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Discoverymania: Plausibility Pleading as Misprescription

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NOTES

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Discoverymania

PLAUSIBILITY PLEADING AS MISPRESCRIPTION

Fabio Arcila, Jr.[†]

“I want to know where the judge has the power to control discovery in the rules. That’s—I should know that. I can’t remember my civil procedure course. Probably, it was taught on day 4.”—Justice Breyer.¹

“Justice Scalia: what’s driving [*Iqbal*] is discovery, ‘especially in an age of electronic discovery.’ #aals”²

INTRODUCTION

In *Bell Atlantic v. Twombly*³ and *Ashcroft v. Iqbal*⁴ the Supreme Court heightened the requirements for adequately pleading a complaint in federal court, replacing lax notice pleading with more demanding plausibility pleading.⁵ The Court denied

[†] © 2014 Fabio Arcila, Jr. Professor of Law and Associate Dean for Research and Scholarship at Touro Law Center. Many thanks to Derek Bambauer, Rodger Citron, Darrell Miller, and Jane Yakowitz, as well as participants in Brooklyn Law School’s workshop group, who provided thoughtful comments on this manuscript. My sincere gratitude also extends to the many people at Touro Law Center who helped me with this project, including Dean Patricia Salkin as well as previous Dean Larry Rafal, who provided generous summer support. Also included in this group are April Schwartz and her library staff. Thanks also to my research assistants who helped on this project: Julia Capie, Danielle Koestner, Sergey Korolev, Jennifer Maldonado, Arsalan Ali Memon, Larry Przetakiewicz, and Megan Sterback.

¹ Transcript of Oral Argument at 17, *Ashcroft v. Iqbal*, 556 U.S. 662 (2008) (No. 07-1015), 2008 WL 5168391 [hereinafter *Iqbal* Transcript].

² Ira Nathenson, *Comments on AALS Panel on 75th Anniversary of the FRCP*, INFOGLUT.TUMBLR (Jan 5, 2013, 3:13 PM), <http://infoglut.tumblr.com/post/40037283307/comments-on-aals-panel-on-75th-anniversary-of-the> (recording, via a tweet, Justice Scalia’s comment about *Iqbal*, made as a panel speaker during the 2013 annual meeting of the Association of American Law Schools).

³ 550 U.S. 544 (2007).

⁴ 556 U.S. 662 (2009).

⁵ *Iqbal*, 556 U.S. at 677-86; *Twombly*, 550 U.S. at 556-57, 570. The Supreme Court’s new plausibility pleading standard measures whether a plaintiff has succeeded in meeting the “short and plain statement of the claim” requirement under Federal Rule of Civil Procedure 8(a)(2), which is one of Rule 8(a)’s three requisites for stating a valid complaint in federal trial courts. The other two requirements are “a short and plain statement of the grounds for the court’s jurisdiction,” FED. R. CIV. P. 8(a)(1), and “a demand for the relief sought,” FED. R. CIV. P. 8(a)(3).

that it was adopting a new, tougher pleading requirement,⁶ but it is difficult to take that denial seriously.⁷ This plausibility pleading revolution has deservedly garnered enormous attention.⁸ The

For purposes of convenience, I will use the word “Rule” or “Rules” to refer to one or more Federal Rules of Civil Procedure. Similarly, when I refer to the “Advisory Committee” or “Standing Committee” I am referring to those pertaining to the Federal Rules of Civil Procedure.

⁶ *Twombly*, 550 U.S. at 569-70 & n.14.

⁷ See, e.g., *Starr v. Baca*, 652 F.3d 1202, 1212-16 (9th Cir. 2011); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010) (describing *Twombly* and *Iqbal* as having “dramatically heightened pleading standards”). See generally *infra* notes 110, 247. A prime piece of evidence supporting the heightened pleading interpretation is that the Court’s approaches in *Twombly* and *Iqbal* seem impossible to reconcile with the cursory forms in an appendix to the Rules that are supposed to serve as representative samples of adequate pleading. See FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”); FED. R. CIV. P. app. Form 11 (indicating that an allegation stating “[o]n date, at place, the defendant negligently drove a motor vehicle against the plaintiff” suffices to satisfy FED. R. CIV. P. 8(a)(2)); *Swierkiewicz v. Sorema*, 534 U.S. 506, 513 n.4 (2002); see also Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 861 (2010) [hereinafter *Comment on Iqbal*] (explaining that “it is difficult to see the difference between this negligence allegation [in Form 11] and the key allegations in *Iqbal*”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 838 (2010) (“After *Iqbal*, then, a complaint hewing carefully to the standard reflected by the sample Forms should, in theory, succumb to a motion to dismiss for failure to state a claim.”). In his *Twombly* dissent, Justice Stevens pointed out the discrepancy between plausibility pleading and the Rule forms. *Twombly*, 550 U.S. at 575-76 (Stevens, J., dissenting). No justice in the *Twombly* or *Iqbal* majorities addressed the discrepancy.

Currently, the dissonance between plausibility pleading and the Rule forms is potentially subject to “magical” resolution through an effort to abrogate the forms. See *infra* note 35; Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, ___ NEV. L.J. (Seattle University School of Law Research Paper No. 14-09, 2014), available at <http://ssrn.com/abstract=2375042>; see also A. Benjamin Spencer, *The Forms Had a Function*, ___ NEV. L.J. (Virginia Public Law and Legal Theory Research Paper No. 2014-44, 2014), available at <http://ssrn.com/abstract=2472083>. This is one part of an inadvisable post-hoc effort to conform the Rules to plausibility pleading. See *infra* notes 34-36 and accompanying text.

⁸ For example, symposia dedicated to this revolution and its implications have been held at the Lewis & Clark Law School, the Penn State Law School, and New York Law School. See Symposium, *Pondering Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010); Symposium, *Reflections on Iqbal: Discerning Its Rule, Grappling with Its Implications*, 114 PENN. ST. L. REV. 1143 (2010); Symposium, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659 (2012-2013). The topic was also examined by the Section on Civil Procedure, under the rubric *The Changing Shape of Federal Civil Pretrial Practice*, at the 2009 Association of American Law Schools Annual Meeting, which resulted in the publication of several articles. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010) [hereinafter *Comparative Pleading*]; Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); Schneider, *supra* note 7, at 518; Catherine T. Struve, *Foreword: Procedure as Palimpsest*, 158 U. PA. L. REV. 421 (2010). Additionally, Duke University Law School held a related conference. *Special Symposium Issue, 2010 Civil Litigation Review Conference*, 60 DUKE L.J. 537 (2010). Its general focus was upon costs and delays in litigating in federal courts; unsurprisingly, parts of the

Court's objective was to use pleading doctrine to increase early judicial discretion to dismiss cases,⁹ and thereby make it harder for plaintiffs to access discovery.¹⁰ This article adds a new critique to the discussion about the *Twombly* and *Iqbal* plausibility pleading regime by focusing upon the Supreme Court's crucial yet largely unexplored choice to prescribe a *pleading solution* for a perceived *discovery problem*.¹¹ This critique has important implications for recent discovery reform proposals that the Advisory Committee and the Standing Committee have recently considered.¹²

The Court imposed plausibility pleading principally because it was concerned about perceived problems with discovery.¹³ Discovery grants an individual party the discretion to compel disclosure in a powerful and dangerous way because the costs for requesting discovery are low but are usually coupled

conference considered pleading doctrine—including *Twombly* and *Iqbal*—as well as discovery. See John G. Koeltl, *Introduction: Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 540-44 (2010).

⁹ See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 883 (2009) [hereinafter *Regulation of Court Access*] (describing *Twombly* as “elevat[ing] case screening to an important pleading function in sharp contrast to notice pleading’s exclusive focus on giving notice”).

¹⁰ See *infra* notes 24-27 and accompanying text. Numerous commentators have recognized that the *Twombly* and *Iqbal* majorities were powerfully animated by hostility to discovery and the burdens it can impose. See, e.g., Bone, *Regulation of Court Access*, *supra* note 9, at 884, 919-20; Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 69 (2010) [hereinafter *New Discovery*]; Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2023, 2025-26 (2010); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 107 (2010); Schneider, *supra* note 7, at 524.

¹¹ The perception that discovery is problematic is undeniably widespread. See, e.g., AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 2 (2009) [hereinafter ACTL/IAALS, FINAL REPORT] (reporting on 2008 litigation survey of American College of Trial Lawyers fellows, which found perception that “discovery can cost far too much and can become an end in itself”). However, the evidence points to a more nuanced reality, in which discovery may be problematic only in a small minority of cases. See *infra* notes 83-85 and accompanying text. To the extent that discovery is problematic, Professor Kessler persuasively pins the blame upon our merger of law and equity power. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1251-54 (2005) (arguing that merger of equity and law courts has given parties powerful procedural devices, including broad discovery options, that used to exist only in equity—wholly subject to judicial control—which has given parties power to abuse those procedures and subsume courts’ justice and truth-seeking function in favor of procedural dominance); see also FED. R. CIV. P. 2 (abolishing distinction between equity and law in favor of “one form of action—the civil action”).

¹² See *infra* note 34; see *supra* note 5 for an explanation of my use of the phrases “Advisory Committee” and “Standing Committee.”

¹³ See *supra* note 10.

with a unilateral ability to impose sometimes high costs upon an opponent.¹⁴ Though the Rules¹⁵ offer the economizing option of simply opening one's files to the party seeking discovery,¹⁶ this option is illusory for at least two reasons. First, the responding party has an obligation to do some significant work in at least selecting and parsing the portions of records that are likely to be responsive, rather than imposing upon the requesting party the burden of wading through quantities of unresponsive documents.¹⁷ Second, at least in cases involving voluminous documents, the option of allowing inspection rather than producing documents is more theoretical than real given the need to know what information has been revealed to an adversary. Even if the costs of responding to discovery can be reduced, such as through the relatively new Federal Rule of Evidence 502¹⁸ or the use of computer automation, the demand for informational transparency through discovery will always be subject to the procedural critique that it is too unfettered. For example, it is not subject to the majoritarian check that applies to compelled disclosure in congressional or regulatory inquiries.¹⁹

It is undoubtedly true that *Twombly* and *Iqbal* were motivated by concerns broader than discovery.²⁰ Generally

¹⁴ Dodson, *New Discovery*, *supra* note 10, at 80 (“[S]erving discovery usually is far less expensive than *responding* to discovery.”).

¹⁵ See *supra* note 5 for an explanation of my use of the word “Rule” or “Rules.”

¹⁶ Technically, the Rules authorize a responding party to merely grant access to business records (as opposed to actually producing a set of those business records for the requesting party) only when responding to interrogatories. FED. R. CIV. P. 33(d). Yet it is widely accepted that simply granting an opportunity to inspect records is an option in response to requests for document production under FED. R. CIV. P. 34. See, e.g., 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 34.13[2][a] (3d ed. 2012); 8B CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE § 2213 (3d ed. 2010).

¹⁷ See *Rothman v. Emory Univ.*, 123 F.3d 446, 455 (7th Cir. 1997); *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004); *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606, 610 (D. Neb. 2001); *Stiller v. Arnold*, 167 F.R.D. 68, 71 (N.D. Ind. 1996); *Montania v. Aetna Cas. and Sur. Co.*, 153 F.R.D. 620, 621 (N.D. Ill. 1994); *Colorado ex rel. Woodward v. Schmidt-Tiago Constr. Co.*, 108 F.R.D. 731, 735 (D. Colo. 1985).

¹⁸ Rule 502, which protects against inadvertent waiver of attorney-client privilege and work product protection during litigation, was enacted in 2008. Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537.

¹⁹ See generally 2 U.S.C. § 192 (2012) (establishing penalties for failure to comply with congressional directive to appear as witness or produce records); *Barenblatt v. United States*, 360 U.S. 109, 117-18 (1959) (implying congressional investigatory power as incident of Article I legislative function); *Quinn v. United States*, 349 U.S. 155, 160-61 (1955) (holding that either house of Congress, or a congressional committee appointed by Congress, has authority to conduct investigations); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (establishing applicable guidelines when Congress wishes to hold an individual in contempt for refusing to comply with congressional subpoena).

²⁰ See *Schneider*, *supra* note 7, at 519 (opining that decisions were motivated by a more generalized hostility to litigation and a desire to limit the judicial role, at least in certain types of disfavored cases).

speaking, these cases were concerned about waste and abuse. The waste and abuse that *Twombly* and *Iqbal* targeted are often connected to discovery but also exist independent of it, and are largely (though not wholly) related to party fairness. Two concerns are about the parties' financial and non-financial resources. *Twombly* stated that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties . . ." ²¹ *Twombly* was primarily focused upon defendant fairness, as it exemplified when it referred to the need to apply "financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy."²² These concerns about the parties' financial and non-financial resources not only can be, but many times certainly are, related to discovery, which imposes financial and non-financial costs.²³ But these costs can be, and often are, totally independent of discovery, such as the time and effort to locate and hire an attorney, cooperate with the attorney, and engage in non-discovery motion practice.

