include the certification requirement of Rule 26(g), which requires certification of all discovery requests and responses, indicating that they are not interposed for improper purposes,[95] as well as the presumptive limitations imposed on the amount of discovery, expressly included in the rules describing the particular discovery devices—limitations which the court has discretion to alter in an individual instance. In both instances, however, as a result of these limitations, both the court and the litigants may become involved in potentially burdensome satellite litigation concerning either possible sanctions for violation of the certification requirement or the possible need to alter the presumptive limitations expressly imposed in the specific discovery rules.

Once again, the primary difficulty with this method of discovery control is probably not the potential burdens and inefficiencies of resultant satellite litigation, however real those dangers may or may not be. It is, rather, the inherently clumsy nature of this form of restriction. The Rule 26(g) certification requirement, for example, gives rise simultaneously to serious risks of over-protection and under-protection. On the one hand, it is far from inconceivable that risk-averse litigants, for fear of possible sanctions, will refrain from making discovery requests that, with perfect knowledge, they would have known would be perfectly legitimate. On the other hand, parties

operating in bad faith may comply with the certification requirement in the belief that they will be able to circumvent sanctions. Absent effective enforcement of the certification requirement, those parties will be able to undermine the salutary purposes served by that requirement. The problem with the presumptive limitations imposed on the amount of discovery, in contrast, is the "one size fits all" nature of those limitations. It is, of course, true (as already noted) that the court has authority to alter those limits in the individual instance, but that option inherently brings with it arguably unnecessary internal transaction costs necessarily involved in making the decision whether to authorize the alteration.

As in the case of the direct interventionist model, it does not necessarily follow that these forms of discovery control should be abandoned. It means, rather, that they need to be supplemented in some way in order to achieve the goal of assuring the discovery process's compliance with the dictates of the litigation matrix.

3. The Prophylactic Models of Discovery Control

a. The "Interventionist Prophylactic" Model

In contrast to the direct models, a prophylactic model of discovery control seeks to prevent or deter discovery excesses before they occur. What I refer to as the interventionist version of the prophylactic model involves the use of the discovery conference methodology that, in one form or another, has been around since the 1980 amendment to the Federal Rules.[96] While the procedure neither directly restricts discovery as a whole nor provides for intervention into specific situations in order to stop particular discovery abuse, its rationale is that by ordering the substance of the discovery process from the outset the model may deter pathological aberrations later on.

Though it is difficult to make definitive empirical assessments, it is possible that use of the discovery conference has had some beneficial impact on the discovery process. Even assuming that to be true, however, there is no doubt that the benefit comes at a cost, in terms of both judicial and attorney time. Moreover, because the process does not involve direct attacks on discovery abuse, it is very difficult to ascertain the true benefits the methodology brings about. That problem, after all, is inherent in the use of any prophylactic method.

b. The "Automatic Prophylactic" Model

The automatic disclosure device, originally adopted (in a more controversial version) in 1993 and currently embodied in Rule 26(a)(1),[97] seeks to avoid the burdens and confrontations that often accompany the discovery process by imposing on the litigants the obligation to automatically disclose certain basic information which, most likely, would have been requested in any event.

There are likely marginal benefits of efficiency derived from this anticipatory process, but it is difficult to see how it can deter or avoid the problems of inefficiency and distortion threatened by unwarranted or abusive discovery. It is therefore necessary to search for an alternative means of discovery control, one that functions differently from the currently-existing four regulatory models.

4. The Cost Allocation Model and the Control of "Excessive" Discovery

One can readily see why these alternative models of discovery control, either standing alone or in combination, fail to control discovery in an effective and efficient manner. They all create the risk of being over-effective, under-effective, economically inefficient, or even all three at once. This does not mean that they fail to serve any legitimate role in the overall scheme of discovery control. At the very least, however, it does mean that something more is needed in order to ensure that discovery in large or complex litigation is not permitted to degenerate into a pathological process of procedural inefficiency or substantive distortion. It is for this reason that it is necessary to turn to an alternative method of discovery control that has mysteriously been all but ignored since the very inception of the Federal Rules: the allocation of the costs of discovery not to the responding party (the overwhelmingly accepted practice) but rather to the requesting party.