The choice *Twombly* and *Iqbal* made to apply a pleading solution to problems of waste and abuse is justifiable to a certain extent because pleading doctrine can address both of these concerns, and can do so extremely effectively. The problem is that it cannot do so carefully, in a manner that avoids sacrificing other important and competing objectives. The question that *Twombly* and *Iqbal* raise is whether that sacrifice is worth it. Most of the scholarship about *Twombly* and *Iqbal* answers that it is not.

This is especially so where the concerns about waste and abuse are primarily centered around discovery. And there is no doubt that, although some non-discovery concerns motivated *Twombly* and *Iqbal*, discovery was a prime motivating factor behind plausibility pleading, as Justice Scalia has since acknowledged in comments to law professors.²⁴ *Twombly* highlighted the link to discovery when it stated 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 facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."²⁵ It again

²¹ Bell Atl. Corp. v. *Twombly*, 550 U.S. 544, 558 (2007) (internal quotations and citations omitted).

²² *Id.* at 567 n.12.

²³ See *infra* text accompanying note 149.

²⁴ See *supra* note 2 and accompanying text; see also *supra* note 10.

²⁵ *Twombly*, 550 U.S. at 556.

signaled its concern about discovery when it warned that “before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct.”²⁶ *Iqbal* rang a similar bell about discovery when it noted that “Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”²⁷ *Iqbal*'s use of gatekeeping language with respect to discovery was no accident and emphasizes the pleading-discovery nexus the Court was leveraging.

Twombly and *Iqbal* are difficult to justify because of the catalyzing role that discovery played in them. Insufficient attention has been paid to whether the pleading remedy *Twombly* and *Iqbal* chose to apply was well suited to their overarching concerns about discovery. Viewing *Twombly* and *Iqbal* through a lens that accounts for discovery's purposeful role in our litigation system provides further reason for criticizing those opinions. The litigation system established under the Federal Rules of Civil Procedure was premised upon low pleading standards and broad discovery in the hope that this would increase dispositions reflective of the true merits of cases rather than upon technicalities. Such justice comes at a cost, but the Rule drafters believed that the costs attendant to a low pleading threshold for accessing the courts, coupled with liberal discovery, were worthwhile. The *Twombly* and *Iqbal* Courts did not. In choosing to address discovery concerns through pleading, the Court embraced the overlap between pleading and discovery. This choice is understandable to the extent that a relationship exists between pleading and discovery. More detailed pleading would be expected to narrow the issues for trial and correspondingly during discovery.²⁸ Additionally, lax pleading can be used hand-in-hand with discovery for illegitimate purposes.²⁹ However, the Court ignored that there is an insufficient correlation between pleading and discovery to accomplish its goals without unduly sacrificing court access, including its twin objectives of procedural and substantive justice.

This has resulted in several important consequences. First, it calls into question whether the Court has the authority,

²⁶ *Id.* at 563 n.8.

²⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

²⁸ See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 644-45 (1989) [hereinafter Easterbrook, *Discovery as Abuse*].

²⁹ See Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513, 519 (2010).

expertise, and institutional competence to change the pleading standard in the absence of any change to Federal Rule of Civil Procedure 8(a)(2).³⁰ By invoking raw judicial power to change pleading standards for every civil case filed in the federal district courts, motivated in large measure by antipathy to discovery, the Supreme Court has indulged in an analytical muddle. The Court has created uncertainty for litigants and federal judges³¹ and has bypassed the rulemaking process under the Rules Enabling Act,³² which is better suited to considering what discovery reforms, if any, should be implemented.³³ As a result, the Court has improperly aggrandized its own power, and for questionable ends. Second, it has destabilized the entire procedural structure in federal district courts because the simplified pleading system the Federal Rules of Civil Procedure adopted was holistically linked to other parts of the Rules' structure. Third, the Advisory Committee for the Federal Rules of Civil Procedure has responded by seeking to reform the rules in a manner that seemingly brings them into accord with plausibility pleading, as evidenced by proposals to tighten and reduce discovery and to eliminate the form complaints that evidenced the original simplified pleading requirements that the rules inaugurated in 1938. The Advisory Committee withdrew several of the more aggressive discovery limitations.³⁴ Both the

³⁰ See *infra* note 33.

³¹ See Clermont & Yeazell, *supra* note 7, at 823, 844-46.

³² See 28 U.S.C. §§ 2072(a)-(b) (2012) (authorizing Supreme Court to "prescribe" federal rules, but prohibiting ones that "abridge, enlarge or modify any substantive right").

³³ Numerous commentators have questioned the procedural legitimacy of *Twombly* and *Iqbal* given that they reformed pleading doctrine outside the Rules Enabling Act process and in the absence of legislative directive. See, e.g., Bone, *Comment on Iqbal*, *supra* note 7, at 883-85; Clermont & Yeazell, *supra* note 7, at 849-50; Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 GEO. WASH. L. REV. 9, 28-29 (2009); see also Effron, *supra* note 10, at 2026-27; see *infra* note 110 and accompanying text.

³⁴ In August 2013, the Advisory Committee proposed to: reduce the presumptive number of allowed depositions per side to five (from ten); shorten each deposition's presumptive allowed length to six hours (from seven); limit the presumptive number of allowed interrogatories to 15 (from 25); and inaugurate a presumptive limit on requests to admit (pegged at 25). Danielle Dellerson, *Proposed Changes to Discovery, ESI Rules Top Civil Rule Proposals Out for Comment*, 82 U.S.L.W. 276, 276 (2013); Jeffrey D. Koelemay, *Draft Discovery Rules May Create Injustice, Democrats Say at Subcommittee Hearing*, 82 U.S.L.W. 715, 715 (2013). It withdrew these proposals after "encountering 'fierce resistance.'" Tera E. Brostoff & Jeffrey D. Koelemay, *Draft E-Discovery Rule Gets Another Revision; Is Process Too Slow For Pace of Technology?*, 82 U.S.L.W. 1501, 1503 (2014) (quoting Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 4 (June 14, 2014), in SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. B-4 (Sept. 2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>).

Standing Committee and then the Judicial Conference approved what remained, as well as Rule amendments that are more nuanced but that have the potential to significantly change discovery, which will become law unless the Supreme Court or Congress intervenes.³⁵ This course of action can be justified as a reasonable response to *Twombly* and *Iqbal*, but whether it is advisable depends upon *Twombly*'s and *Iqbal*'s legitimacy. Unfortunately, *Twombly* and *Iqbal* were bad rulings for numerous reasons. The misguided choice they made to use pleading doctrine to address discovery concerns has serious repercussions for the business of our federal courts—rights enforcement—and the people, organizations, and governmental entities that turn to those courts for the resolution of disputes. The repercussions are important because “[i]n a society that relies heavily on the courts for rights vindication and social reform, the distribution of litigating power is vital to the distribution of social and political power.”³⁶ Thus, rather than revising the Rules’ structure to conform to those inadvisable rulings, reformers would do better to use the legislative process to amend the Federal Rules of Civil Procedure in a manner that limits damage from *Twombly* and *Iqbal*. One avenue would be to reform the discovery rules themselves, but in fairer and more even-handed ways than are currently being pursued.

Part I of this article will explain why plausibility pleading is poorly matched to resolving any discovery problems that might exist. Part II will make the case that a better solution is to reform

³⁵ These include: abrogating Rule 84 and the appendix of forms that have exemplified the simplified pleading that the rule drafters intended to satisfy Rule 8(a)(2); expressly adopting proportional discovery in Rule 26(b)(1) and referencing it as a discovery limitation in Rule 26(b)(2)(C)(iii); eliminating the possibility of a good cause expansion of discovery to what is relevant to the subject matter; deleting the definitional statement in Rule 26(b)(1) pertaining to discovery “relevant to any party’s claim or defense,” which specifies that it includes the existence, description, and location of documents and witnesses; deleting Rule 26(b)(1)’s explanatory phrase that discovery “reasonably calculated to lead to the discovery of admissible evidence” is proper and replacing it with what appears to be a substantively narrower statement that discovery “need not be admissible in evidence to be discoverable”; in Rule 26(e)(1)(B) expressly allowing discovery cost-shifting in protective orders; and greatly expanding the Rule 37(e) e-discovery safe harbor for failure to preserve electronically stored information as compared to both the Rule’s previous iteration and several, often influential, lower court interpretations. Tera E. Brostoff & Jeffrey D. Koelemay, *E-Discovery Rule Gets Late-Night Rewrite, Advisory Committee Approves Rule Package*, 82 U.S.L.W. 1549, 1551 (2014); Kimberly Robinson, *‘Significant’ Changes to Federal Civil Rules, Including E-Discovery, Pass Judicial Muster*, 83 U.S.L.W. 444, 445 (2014); Koelemay, *supra* note 34. The United States Supreme Court has approved these changes and submitted them to Congress. Order of the United States Supreme Court (Apr. 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf). At this point only Congress can prevent these amendments from becoming law. See 28 U.S.C. §§ 2072(a), 2074.

³⁶ Bone, *Regulation of Court Access*, *supra* note 9, at 875.

discovery instead of pleading doctrine. Finally, Part III will survey numerous options for reforming discovery.

I. PLAUSIBILITY PLEADING AS AN IMPROPER SOLUTION TO A “DISCOVERY PROBLEM”

To understand how the Supreme Court so badly went astray in *Twombly* and *Iqbal*, it is helpful to initially focus upon the Court’s views about discovery rather than the pleading issues or any other legalities involved in the two cases. Just as motive is so often crucial to solving a crime, discovery is crucial to understanding how we have reached this point because it is what principally motivated the Court in these two decisions.

The Court majorities in *Twombly* and *Iqbal* have a very particular, disfavorable view of discovery, but all indications are that they do not fully appreciate the realities of discovery in practice or its doctrinal or theoretical complexities. With regard to the realities, they greatly exaggerate the problems with discovery and treat the small subset of cases in which discovery is problematic as if they are representative of the whole. As for doctrine and theory, they ignore that pleading and discovery are holistically linked to each other as well as other provisions in the Federal Rules of Civil Procedure, and that changing pleading doctrine but nothing else will therefore have a destabilizing effect. Because discovery is problematic in a small percentage of cases, *Twombly* and *Iqbal* fail to appreciate that applying a pleading solution to all cases is unfairly overinclusive. *Twombly* and *Iqbal* also seriously erred by focusing only upon defendant fairness in discovery, while ignoring plaintiff fairness, and thus they are also unfairly underinclusive. Finally, they evinced such an exaggerated concern for defendant fairness in discovery as to have blurred the lines between anti-suit protections in general civil litigation as compared to cases involving qualified immunity defenses.

A. *The Easterbrook Canard*

With regard to the Supreme Court’s practical understanding of discovery, *Twombly* relied upon and quoted extensively from Judge Easterbrook’s well-known critique of discovery,³⁷ as I will detail below.³⁸ *Iqbal* similarly emphasized its distrust of limited discovery when it stated that “the question

³⁷ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559-60 & n.6 (2007) (quoting Easterbrook, *Discovery as Abuse*, *supra* note 28).

³⁸ See *infra* text accompanying notes 42-43.

presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process,”³⁹ and again when it derided staggered discovery because even defendants temporarily protected from discovery would still be burdened by needing to monitor and hence participate in it.⁴⁰ The Supreme Court’s embrace of Judge Easterbrook’s critique, and its corresponding hostility to discovery, is misplaced, particularly as a justification for imposing plausibility pleading. On close examination, Judge Easterbrook’s critique is overblown at best, and is often just plain wrong, especially as applied to the run of cases. To the extent his position is defensible, it is most likely in large, complex cases. This admittedly helps justify the *Twombly* majority’s reliance on it, as the large antitrust case at issue there was of a type most susceptible to Judge Easterbrook’s critique. But *Iqbal* emphasized that plausibility pleading now applies to all federal district court cases⁴¹—not just large, complex ones—and the resulting carryover of Judge Easterbrook’s discovery critique is thus both unjustifiable and unfortunate.

The *Twombly* majority was so influenced by Judge Easterbrook’s account that it extensively quoted him in rejecting the ameliorative prospect of judicial supervision of discovery.

The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define “abusive” discovery except in theory, because in practice we lack essential information.⁴²

³⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 684-85 (2009).

⁴⁰ See *infra* text accompanying note 106.

⁴¹ See *infra* note 89 and accompanying text.

⁴² *Twombly*, 550 U.S. at 560 n.6 (quoting Easterbrook, *Discovery as Abuse*, *supra* note 28, at 638-39) (citation omitted).