From the outset, it is important to understand that I am not here advocating a process of cost *shifting;* indeed, the very use of that word would necessarily concede that the inertia of cost allocation appropriately belongs on the responding party, and must be *shifted* in order to have discovery costs attributed to the requesting party. Yet at no point has anyone—including those who drafted the Federal Rules in the first place—even attempted to rationalize the respondent-centric model of cost allocation that has dominated since the Rules' original promulgation. Were one actually to consider the issue afresh, it would be difficult to understand the assumptions inherent in such a model. It is true, of course, that in the crudest, most concrete sense the cost is immediately incurred by the responding party, not the requesting party. But that fact, standing alone, in no way necessarily implies that even at that point the cost is appropriately to be attributed to the responding party.

One may best understand the point by consideration of a simple analogy. Assume a co-worker asks you to do him a favor and pick up lunch for him. You do so, paying the $15 that the lunch costs. You then bring the lunch to your co-worker; unless he was raised by wolves, he will immediately thank you and reimburse you for your $15 expenditure on his behalf. Is such reimbursement appropriately characterized as "cost shifting" in anything but the most concrete, technical and immediate sense? At any point in this hypothetical transaction, was the cost of that lunch appropriately viewed, morally or conceptually, as *your* cost, rather than your co-worker's cost? Long-established principles of quantum meruit would readily answer that question in the negative.[98] You performed work on behalf of another, who was aware both that you were performing that work on his behalf and, as a result, incurring costs on his behalf. The law of quasi-contract unambiguously dictates that in such a situation the cost is deemed that of the party on behalf of whom the work was done, not of the party who performed the work.[99] In fundamental ways, the discovery process is identical to this hypothetical situation. The only differences are that in the case of discovery, the performing party is usually performing

the work not out of the goodness of his heart but rather due to the coercive threat of court sanction if he fails to do so. Moreover, the work performed by the responding party will not only help the requesting party but often actually harm the interests of the responding party himself. These differences, however, make even more bizarre the seemingly universal but wholly unsupported assumption that discovery costs are appropriately attributed to the responding party, rather than to the requesting party.

It should be clear that as both a legal and moral matter, the costs of discovery are properly attributable, in the first instance, to the requesting party. By imposing the costs of discovery on the responding party, then, our system has effectively required the responding party to provide a subsidy to the requesting party. To be sure, assuming no constitutional problems,[100] the system may choose to order such a subsidy. But because those who created the system implicitly—and inaccurately—assumed that the costs of discovery was properly seen as a cost to be borne by the responding party, our system has provided for a hidden subsidy, one recognized by no one. At the very least, democracy demands that the decisions of those who make fundamental choices of social policy make clear what those choices actually are, so a transparent debate of whether it is fair to impose such a subsidy may finally take place. This has never been done in the case of discovery costs.

Wholly apart from this complete lack of transparency, the implicit assumption that the costs of discovery are to be attributed to the responding party makes little sense, from any theoretical or practical perspective, particularly when coupled with the broad scope of discovery in the age of informational technology. In addition to its moral and legal bases, attribution of the costs of discovery to the discovering party, rather than the responding party, is likely to have significant instrumental benefits, because it would cure what has long been a fundamental economic pathology plaguing the discovery process: the externality inherent in the choice to invoke discovery. Simply put, under the prevailing practice the cost-benefit decision whether or not to invoke the discovery process is made by a party who risks incurring no cost, only benefit, even though it is quite conceivable that the choice will impose a significant cost on others. This lack of economic disincentive underscores what may well be a far greater harm to the system than intentionally abusive discovery: what can be most appropriately labeled "excessive" discovery. This concept includes discovery which, while not consciously interposed for purposes of delay or harassment, nevertheless gives rise to costs greater than its benefits in finding truth. Recall that in the foundational litigation matrix, the value of finding truth cannot be considered in a vacuum, wholly divorced from the costs to which the effort gives rise.[101] Some rough judgment must always be made by some decision maker whether the likely benefit to come from the effort justifies the effort's costs. Yet when the responding party, rather than the requesting party, bears the costs of the process, the requesting party has absolutely no economic disincentive not to make the request, regardless of its costs. Indeed, given that it is the requesting party's opponent who will bear that cost, one might even suggest that in a perverse sense, the higher the cost the greater the incentive to invoke the discovery process.