Though not quoted by the *Twombly* majority, Judge Easterbrook had continued:

Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole . . . from a request that was not justified at the time? Ex post perspectives are no answer to problems that must be solved ex ante. . . . [Magistrates] have no way to evaluate the costs and benefits of discovery ex ante, and they rarely examine their handiwork ex post (because the case either settles or passes to the judge for disposition).⁴³

Twombly badly erred in crediting Judge Easterbrook's hyperbolic discovery critique. Consider the "sketchy complaint."⁴⁴ Complaints do not get much "sketchier" than the form complaints appended to the Rules, such as the negligence complaint in Form 11 for a collision between a person and an automobile.⁴⁵ Taking Judge Easterbrook at his word would leave one believing that there is no reliable way, ex ante or ex post, to assess the reasonableness of discovery in such a case. But that is clearly untrue. Even with the dearth of facts in such a complaint, both the parties and the judge have ample bases upon which to gauge whether discovery requests are reasonable or not. These actors know that numerous areas of inquiry are likely to be proper, such as inquiries into eyesight, what each person was doing at the time of the alleged collision, whether the automobile was in proper repair, etc. All have sufficient information to have a sense that some types of information may or may not be proper. For example, whether plaintiff's medical history should be discoverable will depend upon the extent to which it is related to the alleged injuries.

Further, Judge Easterbrook's lament that "[a] judicial officer does not know the details of the case" is often untrue. It is most often true in the case of the "sketchy complaint" Judge Easterbrook mentions. But sketchy complaints are most likely used in simple cases—usually pro se cases—where details of the case are not usually necessary to have a sense of what discovery is proper and improper. The vast majority of complaints are not "sketchy" but instead go above and beyond Rule 8(a)(2)'s minimal requirements. This is the difference between the art and craft of legal practice and its prevailing standards versus Rule 8(a)(2)'s technically minimal pleading requirements. The complaints in large, complex cases, such as *Twombly*, are invariably rife with

⁴³ Easterbrook, *Discovery as Abuse*, *supra* note 28, at 639.

⁴⁴ See *supra* text accompanying note 42.

⁴⁵ FED. R. CIV. P. Form 11. Form 11 may soon be a historical relic. See *supra* note 35.

factual detail. The *Twombly* complaint was 29 pages long, with 96 numbered paragraphs.⁴⁶ The *Iqbal* complaint was 54 pages long, with 270 numbered paragraphs.⁴⁷ These complaints were certainly not “sketchy.” They undeniably provided adequate notice to the defendants and judge of the factual bases of the suits and the legal bases upon which liability was alleged. They were not so bereft of detail that the parties and judges in the cases would be left meandering about aimlessly, with little to no understanding of what the case was about, how to respond and defend, or as to the scope of discovery. Contrary to what *Twombly*’s and *Iqbal*’s rhetoric suggested, the “judicial officer[s]” presiding over the cases would not have been hamstrung by “not know[ing] the details of the case” in a manner that would leave the officers clueless about how to oversee discovery. *Twombly* was simply wrong in suggesting the contrary when it endorsed Judge Easterbrook’s critique.

After all, if Judge Easterbrook, and in turn *Twombly* and *Iqbal*, were correct about the futility of judicial oversight over discovery because its scope and limitations are too uncertain or essentially unknowable, spoliation sanctions would rarely if ever be issued because parties could not be held to poorly defined or unknowable discovery obligations that judges could not identify.⁴⁸ But that is clearly not the case. Litigation and discovery come with an obligation to preserve evidence. That obligation is enforced through spoliation doctrine. “Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation” and is sanctionable.⁴⁹ Contrary to what Judge Easterbrook’s critique suggests, the scope of discovery is sufficiently knowable that spoliation sanctions are regularly granted. That the duty to preserve evidence exists even

⁴⁶ Consolidated Amended Class Action Complaint, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02-CIV-10220), 2003 WL 25629874, *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

⁴⁷ First Amended Complaint and Jury Demand, *Elmaghraby v. Ashcroft*, No. 04-CIV-01809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), 2004 WL 3756442, *rev’d sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁴⁸ Recall that Judge Easterbrook’s critique, with which *Twombly* was so taken, was not only that the presiding judicial officer could not know enough to recognize discovery limitations, but that even the *parties* might not know. *See supra* text accompanying note 42 (“The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find.”).

⁴⁹ *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

before litigation has commenced further undermines the critique that discovery obligations are too amorphous.⁵⁰

The “problem” to which the Supreme Court was responding in *Twombly* and *Iqbal* was decidedly *not* “sketchy” complaints, or the lack of sufficient notice about the claims asserted or their factual nature. The problem was *discovery* and, to be more precise, discovery burdens in general as well as the more specific concern about unilateral imposition of asymmetric discovery burdens. Had “sketchy” complaints been the real problem, a pleading doctrine solution would have been fitting. But where the perceived problem was discovery, the Court made a poor choice in responding with a pleading prescription. It would have done better to pursue a more appropriate remedy—reforming discovery itself.⁵¹

B. Destabilizing

Though the discovery concerns that so motivated *Twombly* and *Iqbal* may have some merit in a small minority of cases,⁵² *Twombly* and *Iqbal* have “destabilized the entire system of civil litigation”⁵³ in federal court by revising pleading doctrine without adequately addressing the impact in light of the other Rules. The Rules—for sound systematic reasons—operate from a presumption that favors disclosure.⁵⁴ The Rules seek to promote dispute resolution on the merits,⁵⁵ and sharing information is central to that goal.⁵⁶ The party seeking disclosure need only overcome the

⁵⁰ *Id.* at 591 (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”).

⁵¹ See *infra* Part III.

⁵² See *infra* notes 83-85 and accompanying text.

⁵³ Clermont & Yeazell, *supra* note 7, at 823.

⁵⁴ See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238-39 (1989); see also *id.* at 2239 (“[I]n operation the system is one of mandatory response rather than focused inquest . . .”); *id.* at 2241 (referring to “[t]he open disclosure ethos of the Federal Rules”); Netzorg & Kern, *supra* note 29, at 514, 517, 520; *id.* at 527 (arguing that, though Rule 26(b)(2)(C) already includes proportionality factors to apply to discovery disputes, “in practice the guidelines are rarely used. Instead, proportionality takes a back seat to the strong presumption in favor of broad and liberal discovery.”). This ethos of liberal discovery is unique in the world. See Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 6 (2001) (“[N]o other country in the world has any system of discovery approaching that provided for in the Federal Rules of Civil Procedure.”).

⁵⁵ See *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 289-90, 293 (2010) [hereinafter *Improving Rule 1*]; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

⁵⁶ See *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011) (“The theory of the federal rules is that once notice-giving pleadings have been served, the parties are to

minor obstacles of relevancy and nonprivilege to establish a presumptive entitlement to information,⁵⁷ and sometimes need not do even that, as some information is subject to initial disclosure without even a request for information or an initial showing of relevancy and nonprivilege.⁵⁸ The Rules place on the holder of information the burden of showing some reason to escape disclosure,⁵⁹ even to the extent of placing upon that party the burden of asserting irrelevancy or privilege objections.⁶⁰

The change to plausibility pleading, without altering discovery, is destabilizing because it ignores the holistic symbiosis between pleading and discovery that the Rule drafters both pursued and achieved.⁶¹ Rule 8(a)(2), implemented with the adoption of the Rules in 1938 (an effort that law school Dean Charles Clark spearheaded),⁶² abandoned the preceding heightened pleading standards of common law writ pleading, the Field Code, and fact pleading in favor of simplified pleading that came over time to be equated with notice pleading.⁶³ It did so precisely

conduct discovery in order to learn more about the underlying facts. When they have learned the facts, the parties can settle or seek judgment.”); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) [hereinafter *New Federal Rules of Civil Procedure*]; Marcus, *supra* note 55, at 439-40; Netzorg & Kern, *supra* note 29, at 514; Schneider, *supra* note 7, at 523-24; *see also* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 396-97 (2010) [hereinafter *Adjusting “One Size Fits All”*] (making the wider point that, in the United States, private litigation is central to enforcing law, and discovery is crucial to effectiveness of private litigation). To achieve the goal of informational transparency necessary to resolution on the merits, the Rules revolutionized discovery, which previously had been “severely limited.” Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998) [hereinafter *History of Federal Discovery Rules*]; *see also id.* at 694-710, 717-29. The Rules’ liberalization of discovery was successful. “By the end of the first decade after the Federal Rules became law, many courts were routinely giving the discovery provisions the full scope the drafters had intended.” *Id.* at 738.

⁵⁷ FED. R. CIV. P. 26(b)(1). Soon this party may also have to overcome a proportionality obstacle. *See supra* note 35.

⁵⁸ FED. R. CIV. P. 26(a)(1), (2).

⁵⁹ *See* FED. R. CIV. P. 26(b)(2) & (c); *see also* Netzorg & Kern, *supra* note 29, at 517.

⁶⁰ *See* Netzorg & Kern, *supra* note 29, at 519-20. Soon objectors may have a new quiver in their arrow: an expressly recognized proportionality objection. *See supra* note 35.

⁶¹ Efforts are currently underway to alter discovery, but in an inadvisable way by simply limiting it across the board. *See supra* note 35; *see infra* Part III.A.1.

⁶² *See* Marcus, *supra* note 55, at 433; Subrin, *History of Federal Discovery Rules*, *supra* note 56, at 710.

⁶³ *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80 (1989) [hereinafter *Mapping Dispute Boundaries*]; Dodson, *Comparative Pleading*, *supra* note 8, at 448; Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002); Marcus, *supra* note 55, at 433. *See generally* Subrin, *History of Federal Discovery Rules*, *supra* note 56, at 692-94 (briefly recounting history that led to passage of the Rules Enabling Act, which authorized the Federal Rules of Civil Procedure).

because experience under the earlier, more demanding pleading systems showed an inadequate correlation between pleading and a case's underlying merits.⁶⁴ "[T]he rulemakers felt that" those earlier systems "asked too much of the pleading stage, which consequently had become the center of legal attention, ended up mired down in battles over technicalities, and provided a vehicle for monumental abuse."⁶⁵ Thus, Clark concluded over 70 years ago that "[e]xperience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function."⁶⁶ Though modern scholarship

There is disagreement about whether Rule 8(a)(2) implemented notice pleading. See Bone, *Regulation of Court Access*, *supra* note 9, at 892-93 & n.102; Clermont & Yeazell, *supra* note 7, at 824 n.6. The better view is that Rule 8(a)(2) came to be identified with notice pleading as a result of Clark's judicial efforts after ascending to the U.S. Second Circuit Court of Appeals, and in particular to the Supreme Court's interpretation of Rule 8(a)(2) in *Conley v. Gibson*, 355 U.S. 41 (1957). Bone, *Regulation of Court Access*, *supra* note 9, at 893; Clermont & Yeazell, *supra* note 7, at 824 n.6. Clark himself denied that the Federal Rules called for notice pleading. Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49-50 (1957); Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 278 (1942) [hereinafter Clark, *Simplified Pleading*]; Charles E. Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 12 (1941) [hereinafter Clark, *Texas and Federal Rules*]. He preferred a system in which "illustrative forms" were used to "give specific content to" rules. Clark, *Simplified Pleading* at 278; Clark, *Texas and Federal Rules* at 12 n.24; see also *supra* note 7 (citing Rule 84 and Civil Form 11 and providing relevant language).

Determining precisely how much more factual detail Clark desired above and beyond the full laxity of formal notice pleading is challenging. See Hartnett, *supra* note 8, at 493-94 & nn.99-103. Professors Clermont and Yeazell seem to have aptly summed up the evidence when they conclude that "[w]hether or not Judge Clark favored 'notice pleading,' he certainly supported simple pleading." Clermont & Yeazell, *supra* note 7, at 825 n.11; see also Edward D. Cavanagh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 877 (2008) (explaining how the rule drafters declined to require a plaintiff to allege facts sufficient to establish a cause of action); Subrin, *History of Federal Discovery Rules*, *supra* note 56, at 711 n.133.

⁶⁴ See Clark, *New Federal Rules of Civil Procedure*, *supra* note 56, at 977; Clermont & Yeazell, *supra* note 7, at 824-25; see, e.g., *Ross v. Mather*, 51 N.Y. 108 (1872) (holding that, under code pleading, complaint pleading fraud lacked merit despite plaintiff having proved breach of contract); *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762, 765-66 (N.C. 1963) (affirming, under code pleading, dismissal of complaint that clearly asserted a trespass claim because plaintiff failed to allege underlying facts). This weakness in the pleading-merits link strongly influenced Clark and other Rule drafters.

It is true that Charles Clark eschewed case screening at the pleading stage and that the drafters contemplated decisions on the basis of evidence rather than allegations They thought a procedural system with these elements would work much better than the common law and code systems they inherited. "Work much better" meant that the procedural system would enforce the substantive law more effectively

Bone, *Regulation of Court Access*, *supra* note 9, at 895 (citations omitted); see also *id.* n.116 and accompanying text.

⁶⁵ Clermont & Yeazell, *supra* note 7, at 824; see also Bone, *Comment on Iqbal*, *supra* note 7, at 862-67.

⁶⁶ Clark, *New Federal Rules of Civil Procedure*, *supra* note 56, at 977.

makes the same point,⁶⁷ nonetheless *Twombly* and *Iqbal*—whether properly interpreted as imposing a type of fact pleading,⁶⁸ or an entirely “novel” pleading doctrine⁶⁹—essentially force us back to a time of heightened pleading requirements,⁷⁰ with no justifiable sense that a better outcome will ensue.⁷¹

Despite these historical lessons, the Supreme Court has introduced plausibility pleading without any corresponding change to the holistically connected discovery rules.⁷² Consequently, the heightened plausibility pleading regime has created an aggressive pre-discovery dismissal regime in the absence of any mechanism for assessing whether at least limited discovery is merited prior to a dismissal. Though discovery is strictly limited in civil law inquisitorial systems, at least there the inquisitorial judge fulfills the function of assessing whether some discovery is merited prior to an early dismissal,⁷³ which helps justify the more stringent pleading regimes in those systems. By contrast, those plaintiffs that *Twombly* and *Iqbal* newly disadvantage not only find themselves inhibited from succeeding in our adversarial system, but now also find themselves actually *worse off* than if they had litigated in an inquisitorial system despite that in such systems party control over discovery is minimal or non-existent. In an

⁶⁷ See *infra* notes 111-112 and accompanying text.

⁶⁸ A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009) [hereinafter *Understanding Pleading Doctrine*]; But see Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1340-59 (2010) (distinguishing plausibility pleading from fact pleading).

⁶⁹ Professors Clermont and Yeazell perceive *Twombly* and *Iqbal* as having created an entirely new pleading regime. Clermont & Yeazell, *supra* note 7, at 832-34 (explaining that plausibility pleading creates a “test not for factual detail, but for factual convincingness,” and requires a “judge to weigh likelihood without any evidential basis and with scant procedural protections, effectively creating a civil procedure hitherto foreign to our fundamental procedural principles, at least in the absence of emergency”). I think they are correct. See *infra* note 126 and accompanying text.

⁷⁰ See Hartnett, *supra* note 8, at 486; Mark Herrmann, James M. Beck, & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 149 (2009), <http://www.pennlawreview.com/debates/index.php?id=24>.

⁷¹ See Bone, *Comment on Iqbal*, *supra* note 7, at 869; Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 22-23, 29-30 (2010) (arguing that plausibility pleading invites subjective judgments, invades jury’s role, and could improperly limit access to justice).

⁷² As I discuss in more detail above and below, the Advisory Committee is on a campaign to reform discovery, though unfortunately to limit discovery rather than by promoting better tailored discovery. See *supra* notes 34-35 and accompanying text; see *infra* Part III.A.1.

⁷³ See Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 690 (2006); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 971 (2004).

inquisitorial system, these plaintiffs could have hoped that the presiding magistrate would oversee at least limited fact-finding,⁷⁴ which often serves in the stead of the party-controlled discovery model of our adversarial system. Thus, after *Twombly* and *Iqbal*, many plaintiffs will be deprived of the adversarial discovery that is an integral part of our Rules system, and moreover will be worse off than if they had litigated in an inquisitorial system, where they would lack control over discovery but at least have the possibility of an investigative process that could uncover the facts necessary to their case. These plaintiffs quite literally find themselves in the worst of both worlds: deprived of an opportunity to succeed in our adversarial system, while also being deprived of access to inquisitorial power that may have allowed them to prevail.

It is likely that one animating factor for the *Twombly* and *Iqbal* majorities was the transsubstantive nature of the Rules,⁷⁵ which has become a great disadvantage when discovery is at issue, particularly given that discovery concerns seem concentrated in a small number of complex cases.⁷⁶ The transsubstantive discovery Rules are so powerful that they can usually compel disclosure, subject to limited exceptions such as privileges,⁷⁷ protected work product,⁷⁸ when some intellectual property rights such as “trade secret[s]” or “commercial information” are at issue,⁷⁹ or in rare instances when specific statutory limitations exist.⁸⁰ This, combined with the often cost-free ability to impose discovery costs upon an opponent, is a great weakness in our discovery regime because it creates a dynamic ripe for manipulation and gaming. Many academics have argued forcefully against transsubstantive

⁷⁴ See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991); Pearce, *supra* note 73, at 978.

⁷⁵ See Bone, *Improving Rule 1*, *supra* note 55, at 290-92 (reviewing origins of the Federal Rules of Civil Procedure and explaining that they were meant to be transsubstantive).

⁷⁶ See *infra* notes 83-85 and accompanying text.

⁷⁷ FED. R. CIV. P. 26(b)(1) (making only “nonprivileged” information discoverable).

⁷⁸ FED. R. CIV. P. 26(b)(3).

⁷⁹ FED. R. CIV. P. 26(e)(1)(G).

⁸⁰ One such example can be seen in the Stored Communications Act, 18 U.S.C. §§ 2701-11 (2013), which protects electronic communications and transactional records and regulates government access to customer records and contents stored on electronic databases. The SCA has been interpreted as providing an exemption from litigation discovery. See Opinion and Order at 2, *Fontenot v. Brouillette*, No. H-10-1053 (S.D. Tex. Feb. 9, 2012) (quashing subpoena to email provider after ruling that SCA § 2702 prohibits such providers from disclosing customers’ communications absent an SCA exception, and determining that the SCA contains no exception for civil discovery); see also *J.T. Shannon Lumber Co., Inc. v. Gilco Lumber, Inc.*, No. 2:07-CV-119, 2008 WL 3833216, at *1 (N.D. Miss. Aug. 14, 2008) (holding that SCA “prohibits a person or entity that provides an electronic communication service to the public from knowingly divulging the contents of any communication that is carried or maintained on the system”).

pleading,⁸¹ and one would expect the case to be only more powerful against a discovery regime that is largely applied in a similar manner—consistent with the liberal discovery “ethos” inherent in the Rules⁸²—across the broad swathe of cases. But by taking aim at pleading rather than discovery, the *Twombly* and *Iqbal* Courts destabilized the Federal Rules of Civil Procedure, an outcome they accomplished by engaging in misdirection and short-circuiting the debate that was at the core of their concern: the legitimacy of our discovery regime and whether it should be reformed.

C. *Unfairly Overinclusive*

In addition to being destabilizing, the transsubstantive nature of the *Twombly* and *Iqbal* plausibility pleading standard, which reforms pleading doctrine while changing nothing else in the Rules system, is unfairly overbroad, for at least two reasons. First, plausibility pleading affects all plaintiffs. Its impact is not limited to the small amount of litigation in which discovery is likely to be problematic. Second, *Twombly* and *Iqbal* ignore the huge impact that plausibility pleading will have in the many classes of cases that are marked by information asymmetry.

Empirical evidence suggests that, to the extent *Twombly* and *Iqbal* adopted plausibility pleading as a solution to a perceived discovery problem, they were staggeringly overbroad. To the extent that discovery is problematic, this appears to be true only in a small proportion of federal litigation, most particularly in complex litigation.⁸³ As Professor Subrin has explained, “discovery is overwhelming” in only a minority of cases, though these constitute “a substantial number” and “it is those cases that tend to occupy a good deal of the attention of federal judges and the press.”⁸⁴ It is this disproportionate attention that moved the Court in *Twombly* and *Iqbal*, but led it astray. Though the Court applied plausibility pleading to all plaintiffs in all cases,

⁸¹ E.g., Bone, *Regulation of Court Access*, *supra* note 9, at 936; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713-18 (1988); Keith N. Hylton, *When Should a Case Be Dismissed?: The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 41 (2008); Subrin, *Adjusting “One Size Fits All,” supra* note 56, at 377 & n.1; *see also* Bone, *Improving Rule 1, supra* note 55, at 288, 300-01 (arguing against transsubstantive procedural rules that allow tailoring but through insufficiently constrained judicial discretion).

⁸² Hazard, *supra* note 54, at 2241.

⁸³ *See* Easterbrook, *Discovery as Abuse, supra* note 28, at 646; Kessler, *supra* note 11, at 1189.

⁸⁴ Subrin, *Adjusting “One Size Fits All,” supra* note 56, at 392-93.

in significant part to address a perceived discovery problem, the Court ignored the evidence, which indicates that discovery and its costs are problematic in only a small minority of cases.⁸⁵

Twombly and *Iqbal* can also be faulted for ignoring that changing the pleading standard as a response to discovery concerns creates problems, particularly in common types of litigation in which informational asymmetry between the parties is a hallmark.⁸⁶ Information asymmetry exists anytime the defending party's state of mind is material, as is the case in many civil rights cases, such as in employment discrimination litigation, and in many intentional torts.⁸⁷ Information asymmetry is also a hallmark of other types of litigation such as medical malpractice, products liability, shareholder derivative actions, corporate wrongdoing suits such as antitrust, unlawful conspiracies, and intellectual property suits.⁸⁸ *Iqbal* expressly held that plausibility pleading is the standard under Rule 8(a)(2) and thus is the standard that must be met in all federal district court litigation,⁸⁹ resolving any doubts on that issue that had remained after *Twombly*.⁹⁰ Consequently, *Iqbal* clarified that plausibility pleading applies to all civil cases in federal district courts, regardless of whether informational asymmetry exists.

But this universalist application of the plausibility standard is in tension with the way the Rules treat state of mind

⁸⁵ See Miller, *supra* note 71, at 61-64 ("The excessive costs of discovery cited in *Twombly* seem to occur in a rather small percentage of cases."); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) [hereinafter Mullenix, *Discovery in Disarray*]; Schneider, *supra* note 7, at 533; Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 246-49 (1999).

⁸⁶ See Bone, *Comment on Iqbal*, *supra* note 7, at 873; Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 24 ("[I]n any case depending on subjective motivation or concealed activities the plausibility pleading standard will not necessarily accurately identify claims that truly lack merit. Rather, [it] will identify claims whose merit depends on information the plaintiff may not yet have.").

⁸⁷ See Bone, *Comment on Iqbal*, *supra* note 7, at 879 & n.141; Dodson, *New Discovery*, *supra* note 10, at 66; Schneider, *supra* note 7, at 519-21, 531-32; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989).

⁸⁸ Dodson, *New Discovery*, *supra* note 10, at 66; Lonny Hoffman, *Using Presuit Discovery to Overcome Barriers to the Courthouse*, LITIG., Summer 2008, at 31, 32; Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 33. The information asymmetry dynamic presented in these sorts of cases—that of "informed defendants and uninformed plaintiffs"—poses particular problems, and thus these cases "prompt some of the most serious concerns about frivolous suits." Bone, *Regulation of Court Access*, *supra* note 9, at 925.

⁸⁹ See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009); Bone, *Comment on Iqbal*, *supra* note 7, at 858.

⁹⁰ One interpretation of *Twombly* had been that its plausibility pleading standard was limited in some way, such as that it was limited to antitrust cases, or perhaps complex cases in which extensive discovery could be expected.

allegations. Rule 9(b) specifies that state of mind allegations can be alleged generally.⁹¹ True, it is possible to reconcile these two approaches by treating Rule 8(a)(2) plausibility pleading as the general standard, subject to a specific exception in Rule 9(b) for state of mind allegations, which can continue to be pled generally even after *Twombly* and *Iqbal*. The problem is that *Iqbal* itself implicitly rejects this possibility because it seems to require specific pleading of detailed facts with regard to Ashcroft's and Mueller's discriminatory intent, rejecting as conclusory *Iqbal*'s direct but general allegations on the issue.⁹²

Perhaps *Iqbal* did not mean to require specific pleading of state of mind, but that seems unlikely because such a requirement seems crucial to its belief that defendants Mueller's and Ashcroft's motions to dismiss should be granted. For example, it is speculative to predict how the Court would have ruled on the motions to dismiss had *Iqbal* specifically identified the state of mind allegations as "likely hav[ing] evidentiary support after a reasonable opportunity for further investigation or discovery," which Rule 11(b)(3) says is sufficient.⁹³ But it is difficult to imagine that would have made a difference to the *Iqbal* majority, which clearly preferred dismissal. After all, to the *Iqbal* majority, discovery—which Rule 11(b)(3) promises—was the problem. It was not a solution. So even if *Iqbal* had specifically invoked Rule 11(b)(3), the majority likely would have found a way around it, perhaps by simply declaring that Rule 11(b)(3) does not provide a safe harbor for conclusory allegations.

Apparently appalled by the power given to plaintiffs through discovery in our adversarial system—most likely a minority of plaintiffs—the Supreme Court has now seriously disadvantaged all plaintiffs by using pleading doctrine to raise the wall that separates them from discovery.

D. *Unfairly Underinclusive*

Using plausibility pleading to address the discovery concerns that animated the *Twombly* and *Iqbal* Courts is also unfair because this "solution" does nothing to address defendant discovery abuse. This one-sided approach to discovery abuse constitutes part of the unfairness inherent in *Twombly* and *Iqbal*, in which no justice—either in the majority or dissent—evinced

⁹¹ FED. R. CIV. P. 9(b).