This focus on the subtle but important differences between "abusive" and "excessive" discovery underscores the manner in which a reversal in the ex ante presumption of discovery cost attribution can function in a symbiotic manner with both the direct and prophylactic methods of discovery control.[102] While those more judicially-driven practices are more likely to punish or deter abusive discovery, it is the self-executing shift in discovery cost allocation that is far more likely to deter the practice of excessive discovery.

The key social problem to which imposition of discovery costs on the requesting party might give rise derives from its inherently regressive nature: the poor will be more immediately and seriously impacted by such costs than will the rich. To be sure, this is also true of all litigation costs, though this fact has never caused us to shift all of the poor's litigation costs to the wealthier party. Moreover, particularly in the case of complex class action lawsuits, the real party in interest will not be the individual plaintiff but rather the plaintiff's attorneys, for whom the funding of such suits is simply a cost of doing business. In these cases, it would be wrong to see this alteration in discovery cost allocation as an inherently regressive practice. In any event, if there are particular substantive rights which the governmental body decides require procedural subsidization, that body may say so at the time it creates those rights. Therefore, even if one were to find the regressive impact of this reversal in cost allocation to be a matter of concern, a wholesale rejection of the cost allocation model would not be justified.

Even if society were to decide to subsidize a poorer litigant's discovery in particular suits, it hardly makes sense to impose that cost on his opponent, rather than on society as a whole. Indeed, to allow a private individual's unilateral filing of a lawsuit to justify imposition of discovery costs on the defendant gives rise to serious constitutional concerns of due process. The Supreme Court has long held that due process prohibits the deprivation of a defendant's property absent meaningful judicial involvement in the determination of that defendant's culpability.[103]

A conceivable objection to the reversal of the current cost allocation model might be that such a practice would simply shift the externality, for under the new model the responding party will have no incentive to keep costs down. But it is the discovering party who sets the contours of the response by the scope of its inquiries or production requests. In an important sense, then, the outer limits of the costs that the responding party will incur are set out by the requesting party. In any event, there always exists the possibility of judicial intervention to determine that the submitted costs are excessive. While it might be responded that such intervention would significantly increase the systemic burdens of the discovery process, it is highly unlikely that judicial intervention would be required in many instances. If the responding party knows that any excessive costs it incurs may well not be reimbursed, it is unlikely to risk incurring them in the first place.

IV. Pleading, Discovery, and the Revision of the Federal Rules

It should be clear by this point that an exclusive focus on the concern that plaintiffs be able to vindicate their substantive rights in court myopically ignores many of the most important elements of the foundational litigation matrix. While the danger of under-enforcement is surely to be avoided wherever feasible, the fundamental values of efficiency, fundamental fairness and maintenance of the substantive-procedural balance dictate the need to avoid both wasteful systemic costs and the substantive economic skewing that inevitably results from over-deterrence. Simply put, an understanding of the foundational normative precepts of modern procedural theory demand that pleading requirements impose some meaningful restraint on litigants' ability to invoke the elaborate discovery devices. Otherwise, it will be all but impossible to prevent parties who have suffered no legally cognizable injury from wastefully increasing both the internal costs of the adjudicatory system and the external costs of products and services in the marketplace. Moreover, once a litigant is permitted to get past the pleading stage to the discovery process, it is essential that the costs of that system are attributed in a manner consistent with the dictates of fundamental fairness and economic efficiency, in order to avoid the wasteful and inefficient misuse of that system.

Once all agree on these fundamental normative contours of the procedural system, the question naturally arises whether those goals may be achieved within the existing framework established by the Federal Rules of Civil Procedure, or whether instead fundamental changes in that framework are now required. Quite clearly, if the reversal in cost allocation presumption were to be imposed, an amendment adding this directive would need to be adopted. Of course, nothing in the current version of the Federal Rules expressly prohibits a court from shifting the costs of discovery from responding party to requesting party, and it is well-accepted that a court possesses discretion to shift costs under its broad powers given it by Rule 26(c).[104] But absent a provision in the Federal Rules expressly dictating that presumptively the costs of discovery are to be imposed on the requesting party, it appears clear that as a general matter courts will fail to allocate discovery costs in this manner. Thus, it is vitally important that the Federal Rules be amended to reflect such a change in traditional practice.