⁹² See *Iqbal*, 556 U.S. at 686-87; Bone, *Comment on Iqbal*, *supra* note 7, at 860.

⁹³ FED. R. CIV. P. 11(b)(3).

the slightest concern about discovery abuse by defendants, though it plays a significant if not primary role in any such problem.⁹⁴

It is no answer to assert that defendant discovery abuse is of lesser concern because defendants, unlike plaintiffs, did not voluntarily choose to be in court. Discovery abuse by either side raises similarly serious problems and concerns. If plaintiff-side discovery abuse can lead to nuisance settlements, defendant-side discovery abuse can manipulate outcomes, including producing lower settlements, such as through improper non-production of prejudicial evidence, as well as inefficiencies and delays that prejudice plaintiffs and waste judicial resources, such as in the case of scorched-earth discovery practice and motions.

E. A Misconceived Right to Avoid Discovery: The Qualified Immunity Canard

Concern that notice pleading does not sufficiently correlate with ultimate merit—what I call pleading-merits dissonance, a topic I discuss in more detail below⁹⁵—seems to animate *Twombly* and *Iqbal* and their hostility to the notion of subjecting the relevant defendants in those cases to discovery,⁹⁶ which leads to yet another criticism of those decisions: they come perilously close to transposing the notions underlying qualified immunity doctrine from a select group of defendants to all defendants, but without sufficient doctrinal justification. Of course, qualified immunity was indeed at issue in *Iqbal*. But it was not applicable in *Twombly*, the first case that gave us plausibility pleading. Moreover, the *Iqbal* majority clarified that the plausibility pleading standard is applicable to *all* civil actions filed in federal trial courts.⁹⁷ The standard is not limited to instances when qualified immunity is at issue.

Qualified immunity doctrine provides public officials with more than an additional defense. It provides them with a special one that entitles them, if it successfully applies, to not only a non-liability verdict, but also to an actual right not to be

⁹⁴ See Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1233 (2008) [hereinafter Hoffman, *Burn Up the Chaff*]; Mullenix, *Discovery in Disarray*, *supra* note 85, at 1401; *see, e.g.*, *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372, 376 (6th Cir. 2008); *Atlas Res., Inc. v. Liberty Mut. Ins. Co.*, 291 F.R.D. 638, 650 (D.N.M. 2013); *Perkinson v. Houlihans/D.C., Inc.*, 108 F.R.D. 667, 671 (D.D.C. 1985).

⁹⁵ See *infra* Part II.

⁹⁶ The Supreme Court majorities in both *Twombly* and *Iqbal* grounded their adoption of the plausibility pleading standard in significant part upon concerns about discovery burdens. See *supra* note 10.

⁹⁷ See *supra* notes 89-90 and accompanying text.

sued.⁹⁸ It is because qualified immunity represents a right to be free from suit that the Supreme Court has declared that the defense should be resolved in the early stages of litigation.⁹⁹ Moreover, the right is so strongly protected that the qualified immunity defense constitutes a rare exception to the final judgment rule, so that interlocutory appeals are allowed in an effort to preserve the right.¹⁰⁰

The desire to shield governmental defendants from nettlesome and burdensome discovery is a primary justification for qualified immunity doctrine. The Supreme Court has emphasized that the “driving force” behind creation of the qualified immunity doctrine was a desire to ensure that “‘insubstantial claims’ against government officials [will] be resolved prior to discovery.”¹⁰¹ Thus, “[u]nless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.”¹⁰² *Iqbal* emphasized discovery’s dangers, stating that:

[o]ur rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” . . . If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of *efficiency and expenditure of valuable time and resources* that might otherwise be directed to the proper execution of the work of the Government.¹⁰³

The Court’s references to “efficiency” and the “expenditure of valuable time and resources” are broad enough to encompass concerns about wasteful time, effort, and resources that defendants and courts expend during discovery in cases

⁹⁸ See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

⁹⁹ See *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 818 (1982).

¹⁰⁰ See *Forsyth*, 472 U.S. at 527-30. The final judgment rule is codified at 28 U.S.C. § 1291 (2013).

¹⁰¹ *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (quoting *Harlow*, 457 U.S. at 818-19); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009); *Forsyth*, 472 U.S. at 526; *Harlow*, 457 U.S. at 817-18 (indicating that discovery should be stayed pending resolution of qualified immunity defense). *But see infra* note 104 and accompanying text.

¹⁰² *Forsyth*, 472 U.S. at 526.

¹⁰³ *Iqbal*, 556 U.S. at 685 (emphasis added) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

that are ultimately dismissed on qualified immunity grounds. Consequently, it is no surprise that the Court has previously emphasized that, if discovery is allowed in order to assess a qualified immunity defense,¹⁰⁴ then such discovery should be limited or narrowly tailored specifically to the qualified immunity issues.¹⁰⁵

But this possibility was not good enough for the *Iqbal* Court, which placed discovery at or near the top of the causes for waste, a point it stressed when it emphasized the importance of avoiding these problems in the qualified immunity context while rejecting limited discovery as a safeguard.

It is no answer . . . to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.¹⁰⁶

By placing so much emphasis upon discovery avoidance as a primary justification for imposing plausibility pleading, *Twombly* and *Iqbal* suggest that discovery has become so burdensome that defendants should at a minimum enjoy greater protections from it, if not a right to avoid it as under qualified immunity doctrine. Whatever one's views on this issue, this expansion of a "right" to avoid discovery is in significant tension with the justifications for qualified immunity doctrine, which are inapplicable to private defendants. The Supreme Court justifies qualified immunity doctrine on the basis that it serves the important goal of avoiding unnecessary social costs in meritless cases, such as "the expenses of litigation, the diversion of official

¹⁰⁴ See *Anderson*, 483 U.S. at 646 n.6 (recognizing that discovery may be required prior to adjudicating qualified immunity defense on summary judgment).

¹⁰⁵ See *Crawford-El v. Britton*, 523 U.S. 574, 597-600 (1998).

¹⁰⁶ *Iqbal*, 556 U.S. at 685-86.

energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” as well as inhibiting public officials from the performance of their duties.¹⁰⁷ Of these rationales, only the expense of litigation is even potentially applicable to private defendants, but the concern that underlies it—protecting the public treasury—shows that it is inapposite. While a nuisance settlement concern exists in both general and qualified immunity litigation, that concern is not of sufficient magnitude in private litigation such as to rival the public values at stake in the qualified immunity context, and thus does not justify extending a right to avoid discovery into general litigation.

The Supreme Court in *Twombly* and *Iqbal* used pleading doctrine to narrow the space for discovery in general civil litigation in a manner that is resonant with qualified immunity litigation. The Court has established a qualified immunity jurisprudence that protects governmental defendants from discovery on the basis that they enjoy a right to avoid litigation. After *Twombly* and *Iqbal*, it has now established a general jurisprudence for all civil defendants that uses pleading doctrine to protect them from litigation, in significant part on the basis that they should enjoy a greater right to avoid discovery. Qualified immunity defendants still continue to enjoy stronger protections against discovery, for example due to the interlocutory appeal rights they enjoy,¹⁰⁸ but the space has narrowed considerably after *Twombly* and *Iqbal*. This quasi-equivalence elides the substantive distinctions that exist between general and qualified immunity litigation, and ignores the many cases where discovery is necessary to properly evaluate whether a case should be subject to a pre-trial dismissal.

II. THE CASE FOR REFORMING DISCOVERY, NOT PLEADING

There are more preferable remedies to a discovery problem, if one exists, than the plausibility pleading solution that *Twombly* and *Iqbal* applied. An end to transsubstantive pleading is one option. Even better is to reform discovery itself, which could range from an end to transsubstantive discovery Rules or, as I will suggest below, maintaining transsubstantive discovery but greatly expanding the available toolkit for *better tailoring* discovery to the particular circumstances presented in any one case. Rather than suggest such options or initiate them, however,

¹⁰⁷ Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

¹⁰⁸ See *supra* note 100 and accompanying text.

the Supreme Court imposed plausibility pleading. By doing so, the Court raised the question of whether it was best placed at an institutional level to consider the intricate, important, and varied issues about informational transparency that partly animated *Twombly* and *Iqbal*, or whether, for example, that process was better suited to a legislative or rulemaking determination.¹⁰⁹ If this is correct, it strengthens the procedural objection that *Twombly* and *Iqbal* lack legitimacy for achieving a substantive change to pleading that was properly available only through the Rules Enabling Act process.¹¹⁰

To improve the judicial process in the manner sought by *Twombly* and *Iqbal*, reforming discovery is a more advisable course than imposing more stringent pleading requirements. Though not specifically directing his analysis to *Twombly* and *Iqbal* and their plausibility pleading standard, Professor Bone has used game theory to persuasively demonstrate that stricter pleading requirements should have the undesirable effect of leading to the dismissal of meritorious claims.¹¹¹ Additionally, Professor Alexander Reinert has concluded that, based on an empirical study conducted after *Twombly* and *Iqbal*, thinly pleaded cases have been at least as successful as heavily pleaded cases.¹¹² Yet plausibility pleading's more demanding requirements are likely to lead to the dismissal of some, many, or all of these lightly pled but meritorious claims, consistent

¹⁰⁹ See 28 U.S.C. §§ 2073-74 (2012) (establishing the legislative process through the Judicial Conference for amending the Rules). The legislative or rulemaking process, including as represented by the Advisory and Standing Committees, is not a panacea. Like all such processes, it is subject to drawbacks. One example includes lobbying, potential capture, or undue influence by special interests, which could be magnified by an end to transsubstantive pleading that would open the door to greater legislative activity with regard to the Rules. See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 616 (2010). Another commentator has argued that the process has become mired in inadvisable "wordsmithing" due to uncertainties and second-guessing. Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449, 470 (2013).

¹¹⁰ See Clermont & Yeazell, *supra* note 7, at 850; see also Bone, *Regulation of Court Access*, *supra* note 9, at 909, 918, 935 (arguing that using the formal rulemaking process would be preferable if plausibility pleading is to be interpreted as strict pleading); Bone, *Comment on Iqbal*, *supra* note 7, at 851-52 (acknowledging that *Iqbal* imposed a new "thick screening" plausibility standard); *supra* note 32 (citing to REA and quoting relevant language).

Professor Hartnett contends that *Twombly* imposes only a modest pleading reform, and likely a beneficial one, and he notes others who defend it as well. See Hartnett, *supra* note 8, at 474-75, 476 n.19, 501. But see A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013).

¹¹¹ Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 523, 587-89 (1997) [hereinafter *Modeling Frivolous Suits*]; see also Bone, *Improving Rule 1*, *supra* note 55, at 303-04.

¹¹² Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011).

with Bone's prediction.¹¹³ *Twombly* and *Iqbal* ignore this problem because they frame the question as being whether a plaintiff has pled a sufficiently persuasive case so as to justify requiring the defendant to disclose information through discovery. Fair enough, but the problem with such framing is that there is always a counterframing, such as: what valid interest exists in keeping information hidden that would support a legitimate legal claim? The answer the discovery Rules provide is: very little.¹¹⁴

Considering the competing ways of framing the issue yields a useful insight, which is that neither is a particularly helpful way of thinking about the problem. This is because both the frame and counterframe beg the real issue: which party should bear the risk that the case is illegitimate?

This question is more complicated than *Twombly* or *Iqbal* acknowledge, and their failure to sincerely grapple with it represents their biggest fault. Because they are pleading cases, these opinions implicitly suggest that the illegitimacy issue arises in only one direction, namely that of plaintiffs raising unmeritorious claims. But pleading illegitimacy has another face as well, that of defendants raising unmeritorious defenses to valid claims. This duality raises at least two separate concerns, and, though often there will be considerable overlap between them, it is helpful to consider them independently. The first concern is about *pleading-merits dissonance*, while the second is about *pleading-discovery dissonance*.

Pleading-merits dissonance speaks to the possibility that cases can be adequately pled, and thus brought into the federal court system, yet nonetheless be resolved on terms divorced from

¹¹³ Empirical assessments on the impact that *Twombly* and *Iqbal* are having on Rule 12(b)(6) motions are abundant and ongoing. See, e.g., Clermont & Yeazell, *supra* note 7, at 839 n.66; Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); William H. J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (John M. Olin Program in Law and Economics Working Paper No. 575, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831; William M. Janssen, *Iqbal "Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 571-82 (2011). The Federal Judicial Center is involved in these efforts. E.g., JOE S. CECIL ET AL., FEDERAL JUDICIAL CENTER, UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND (Nov. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf); JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Mar. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf). Some of the Federal Judicial Center's conclusions have been challenged. See Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011).

¹¹⁴ See *supra* notes 77-79 and accompanying text for some bases of exclusion that are explicitly recognized in the Rules.

the true merits of the case. This concern applies to any resolution of a case, whether an adjudicated outcome or through settlement. We hope that adjudicated outcomes are just, in the sense that they accurately reflect the underlying merits of a case (what Professor Bone has referred to as the parties' "substantive entitlements"¹¹⁵), but there are myriad reasons (such as procedural deficiencies, evidentiary problems, or overly broad or underinclusive substantive law, for example) why they might not. A similar dissonance between pleading and merits can occur with settlements, either because plaintiffs benefit from receiving a nuisance settlement that defendants are willing to pay to rid themselves of the suit, or because defendants are able to induce plaintiffs to settle for a lower amount than the case is worth given its underlying value.

The other concern is about *pleading-discovery dissonance*: namely, that our current transsubstantive discovery regime can be abused to foster a suboptimal outcome by using discovery as a bludgeon. This can, but need not necessarily, play a role in pleading-merits dissonance. It is a familiar critique that defendants may agree to nuisance settlements to avoid discovery or other litigation costs that plaintiffs can impose. This is what I mean when I refer to using "discovery as a bludgeon." *Twombly* was clearly concerned about this possibility. It linked the prospect of "enormous" discovery costs to the specter of nuisance settlements, explaining that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment or a jury verdict.¹¹⁶ Consequently, it emphasized that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."¹¹⁷ *Iqbal* also adverted to a different form of this problem when it expressed a preference for freeing high-level government officials from discovery.¹¹⁸ In these sorts of instances, discovery burdens can distort case outcomes, such as if a settlement is not an accurate reflection of the case's underlying merits. They thus represent examples of pleading-discovery dissonance contributing to

¹¹⁵ Bone, *Improving Rule 1*, *supra* note 55, at 302. Professor Bone notes that accuracy is not the only possible determinant of justice. *See id.* at 289 (also referring to "symbolic effects, educative value," and participatory fairness).

¹¹⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

¹¹⁷ *Id.* at 557-58 (internal quotations and citations omitted).

¹¹⁸ *See supra* text accompanying notes 103, 106.

pleading-merits dissonance. But this causal relationship does not always exist. For example, whether or not pleading-discovery dissonance occurs, pleading-merits dissonance might. This can occur for many reasons independent of pleading-discovery dissonance, such as poor lawyer performance, witness or evidentiary difficulties, or a jury misunderstanding its instructions or taking prohibited factors into account.

Though *Twombly* and *Iqbal* speak most directly about pleading-merits dissonance, the opinions are animated by the related concern of pleading-discovery dissonance.¹¹⁹ With respect to the latter, the Court fails in a similar, one-sided way as it does with the former, portraying the deficiency as unidirectional, with lax pleading allowing plaintiffs to threaten defendants with unwarranted discovery burdens and costs. But, again, the problem is really bilateral, as defendants have a similar ability and their own incentives of a comparable nature to abuse discovery by improperly imposing burdens and costs on plaintiffs.¹²⁰

Twombly and *Iqbal*'s choice of applying a pleading solution to a perceived discovery problem is particularly clumsy because there is no way of knowing *ex ante* whether any given claim is legitimate. Related to this last point (because it helps explain why illegitimate claims or defenses are maintained and why the discovery concern is so often dominant in discussions about litigation) is that information often, and in the litigation context perhaps always, has economic value. Thus, the flip side of my counterframing about risk of illegitimacy is yet another framing: who should be allowed, through litigation, to exploit the value of information, and in which circumstances?

Twombly and *Iqbal* are rightly controversial because their answer to this question is vastly different from the answer given in the previously controlling case, *Conley v. Gibson*.¹²¹ *Conley* placed emphasis on the pleading-merits link by favoring the claimant that was actually wronged, that should win on the merits. In a world of ambiguity, where these claimants cannot be identified *ex ante*, and where numerous non-merits obstacles may prevent such a claimant from prevailing, *Conley* imposed a lax

¹¹⁹ See Bone, *Regulation of Court Access*, *supra* note 9, at 919 ("The *Twombly* Court assumes that the cause of meritless filings is asymmetry of discovery costs and the settlement leverage it confers.") (citation omitted); Clermont & Yeazell, *supra* note 7, at 852 (noting that the Supreme Court "clearly had concerns about meritless claims flooding the courts and generating heaps of discovery"); Hoffman, *Burn Up the Chaff*, *supra* note 94, at 1231-34; Malveaux, *supra* note 10, at 107.

¹²⁰ See *supra* note 94 and accompanying text.

¹²¹ 355 U.S. 41 (1957).

notice pleading standard that favored that claimant,¹²² with the goal of allowing access to discovery in the hope that the ultimate resolution of the suit, through whatever mechanism, would best approach the underlying merits.¹²³ “Most observers retained the belief that this choice was a good one.”¹²⁴ Yet, in doing so, *Conley* accepts a cost inherent in adopting notice pleading, namely the possibility of pleading-discovery dissonance: that unmeritorious claimants can nonetheless benefit from lax pleading to use discovery for illegitimate ends,¹²⁵ such as to impose costs and burdens, embarrass the responding party, encourage nuisance settlements, or leak closely-held information.

Like *Conley*, *Twombly* and *Iqbal* also give primacy to the pleading-merits link. But *Twombly* and *Iqbal* do so in a crucially different way, by emphasizing and seeking to minimize the cost that *Conley* accepted—namely, the pleading-discovery dissonance that can result in suboptimal outcomes made possible by lax pleading standards. Because they are animated by a concern about pleading-discovery dissonance, *Twombly* and *Iqbal* seek to minimize it. To promote this goal, they favor the party with the best ex ante access to information, who can either satisfy the new, more demanding plausibility pleading standard, or point out that this standard has not been met given the universe of potentially applicable facts.¹²⁶ Typically, this will disfavor plaintiffs and

¹²² See *supra* note 63 and accompanying text. But see Dodson, *Comparative Pleading*, *supra* note 8, at 450 n.59 (noting scholarly disagreement about whether *Conley* correctly interpreted Rule 8(a)(2) as requiring only notice pleading).

¹²³ See Bone, *Improving Rule 1*, *supra* note 55, at 297, 302, 304; Clermont & Yeazell, *supra* note 7, at 825, 838.

¹²⁴ Clermont & Yeazell, *supra* note 7, at 825.

¹²⁵ See Bone, *Improving Rule 1*, *supra* note 55, at 296-97 (explaining that the “rule drafters” tended to believe that efficiency was improved through resolution on the merits because it avoided needless litigation over technicalities, but suggesting that this led them to overlook the possibility of inefficiency that can result from “making it easy to sue, [which means that] notice pleading invites frivolous suits, which in turn increase litigation costs, add to system delays, and produce unjustified settlements,” and pointing out that one such source of inefficiency is discovery abuse); see also Clermont & Yeazell, *supra* note 7, at 825 (“Some of the persistent opposition to such permissive pleading flowed from the costs of the later stages, to which the Rules had transferred the screening function. Uncovering evidence to demonstrate the weakness of the plaintiff’s claim entails expenses that the defendant cannot recoup from the plaintiff.”).

¹²⁶ The *Twombly* and *Iqbal* plausibility pleading requirement imposes upon plaintiffs a duty to explain away competing, sufficiently plausible lawful alternative explanations for the disputed conduct. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680-82 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 567-68, 570 (2007); Clermont & Yeazell, *supra* note 7, at 832-33, 836-37; Effron, *supra* note 10, at 2014. This is a highly novel pleading standard that is more demanding than even comparative pleading systems that require factual specificity akin to fact pleading (though plausibility remains less demanding than some systems that require production of evidence at the pleading stage). See Dodson, *Comparative Pleading*, *supra* note 8, at 452-55, 463 (describing comparative pleading

favor defendants. Consequently, *Twombly* and *Iqbal* take the opposite approach from *Conley* on the risk of pleading-merits dissonance: while *Conley* favored claimants, *Twombly* and *Iqbal* disfavor them.

Confronted by the same world of ambiguity as the *Conley* Court, *Twombly* and *Iqbal* make the opposite choice from *Conley* and instead tip the scales toward the party that will often have the least need for discovery—usually the defendant.¹²⁷ This is a momentous choice because, as a result of their change in emphasis, the party *Twombly* and *Iqbal* favor will be the opposite of the one that *Conley* favored, as shown most clearly in cases of information asymmetry.¹²⁸ It is no accident that *Twombly* and *Iqbal* are controversial for being pro-defendant: the majorities in each case wholeheartedly embrace the defense side of a highly contested debate about pleading-discovery dissonance.¹²⁹ By doing so, *Twombly* and *Iqbal* are putting plaintiffs into a “Catch-22” where the facts necessary to survive a pleading challenge can only be obtained through what is now inaccessible discovery, a particular problem in cases involving information asymmetry.¹³⁰ *Twombly* and *Iqbal*, with their imposition of plausibility pleading, have thus “destabilized” the system that the Rules established,¹³¹ which was premised upon access to discovery and in which discovery, not pleading, was by far the more important sorting device for weeding meritorious from non-meritorious cases.¹³² It may well be that the greatest problem with *Twombly* and *Iqbal* is that they either consciously ignore or overlook the information asymmetry problem. Indeed, it has been argued that this failure caused *Twombly* to misdiagnose the problem it sought to remedy.¹³³

systems, none of which require explaining away lawful alternative explanations for the disputed conduct, though some require production of evidence at the pleading stage).

¹²⁷ Cf. Clermont & Yeazell, *supra* note 7, at 830 (“The plaintiff who needs discovery to learn the required factual particulars is the person whom the Court has newly put in jeopardy.”) (citation omitted).

¹²⁸ See Dodson, *New Discovery*, *supra* note 10, at 56; Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 28.

¹²⁹ Plaintiff and defense counsel disagree sharply about whether pleading can be a useful tool for minimizing discovery problems. See LITIG. SECTION, AM. BAR ASS'N, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 7 (2009) [hereinafter ABA LITIGATION SECTION SURVEY], available at http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf.

¹³⁰ Bone, *Comment on Iqbal*, *supra* note 7, at 874 n.117; Dodson, *New Discovery*, *supra* note 10, at 68.

¹³¹ See *supra* text accompanying note 53.

¹³² See *supra* notes 54-56 and accompanying text.

¹³³ Bone, *Regulation of Court Access*, *supra* note 9, at 878-79, 920-22.

Twombly and *Iqbal* took the destabilizing step of imposing plausibility pleading in large measure because of their concern about discovery and the distorting effects of pleading-discovery dissonance. While *Conley* placed faith in discovery, *Twombly* and *Iqbal* have so lost faith that they speak disparagingly of it.¹³⁴ The attitude is starkly evidenced in a remark that Justice Scalia made during the *Iqbal* oral argument. In response to the suggestion that the discovery rules and qualified immunity doctrine are adequate to protect government officials, he exclaimed, “Well, I mean, that’s lovely: That the ability of the Attorney General and the Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge.”¹³⁵ He reportedly “pronounce[d] *district court judge* the way you or I might say *serial wife-beater*.”¹³⁶ As a result, while *Conley* favors the claimant who was wronged, *Twombly* and *Iqbal* willingly sacrifice some such parties to the goal of reducing pleading-merits dissonance by decreasing the number of suboptimal outcomes attributable to pleading-discovery dissonance.

The problem is simply that the [plausibility pleading] standard is not sufficiently calibrated to perceive merit but rather is designed more for the purpose of protecting scarce economic and judicial resources from waste. In short, in the competition between efficiency and justice, plausibility pleading is designed to err on the side of efficiency.¹³⁷

Thus, though the new plausibility pleading regime “would doubtless reduce whatever frequency of weakly founded suits that now exists,”¹³⁸ it

would also doubtless reduce the frequency of well-founded suits that now require the assistance of discovery to make their merits clear. The new procedural regime would exchange our current false positives for an unknown number of false negatives. Today, defendants as a group shoulder the burden of false positives. In the hypothesized new regime, plaintiffs would shoulder the burden of false negatives.¹³⁹

¹³⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 684-86 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 & n.6 (2007); Bone, *Comment on Iqbal*, *supra* note 7, at 859.

¹³⁵ *Iqbal* Transcript, *supra* note 1, at 35.

¹³⁶ Dahlia Lithwick, *The Attorney General Is a Very Busy Man: The Supreme Court seems to think that also makes him immune from litigation*, SLATE (Dec. 10, 2008), <http://www.slate.com/id/2206441/pagenum/all/#p2>.

¹³⁷ Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 25.

¹³⁸ Clermont & Yeazell, *supra* note 7, at 838.

¹³⁹ *Id.*; see also Bone, *Comment on Iqbal*, *supra* note 7, at 878-79.