In contrast, the language of Rule 8(a) is in no way necessarily inconsistent with a plausibility standard. The Court in both *Twombly* and *Iqbal* has already construed the provision's text to implement this standard, and the provision's wording is sufficiently flexible to countenance such an interpretation, purely as a matter of textual construction. Indeed, it is highly likely that while the drafters of the original Federal Rules (in most cases)[105] sought to break away from the unduly high barriers to suit set by the code pleading standard for required factual detail, it is difficult to imagine that they intended to allow the pleading of vague and conclusory assertions of legal wrongdoing to enable a plaintiff to invoke the costly and burdensome discovery process absent some showing that the case was more than fanciful. Otherwise, defendants would regularly be at the mercy of any plaintiff who chose to sue them, because the mere filing of a complaint alleging a legal wrong would force defendant to suffer the costs and burdens of discovery. Absent overwhelming evidence to the contrary, one should not assume the Rules' drafters would have intended so untenable a result.[106] Thus, even absent an explicit amendment to Rule 8(a), courts applying that provision may and should reasonably construe it in accordance with the dictates of the plausibility standard.

The fact remains that in its present form Rule 8(a) is sufficiently ambiguous that it is subject to constructions different from that standard. In order to remove any conceivable ambiguity, therefore, the Advisory Committee would be well-advised to revise the provision's language in a manner that explicitly invokes plausibility as the standard that must be satisfied before a party may proceed to the discovery process. Were the Advisory Committee to track the language of the standard articulated in *Twombly,* the revision of Rule 8(a) would send a very clear message to all concerned that while in most cases a complaint need not satisfy the high bar imposed by a fact pleading standard,[107] the mere assertion of a vague and conclusory claim will not permit a litigant to proceed past the pleading stage. Something more is required in a complaint: the allegation of non-conclusory facts sufficient to give rise to the reasonable suspicion that a violation of plaintiff's rights has occurred. Thus, while perhaps as a doctrinal matter formal adoption of such an amendment may not be essential to restoring the proper balance to the pleading standard, doing so would avoid any further confusion among the courts as to what the controlling standard is. More importantly, adoption of such an amendment would stand as a social and political reaffirmance of the need for an economically balanced approach to the competing interests involved in the pleading context.

While formal amendment of the pleading rule may not be essential, the same is not true of the discovery process. As explained earlier, the key to taming the discovery process is to understand that, in the first instance, the costs of discovery are appropriately seen as costs attributable to the requesting party, rather than the responding party. While in its current form Rule 26(c), authorizing the issuance of protective orders, is framed in a manner that vests broad discretion in the district court's hands to "shift" costs, such a power is only rarely employed. In any event, the point of the amendment would not be merely to *authorize* the court to *shift* costs, but rather expressly to attribute the costs, in the first instance, to the requesting party. Rule 26 should therefore be amended to state unambiguously that discovery costs are attributable to the requesting party, unless applicable substantive law provides to the contrary or the court finds that a compelling reason for shifting the costs to the responding party exists.[108]

Conclusion: Assuring that the Genius of 1938 Survives in the Twenty-First Century (With a Little Tweek Every Now and Then)

There is much to celebrate as the Federal Rules of Civil Procedure rapidly approach their 75th birthday. The genius of Charles Clark was his effort to walk the tightrope of the substantive-procedural balance. The goal of Clark and his