Given these consequences, one's views about the legitimacy of *Twombly* and *Iqbal* likely turn upon one's views about pleading-merits dissonance. *Twombly* and *Iqbal* must presume that a sufficient correlation exists between pleading and the merits of a case. They must further presume that to the extent there is an imperfect correlation, which will lead to dismissals on pleading grounds despite the claim's underlying merit, the attendant costs are worthwhile as a means of avoiding discovery abuses. But using strict pleading transsubstantively as a method for fighting unmeritorious suits, as *Twombly* and *Iqbal* do with their adoption of plausibility pleading, is inadvisable because it is too blunt an instrument.¹⁴⁰ At a minimum, "[f]actual sufficiency" in pleadings "is . . . a poor proxy for meritlessness" in cases of information asymmetry,¹⁴¹ something that the *Twombly* and *Iqbal* majorities simply ignore.¹⁴² The decisions are thus rightly controversial because they implicitly claim that the costs of wrongful dismissals in cases of information asymmetry are worthwhile—a highly contentious assertion, and one that sounds an awful lot like a complicated policy determination that should have been left to the legislative or rulemaking process rather than judicial fiat.¹⁴³

Another objectionable feature about *Twombly* and *Iqbal* is that their view of pleading-merits dissonance—their faith in the correlation between pleading and the underlying merits—is at odds with repeatedly (and many would say painfully) learned historical lessons.¹⁴⁴ In again embracing a heightened pleading regime, *Twombly* and *Iqbal* threaten a return to the times of early

¹⁴⁰ See Bone, *Modeling Frivolous Suits*, *supra* note 111, at 587-89 (explaining that "strict pleading has some potential benefits" but is also "likely to generate substantial costs," and thus "the case for strict pleading is much weaker than commonly supposed"; consequently, strict pleading should not be applied transsubstantively).

¹⁴¹ Dodson, *New Discovery*, *supra* note 10, at 68; see also *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 437 (Tenn. 2011) (declining to adopt plausibility pleading as a matter of state law, the Tennessee Supreme Court stated that "[o]ur motion-to-dismiss jurisprudence reflects the principle that this stage of the proceedings is particularly ill-suited for an evaluation of the likelihood of success on the merits or of the weight of the facts pleaded"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 483 (2008) [hereinafter Spencer, *Plausibility Pleading*].

¹⁴² Justice Souter, who authored *Twombly* but then regretted how plausibility pleading was used in *Iqbal*, in which he dissented, continues to press this point even after retiring from the Supreme Court bench. See *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation) (asserting that plausibility is not "a standard of likely success on the merits" and still requires "assuming the pleaded facts to be true and read in a plaintiff's favor").

¹⁴³ See Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483 (2013); Bone, *Comment on Iqbal*, *supra* note 7, at 883-85; see also *supra* note 110 and accompanying text.

¹⁴⁴ See *supra* notes 62-70 and accompanying text.

technical dismissals without access to discovery, but through an inappropriate sleight of hand that threatens to wall off discovery without grappling with the substantive policy question concerning the scope of discovery rights.

III. BETTER SOLUTIONS TO A “DISCOVERY PROBLEM”

It is rather shocking that in *Twombly* and *Iqbal* the Supreme Court identified discovery as the primary problem while failing to consider discovery reform as a solution or seeking a better understanding of the perceived problem. It is rudimentary that to apply a better solution, one needs the best available understanding of the problem. These errors contributed to the *Twombly* and *Iqbal* misprescription of a pleading solution for a perceived discovery problem. The Supreme Court approached *Twombly* and *Iqbal* with skepticism because adhering to the low notice pleading standard threatened discovery, which the Court viewed as problematic. The Court’s deep skepticism was starkly evident in its brisk dismissal of the possibility that district court judges could protect defendants from overly burdensome discovery. *Twombly* relied upon Judge Easterbrook’s well-known critique of discovery to reject the prospect of supervised discovery, invoking the “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”¹⁴⁵ *Iqbal* also evinced a distrust of discovery.¹⁴⁶ Having explained why judicial management offers no solution, the Court imposed plausibility pleading in *Twombly*,¹⁴⁷ and reaffirmed in *Iqbal* that the new plausibility standard applies to all plaintiff efforts to satisfy Rule 8(a)(2)’s demand for a “short and plain statement of the claim” in the complaint.¹⁴⁸

Unfortunately, the Court’s skepticism led it to shoot from the hip instead of examining the perceived problem. Concededly, the suspicion that *Twombly* and *Iqbal* evinced toward discovery has some justification. There are numerous aspects of discovery that can be problematic. These can be grouped into concerns about (1) the direct financial costs of responding to discovery; (2) indirect financial costs resulting from disclosure; (3) privacy and dignitary costs resulting from disclosure; (4) diversion of party resources, which can lead to party disruption and distraction; (5) diversion of

¹⁴⁵ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007); see *supra* Part I.A (setting forth Judge Easterbrook’s critique, and rebutting it).

¹⁴⁶ See *supra* notes 39-40 and accompanying text.

¹⁴⁷ See *supra* note 5 and accompanying text.

¹⁴⁸ FED. R. CIV. P. 8(a)(2); see *supra* note 89 and accompanying text.

judicial resources; (6) delay; (7) improper non-disclosure; and (8) nuisance settlements. Neither *Twombly* nor *Iqbal* carefully parsed these facets of problematic discovery. Indeed, *Twombly* confounded the distinct discovery concerns of cost and abuse, without acknowledging that they can exist independently of each other.¹⁴⁹ To truly grapple with discovery reform, it is necessary to identify discovery's potentially problematic aspects so as to assess the effectiveness of reform proposals.

Such reform is a better response to discovery concerns than is manipulating pleading doctrine. But discovery reforms can vary in their advisability. The Advisory Committee has recently embarked on a campaign to limit discovery.¹⁵⁰ Unfortunately, these reforms repeat many of the same errors that occurred with the introduction of plausibility pleading. The campaign perpetuates the imposition of blunt standards that cannot be responsive to the full range of civil litigation and discovery contexts. It also wholeheartedly embraces a dominant narrative about problematic discovery that is one-sided and thus pursues a reform campaign that gives defense counsel much if not all of what they have sought,¹⁵¹ while ignoring discovery problems and abuse that the defense-side tends to cause. Though admittedly the Advisory Committee's discovery reform efforts are a better way to address discovery concerns than was the imposition of plausibility pleading, there are better alternatives for accomplishing discovery reform. What is truly needed is not *less* discovery in *all* cases, but instead *better tailored* discovery in all cases.

A. *Options for Reforming Discovery*

A better course for addressing the discovery concerns that animated *Twombly* and *Iqbal* is to reform discovery itself. The *Twombly* and *Iqbal* majorities expressed complete disdain for the possibility of using the existing Rules to constrain discovery and tailor it to the particularities of a given case.¹⁵² I do not share that skepticism, but can understand that it may be motivated by a deeply held belief that the core of the problem with discovery is cultural, not technical. After all, from a technical standpoint, our

¹⁴⁹ Hoffman, *Burn Up the Chaff*, *supra* note 94, at 1232-33; Spencer, *Plausibility Pleading*, *supra* note 141, at 451-53.

¹⁵⁰ See *supra* notes 34-35.

¹⁵¹ See Patricia W. Moore, "Corporate and Defense Perspective" Prevails in the Proposed Step Toward Cost-Shifting in Rule 26(c), CIV. PROCEDURE & FED. CTS. BLOG, (Sept. 11, 2014), <http://lawprofessors.typepad.com/civpro/2014/09/corporate-and-defense-perspective-prevails-in-the-proposed-step-toward-cost-shifting-in-rule-26c.html>.

¹⁵² See *supra* text accompanying notes 37-43, 134-136.

discovery Rules already contain numerous provisions that authorize discovery limitations.¹⁵³ But from a litigant's perspective as well as that of judicial culture, such provisions may provide little solace given that our discovery Rules reflect an ethos of broad, liberal discovery.¹⁵⁴ This cultural slant may explain why attorneys surveyed in 2009 generally agreed that "[l]awyers and judges could more often avail themselves of existing means to set limits on discovery that is unduly burdensome or costly."¹⁵⁵ If litigants are pessimistic about gaining discovery protections out of a widespread belief that judges are likely to rebuff such efforts,¹⁵⁶ existing Rules providing for discovery limits will remain inert. Indeed, judicial culture has embraced a predisposition favoring disclosure in discovery.¹⁵⁷ Our Rules grant tremendous discretion to federal trial judges with regard to discovery.¹⁵⁸ This discretion can be used to encourage and foster disclosure, or to restrict it. But if a litigant believes that the judicial tendency is to allow discovery, then there will be little comfort in the mere possibility that discretion will be invoked to limit it. This reluctance to accept discovery limitations as a realistic possibility in our discovery regime seems to have been a decisive factor for the *Twombly* and *Iqbal* majorities, though the majorities' position would be more persuasive had they indicated even the barest familiarity with the Rules that authorize discovery limitations.¹⁵⁹

The *Twombly* and *Iqbal* majorities' unwillingness to consider discovery solutions to a perceived discovery problem¹⁶⁰ can be criticized for failing to recognize that culture is not an island. Culture does not exist independent of the legal regime—the Rules—that govern conduct. Rather, rules and culture are inexorably and inextricably linked. They intersect and intertwine, fold into each other, over, and back again, weave together and apart. Sometimes the relationship is symbiotic, sometimes not;

¹⁵³ See, e.g., FED. R. CIV. P. 26(b)(2), (c)(1), (g), 37(a)-(b), (d), (f).

¹⁵⁴ See *supra* note 54.

¹⁵⁵ ABA LITIGATION SECTION SURVEY, *supra* note 129, at 6.

¹⁵⁶ See Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 483 (2010) (noting "[t]he reluctance of courts to impose sanctions under Rule 37").

¹⁵⁷ See Netzorg & Kern, *supra* note 29, at 517 (contending that, "[i]n practice," Rule provisions protecting against discovery "lie dormant, or are made subservient, to the default rule in favor of virtually unlimited discovery").

¹⁵⁸ See Bone, *Improving Rule 1*, *supra* note 55, at 288, 292.

¹⁵⁹ See *supra* note 1 and accompanying text. In their respective dissents in *Twombly* and *Iqbal*, Justices Stevens and Breyer contended that sufficient tools exist in the Rules for federal trial judges to appropriately limit discovery, with Justice Stevens specifying many of them. See *Ashcroft v. Iqbal*, 556 U.S. 662, 699-700 (2009) (Breyer, J., dissenting); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593-94 & n.13 (2007) (Stevens, J., dissenting).

¹⁶⁰ On the issue of whether discovery is actually problematic, see *supra* note 11.

sometimes it is inimical, sometimes not; sometimes it operates at cross-purposes, sometimes not. Here lies one quite objectionable feature of the *Twombly* and *Iqbal* majorities' approach: they implicitly ignore or deny the real possibility that new discovery initiatives—whether through new interpretations of existing Rules or actual new Rules—can sufficiently influence our existing discovery culture to provide a meaningful solution to the perceived discovery problem.¹⁶¹

This failure is particularly puzzling given the Supreme Court's own role in our judicial structure. It has singular power to change our legal regime and even our social culture. Supreme Court campaigns that successfully accomplished such change are not unusual, even in the procedural context. The summary judgment trilogy,¹⁶² the Sixth Amendment Confrontation Clause cases,¹⁶³ the movement to reinvigorate the Sixth Amendment

¹⁶¹ I say "implicitly" because embracing "new discovery initiatives" was not an accessible option for the Court in either *Twombly* or *Iqbal*. Having decided to grant certiorari, the Court had to decide the issues presented, which were framed as pleading questions. The Court did not formally have the option of fashioning or launching new discovery Rules or interpretations as a means of resolving those cases. Nonetheless, it is fair to characterize those decisions as evincing a pessimism about discovery reforms, which helps explain the majorities' choice to engage in a revolutionary pleading reform. There are abundant reasons to question the Supreme Court's pessimism, which is not universally shared. For example, the discovery panel at the 2010 Duke Law School civil litigation conference, *see supra* note 8, reportedly:

did reach a consensus that there are tools available in the current Federal Rules of Civil Procedure to deal with discovery abuse Although some Rules may warrant amendment to discourage discovery abuse and to assure that discovery is proportional, judges already have a substantial degree of discretion to curb abuse. Numerous speakers stressed that what is important is judicial education to assure that judges exercise the discretion available to them, together with a change in culture for lawyers and clients.

Koeltl, *supra* note 8, at 543-44; *see also* ACTL/IAALS, FINAL REPORT, *supra* note 11, at 2 (concluding, based upon survey of American College of Trial Lawyers fellows, that "[j]udges should have a more active role at the beginning of a case in designing the scope of discovery Where abuses occur, judges are perceived not to enforce the rules effectively."). Fairness requires acknowledging that the final ACTL/IAALS report is just as pessimistic about discovery, if not more so, than the Supreme Court was in *Twombly* and *Iqbal*. The report concludes that "[o]ur discovery system is broken," and takes the "radical" step of making its "most significant proposal," namely to switch to a presumption *against* further discovery after initial disclosures. ACTL/IAALS, FINAL REPORT, *supra* note 11, at 9 ("Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.").