colleagues was to assure that the rules of procedure neither over-enforce nor under-enforce the substantive law being enforced. They wisely saw that the barriers to suit imposed by the stringent standards of fact pleading failed that test, and therefore needed substantial revision. But to construe their abandonment of the fact pleading standard as an intended shift to *no standard at all* would be to commit the same sin of all-or-nothing clumsiness that had plagued the standard they sought to replace. First-year law students have long been taught that law is not simple; there are invariably conceptual and practical complexities that must be carefully balanced. Though it is perhaps difficult for us now to see it, the genius of the drafters of the original Federal Rules was their ability to recognize those complexities and to seek carefully to balance the competing needs as a means of achieving a solution that takes all of those complexities into account. Today, there are many who—in the name of the Rules' original drafters—urge that we impose an extremely lax pleading standard that allows plaintiffs to trigger the burden and costs of the discovery process by nothing more than a cryptic and conclusory assertion of a legal wrong. But now to characterize what the drafters did as the equivalent of a bull in a china shop, destroying everything in its path, would be to do them an injustice. The goal today should be to implement their genius under modern conditions. The Court in *Twombly* and *Iqbal* basically did just that, though one could justifiably question the extent to which it adequately explained its conclusion and rationale. Our goal today should therefore not be to sweep away the important insights of those pleading decisions, but rather to use them as a basis for a deeper intellectual exploration of the moral, social and economic foundations of modern procedure.

The drafters of the Rules, of course, were only human, and humans make mistakes—especially in the process of revolutionizing an entire system. In the discovery process, their first mistake was their failure even to consider the question of to whom discovery costs were to be appropriately attributed in the first instance. Their second mistake was their flawed implicit assumption that the costs were properly to be attributed not to the party who is best able to economically internalize the costs and benefits of discovery, but to the party who has little or no control over those decisions. Just as we have already corrected some of their failures in the discovery process over the years, it is now time to correct their errors—and then wish them a happy birthday.

Endnotes

1 *See generally* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure,* 85 Yale L.J. 914 (1976).

2 *See* Hickman v. Taylor, 329 U.S. 495, 500-501 (1947).

3 *Id.* at 507.

4 *See generally* Charles E. Clark, *The Nebraska Rules of Civil Procedure,* 21 Neb. L. Rev. 307 (1942).

5 *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix,* 51 Duke L.J. 561, 593-600 (2001).

6 550 U.S. 544 (2007).

7 129 S. Ct. 1937 (2009).

8 *See, e.g.,* Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores,* 88 Neb. L. Rev. 261 (2009); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Twombly, 14 Lewis & Clark L. Rev. 15 (2010); A. Benjamin Spencer, *Plausible Pleading,* 49 B.C. L. Rev. 431 (2008).

9 355 U.S. 41 (1957); *see* discussion *infra* at 149-150.

10 *See* discussion *infra* at 156.

11 One example is Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849 (2010).

12 *See* discussion *infra* at 146-147.

13 *See* discussion *infra* at 147.

14 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' *post* at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, Easterbrook, Discovery as Abuse, 69 B.U.L.Rev. 635, 638 (1989) ('Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves'). And it is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries,' *post,* at 1975; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no '"reasonably founded hope that the [discovery] process will reveal relevant evidence"' to support a § 1 claim.").

15 Notice Restoration Act of 2009, S. 1504, 111th Cong. (2009).

16 Website of the Advisory Committee on Civil Rules' 2010 Conference on Civil Litigation, Duke Law School, May 10-11, 2010, http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d052567080016721 2/?OpenDocument (last visited Sept. 1, 2010).

17 *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix,* 57 Stan. L. Rev. 1329 (2005). *See generally* Redish, *supra* note 5.

18 *See infra* Section II.

19 *See infra* Section III.

20 *Id.*

21 Redish, *supra* note 5, at 593-94.

22 *Id.* at 594.

23 See my elaboration of the role of private enforcement of systemic policies in Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 29-42 (2009).

24 Redish, *supra* note 5, at 595-96.

25 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Connecticut v. Doehr, 501 U.S. 1, 11-18 (1991).

26 *See* Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

27 550 U.S. 544 (2007).

28 *See* discussion *infra* at 150-151.

29 129 S. Ct. 1937 (2009).

30 4 William Blackstone, Commentaries 358; *see also* Alexander Volokh, *Guilty Men*, 146 U. Pa. L. Rev. 173 (1997).

31 It is, of course, true that whatever pleading standard is adopted applies to *both* complaints *and* answers. Thus, to the extent plaintiffs are required to satisfy a fact pleading standard, any affirmative defenses pled by defendants would have to satisfy a similar standard. As a categorical matter, however, there can be little doubt that a more demanding pleading standard will have

a more significant impact on plaintiffs. If plaintiffs are unable to satisfy fact pleading in their complaint, defendants will not even need to plead affirmative defenses.

32 Richard Marcus, Martin Redish, Edward Sherman & James Pfander, Civil Procedure: A Modern Approach 125 (5th ed., West Publishing 2009).

33 *Id.*

34 The extent to which either Dean Clark or the other rule makers fully grasped the truly dramatic nature of the change is unclear. On occasion, Clark suggested that the changes brought about by the Federal Rules were relatively minimal, and merely a natural evolution of existing pleading rules. *See* Clark, *supra* note 4, at 308. It is, of course, conceivable that understating the impact of the changes of the Federal Rules was merely an element of a strategy to disarm opponents to the adoption of the Federal Rules' pleading system. It is clear, however, that those opposed to the Rules' alteration of the pleading system fully grasped the magnitude of the changes.

35 Fed. R. Civ. P. 8(a).

36 Fed. R. Civ. P. 12(b)(6). Judge Clark himself would have preferred to dispense with the motion to dismiss altogether, instead relying solely on the summary judgment motion as a means of filtering suits prior to trial. However, his preferred approach was not adopted by the Advisory Committee, which chose to retain the motion to dismiss.

37 The discovery devices are presently governed by Rules 26-37 of the Federal Rules of Civil Procedure.

38 Fed. R. Civ. P. 37.

39 Fed. R. Civ. P. 9(b).

40 *See, e.g.*, Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States,* 22 Am. Bar Ass'n J. 809, 809 (1936) (arguing that the Rules, "if finally adopted[,] will increase litigation and subject those against whom claims are asserted to an increasing number of suits based on unfounded claims," and would increase "to an appreciable extent the volume of litigation . . . . because the preliminary draft [of the Rules] adds greatly to the nuisance value of litigation brought without just cause" and "also increase so-called speculative litigation or litigation based on suspicion rather than facts, with the hope that such fishing may reveal a good cause of action . . . .").

41 Justice Souter expressly acknowledged this fact in *Twombly*. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).

42 Discovery reform of one form or another was undertaken by the Advisory Committee in 1980, 1983, 1991, and 2000.

43 Justice Souter's assertion is borne out by the relevant data. *See* Litigation Cost Survey of Major Companies 8 fig.4 (2010), *available at* http://tinyurl.com/LitCostSurvey-Major-Companies.

44 Use of the term "plausibility" did not begin until the Supreme Court's relatively recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* discussion *infra* at 19-20. However, it is my position that the Court's "plausibility" standard is identical to the standard originally intended to be embodied in Rule 8(a) and the standard the Court has traditionally applied. *See* discussion *infra* at 38-39.

45 *See* Fed. R. Civ. P. 9(b) (imposing fact pleading standard on claims of fraud or mistake).

46 Fed. R. Civ. P. 9(b).

47 355 U.S. 41 (1957).

48 *Id.* at 43.

49 *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 433-434 (1986).

50 *See* Gillispie v. Goodyear Serv. Stores, 128 S.E.2d 762 (N.C. 1963) ("[T]he facts constituting a cause of action, rather than the conclusions of the pleader, must be set out in the complaint, so as to disclose the issuable facts determinative of the plaintiff's right to relief.").

51 355 U.S. 41 (1957).

52 Such a standard is consistent with the assertion by respected commentators that because "speculation" in a complaint's allegations is insufficient to satisfy a motion to dismiss, allegations that raise nothing more than mere "suspicion" is insufficient. Charles Alan Wright & Arthur Miller, Federal Practice and Procedure. "Speculation" amounts to an allegation that renders the defendant's unlawful behavior *possible*; on the other hand, a "plausible claim" standard requires a reasonable basis for believing that, if the allegation is ultimately supported by evidence, a reasonable fact finder could consider the allegedly unlawful behavior on the defendant's part more likely than not.

53 *See supra* Section I.

54 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553-54 (2007) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)).

55 550 U.S. at 555.

56 *Id.* at 556 (footnote omitted).

57 *Id.* at 557.

58 *Id.*

59 *Id.* at 566.

60 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1939 (2009).

61 *Id.* at 1940.

62 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 556-57).

63 *Id.*

64 *Id.* at 1951.

65 *See* discussion *supra* at 146.

66 *See* discussion *supra* at 147-148.

67 *See* discussion *supra* at 149.

68 *See* discussion *supra* at 149-150.

69 139 F.2d 774 (2d Cir. 1944).

70 *Id.* at 774.

71 *Id.* at 775-76.

72 534 U.S. 506 (2002).

73 42 U.S.C. § 2000e *et seq.*

74 29 U.S.C. § 621 *et seq.*

75 534 U.S. at 509 (citing the district court).

76 Fed. R. Civ. P. 9(b); *see* 534 U.S. at 513.

77 534 U.S. at 508 (quoting Rule 8(a)).

78 *Id.* at 512.

79 *Id.* at 514-515.

80 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569-70 (2007).

81 *See* discussion *supra* at 150-151.

82 411 U.S. 792 (1973).

83 *See, e.g.*, Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 510 (2002) ("In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination.").

84 *See, e.g.*, Lathram v. Snow, 366 F.3d 1085 (D.C. Cir. 2003) (Issues of material fact existed as to whether a female government employee was eligible for a higher-level position for which an agency hired an outside male candidate, and whether the employee was substantially more qualified for the job, precluding summary judgment on the employee's Title VII claim of discriminatory nonpromotion.); Scheidemantle v. Slippery Rock Univ. State System of Higher Educ., 470 F.3d 535 (3d Cir. 2006) (A genuine issue of material fact existed as to whether a female employee was more qualified for a university's locksmith position, precluding summary judgment in favor of the female in her Title VII claim of failure to promote due to gender discrimination.); *see also* Wilson v. BIE Aerospace, Inc., 376 F.3d 1079 (11th Cir. 2004); Erickson v. Pardus, 551 U.S. 89 (2007).

85 *Erickson*, 551 U.S. at 89-91.

86 It is true that the Court pointed to the plaintiff's special status as a *pro se* litigant. *Erickson*, 551 U.S. at 93-94. However, it did so *in addition to,* rather than as a rationale for, its description of the generally lax pleading standard.

87 *See* discussion *supra* at 150-151.

88 *See* discussion *supra* at 150.

89 *See* discussion *supra* at 149.

90 *See* discussion *supra* at 148.

91 Fed. R. Civ. P. 26(b)(2)(C).

92 Fed. R. Civ. P. 26(c).

93 *See* discussion *supra* at 147.

94 *See id.*

95 Fed. R. Civ. P. 26(g).

96 Amendment to Rule 26 (1980).

97 Fed. R. Civ. P. 26(a)(1).

98 Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. (forthcoming 2011) (manuscript at 14-18), *available at* http://ssrn.com/abstract=1621944.

99 *Id.*

100 *But see* discussion *infra* at 156.

101 *See* discussion *supra* at 153-154; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (adopting a test that balances systemic costs against goal of accuracy in determining procedural due process).

102 *See* discussion *supra* at 154-155.

103 *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972).

104 It is interesting to note that the current version of the Federal Rules expressly provides for such cost shifting in the case of expert witnesses. *See* Fed. R. Civ. P. 26(b)(4)(C). And, the Committee Note to Rule 26(b)(2) made clear that the conditions the Court may impose on ordering discovery include payment by the requesting party of all or part of the reasonable costs of obtaining the information. *See* Fed. R. Civ. P. 26(b)(2), Committee Note, at 17, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf.

105 In Fed. R. Civ. P. 9(b), the drafters established an island of fact pleading when the issues of fraud or mistake were to be pled.

106 *See* discussion *supra* at 148.

107 It should once again be emphasized that, for whatever reason, the drafters of the original Federal Rules chose in Rule 9(b) to impose a fact pleading standard in cases of fraud or mistake, and there appears to be no movement to alter that exception.

108 Beyond this amendment, it would also make sense for the Advisory Committee to consider possible alternative methods of directly controlling discovery. One such method that has been suggested is restriction of the scope of available discovery. For example, respected organizations have suggested: "Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness." *See, e.g.*, Am. College of Trial Lawyers & Inst. for the Advancement of the Am. Legal Syst., Final Report 7 (2009); 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 8, 14 (2009). That question, however, is an issue on which this Article takes no position.