¹⁶² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see also* Schneider, *supra* note 7, at 537-39 & nn.107-11.

¹⁶³ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

jury trial right in criminal sentencing,¹⁶⁴ and indeed the *Twombly* and *Iqbal* plausibility pleading innovation all come to mind. The most notable example may well be *Miranda v. Arizona*,¹⁶⁵ which was preserved when Chief Justice Rehnquist, against all expectations and after decades of active and hostile resistance, voted in *Dickerson v. United States* to maintain a constitutional requirement that police recite *Miranda* warnings at arrest.¹⁶⁶ His reasoning in *Dickerson* is a powerful rejoinder to *Twombly* and *Iqbal*'s discovery defeatism: he concluded that the *Miranda* warnings should be preserved because they were not just an engrained legal standard, but had "become part of our national culture."¹⁶⁷

The Supreme Court has many options available to accomplish a change in the cultural ethos of discovery. It might admittedly have difficulty unholstering its most potent and obvious weapon, its discretionary appellate power. This is because its options for granting certiorari are limited by the final judgment rule,¹⁶⁸ and discovery disputes do not generally satisfy that requirement.¹⁶⁹ The Court does, however, retain some power to use certiorari to accomplish changes in discovery, such as by expressing an interest in the issue in its opinions. Simply by commenting on discovery even in dicta the Court could exert influence by signaling that it wants discovery tightened. Another option would be to encourage in its opinions the use of several narrow appellate options, such as the ancillary proceedings or collateral order doctrines or mandamus, for routing discovery disputes to the Court.¹⁷⁰ A more likely route, given its availability and efficacy, would be for the Court to call for or initiate either a Rules Enabling Act or congressional reform process with regard to

¹⁶⁴ *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁶⁵ 384 U.S. 436 (1966).

¹⁶⁶ *Dickerson v. United States*, 530 U.S. 428 (2000). In numerous intervening cases Chief Justice Rehnquist had voted to limit *Miranda* and its implications. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974).

¹⁶⁷ *Dickerson*, 530 U.S. at 443.

¹⁶⁸ *See* 28 U.S.C. § 1291.

¹⁶⁹ *See* 19 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE-CIVIL* ¶ 202.11[2][a] (3d ed. 2014).

¹⁷⁰ Though limited grounds such as these do exist for appealing discovery orders, they tend to be subject to conflicting authority. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1307 (1977) (Rehnquist, J., denying application for stay as Circuit Justice); *In re Carco Elecs.*, 536 F.3d 211, 213 & n.3 (3d Cir. 2008); *see generally* 19 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE-CIVIL* ¶¶ 202.7, 202.11[2][a]-[b] (3d ed. 2014).

discovery.¹⁷¹ One attraction to this option would be that the Court could choose how specifically or generally to describe the reform effort. Moreover, the Rules Enabling Act route would preserve a veto power for the Court.¹⁷²

Thus, it is worthwhile to consider the value of a full range of discovery reforms, and whether such reforms offer a better path for addressing the perceived litigation ills that so troubled the *Twombly* and *Iqbal* majorities.¹⁷³ To that end, a series of discovery reform proposals are presented below and in the appendix. Any single proposal is available for adoption by itself, or as a package adopted along with other proposals. Significantly, any such reforms can be subjected to anti-abuse procedural requirements. For example, Professor Dodson argues that discovery reforms adopted in the federal trial courts in response to *Twombly* and *Iqbal* should have the goal of “rectify[ing] information asymmetry without imposing burdensome costs,” and suggests “three principles” for such reform: “(1) it should be used sparingly; (2) it should be narrowly focused and minimize undue cost; and (3) it should toll the running of any applicable limitations period.”¹⁷⁴

1. Heightened Discovery Requirements

One option for reforming discovery is to impose heightened discovery requirements. This option is best suited for adoption if a return to notice pleading is successful.¹⁷⁵ In this way, the more forgiving notice pleading standard can be counterbalanced by tougher discovery standards. No doubt many stakeholders would love to have plausibility pleading combined with heightened discovery standards, but such an approach would constitute a dangerous “double whammy” that could seriously compromise court access and the vindication of rights. Unfortunately, the Advisory Committee has pursued this “double whammy” approach, mostly with success.¹⁷⁶

¹⁷¹ See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law*, 59 UCLAL REV. 1188 (2012).

¹⁷² See 28 U.S.C. §§ 2072(a), 2074 (2013).

¹⁷³ One important counterargument is that this proposal would increase judicial discretion, which can be argued to be an important part of the problem, rather than a solution. See Bone, *Regulation of Court Access*, *supra* note 9, at 899-900.

¹⁷⁴ Dodson, *New Discovery*, *supra* note 10, at 75-85.

¹⁷⁵ Numerous actors have been involved in responding to the *Twombly* and *Iqbal* adoption of plausibility pleading, and many of these efforts hoped to return to notice pleading. See, e.g., Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009) (introduced by Senator Arlen Specter); Open Access to Courts Act, H.R. 4115, 111th Cong. (2009) (introduced by Representative Jerrold Nadler).

¹⁷⁶ See *supra* notes 34-35.

Heightened discovery would require a party seeking discovery to satisfy a more demanding showing before gaining access to it. One such proposal is to explicitly adopt, and potentially reconceive, proportional discovery,¹⁷⁷ a concept that is already implicit in the discovery Rules.¹⁷⁸ An existing iteration of such an approach calls for reducing relevancy's power,¹⁷⁹ thereby ending what is essentially a presumption in favor of discovery, and instead giving priority to "a rational cost/benefit analysis that takes into account the parties' resources, the issues at stake in the litigation, and other proportionality factors."¹⁸⁰

This is exactly the approach the Advisory Committee has taken: it proposes to expressly reference this sort of proportionality in Rule 26(b)(1),¹⁸¹ which sets out the initial scope of discovery. No longer will proportionality only be implicitly addressed in Rule 26(b)(2)(C), which sets out bases for seeking discovery limitations. Thus, the Advisory Committee's approach to proportionality is twofold: it expressly adopts proportionality *and* it changes the locus of that standard. The latter amendment would make it harder for a party to obtain discovery. Currently, under Rule 26(b)(1) this party need only establish relevancy, and overcome any privilege objection, to presumptively access discovery.¹⁸² Under the Advisory Committee's proposed amendment, that same party would now have to additionally overcome a proportionality analysis.

Other means of heightening discovery standards could seek to impose controls upon discovery. These controls could promote the goals of providing access to discovery, but as Professor Dodson has suggested make resort to it sparing, narrow the focus of discovery, and minimize its costs.¹⁸³ Depending on how these reforms are implemented, they might reduce the adversarial characteristic of party control in our discovery,

¹⁷⁷ See Netzorg & Kern, *supra* note 29, at 527-32.

¹⁷⁸ See FED. R. CIV. P. 26(b)(2)(C); John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 457-58 (2010); see also *id.* at 459 (quoting *In re Convergent Techs. Securities Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

¹⁷⁹ See FED. R. CIV. P. 26(b)(1) (stating that nonprivileged information is subject to discovery so long as it is relevant).

¹⁸⁰ Netzorg & Kern, *supra* note 29, at 531. It is possible to tailor this discovery reform option in numerous ways to satisfy policy goals, such as through identifying the standard that plaintiff must meet before accessing discovery. For example, Professors Clermont and Yeazell have suggested the possibility of adopting a probable cause standard for believing that discovery will reveal pertinent information, comparable to what exists in Fourth Amendment search warrant procedure. Clermont & Yeazell, *supra* note 7, at 855-56.

¹⁸¹ See *supra* note 35.

¹⁸² See *supra* note 57 and accompanying text.

¹⁸³ Dodson, *New Discovery*, *supra* note 10, at 75-84.

moving us along a continuum toward a more inquisitorial system in which judges are given more control over discovery.¹⁸⁴

2. Plausibility Discovery

Another option is to create a new tier of discovery that might be called “plausibility discovery,” which would explicitly allow limited, post-complaint but pre-dismissal discovery to address the new plausibility pleading burden.¹⁸⁵ It would create a two-tiered discovery system in which a new plausibility discovery opportunity would exist for plaintiffs, in addition to traditional discovery.

Such an approach has already been tried on an ad hoc basis.¹⁸⁶ Significantly, it is subject to the imposition of procedural requirements designed to minimize its misuse. For example, one could require the filing of a pre-discovery affidavit explaining investigatory efforts to date to help assure that plausibility discovery is merited and is being conducted properly,¹⁸⁷ and an affirmation that the information sought is in the defendant’s possession, custody, or control and has not been successfully obtained either from the defendant or other alternate sources.¹⁸⁸

The opportunity to conduct pre-dismissal plausibility discovery should be implemented through explicit revision of the Rules.¹⁸⁹ Some commentators contend that Rule 26 already allows for pre-dismissal discovery.¹⁹⁰ The better view supports explicit amendment, for at least two reasons. First, “[a]llowing pleading-stage discovery fits the current Rules awkwardly at best.”¹⁹¹

¹⁸⁴ Clermont & Yeazell, *supra* note 7, at 855 & n.128. *See generally* JA Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT’L & COMP. L.Q. 281, 287-89 (2003). For a brief but useful discussion of the distinction between adversarial and inquisitorial systems, see Kessler, *supra* note 11, at 1187-88 & nn.22-23, 25.

¹⁸⁵ *See* Bone, *Regulation of Court Access*, *supra* note 9, at 932-35; Dodson, *New Discovery*, *supra* note 10, at 56-57, 73; Malveaux, *supra* note 10, at 108; Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 30.

¹⁸⁶ *See, e.g.*, Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 821 (7th Cir. 2009); Kregler v. City of New York, 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009).

¹⁸⁷ Bone, *Regulation of Court Access*, *supra* note 9, at 933-34.

¹⁸⁸ *See* Dodson, *New Discovery*, *supra* note 10, at 78-79.

¹⁸⁹ Bone, *Regulation of Court Access*, *supra* note 9, at 934-35.

¹⁹⁰ Hartnett, *supra* note 8, at 507-08, 512-14; Malveaux, *supra* note 96, at 108-24.

¹⁹¹ Bone, *Regulation of Court Access*, *supra* note 9, at 935 (citation omitted); *see also* Malveaux, *supra* note 96, at 126-27 & nn.361-62 (citing federal courts of appeals cases suggesting disapproval of discovery before ruling on a Rule 12(b)(6) motion to dismiss). Professor Hartnett strongly disagrees, and has provided a detailed account of his reasoning. Hartnett, *supra* note 8, at 507-14 & n.151; *see also* Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 30 & n.142. The debate between Professors Bone and Hartnett may rest upon the differences between the practical realities of litigation and formalistic analyses of the Rules. In any event, even Hartnett agrees that, after *Twombly* and *Iqbal*, a worst-case scenario is possible for plaintiffs in which they are caught in a Catch-22 of an

Second, an explicit amendment will clearly signal a rejection of the proposal to presumptively prohibit discovery while a motion to dismiss is pending.¹⁹²

3. Pre-litigation Discovery

Another way to reform discovery in response to *Twombly* and *Iqbal* is to expand the opportunity for discovery even before filing a lawsuit. Given existing rhetoric about frivolous litigation and “fishing expeditions,”¹⁹³ this suggestion will certainly be controversial. But there are strong reasons to doubt that pre-litigation discovery would result in frivolous litigation. Under the Rules, numerous provisions deter such behavior, such as certification requirements, the opportunity for an early adjudicated dismissal, and sanctions for discovery abuse or frivolous litigation.¹⁹⁴ As an economic matter, such behavior is an expensive way for plaintiffs’ lawyers to do business given rational incentives to aim at a likely worthwhile target rather than shooting wildly,¹⁹⁵ particularly given the disincentives to such behavior under the Rules. Indeed, after studying a Texas provision that allows some pre-litigation discovery,¹⁹⁶ Professor Hoffman has determined that, at least when combined with “various formal requirements for instituting

early dismissal on pleading grounds while also being unable to obtain discovery that could have avoided the dismissal. Hartnett, *supra* note 8, at 509 (describing scenarios that “critics of *Twombly* would certainly fear”); *see also* Bone, *Comment on Iqbal*, *supra* note 7, at 874 n.117; Hartnett, *supra* note 8, at 513-14 (noting large discretion trial judges enjoy to stay discovery, and unlikelihood of appellate relief in these and other circumstances). Amendment is preferable because it would help avoid such worst-case scenarios. The current opportunity to engage in pre-dismissal discovery is sufficiently uncertain that one commentator has suggested adopting an optional two-stage complaint pleading regime sandwiched around a limited, express discovery phase. Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191, 1239-45 (2010); *id.* at 1241 (arguing that “[t]he problem” with pre-dismissal discovery now “is that [it] depends entirely on the inclinations of the individual judge and cannot be predicted systematically in advance”).

¹⁹² See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 547 n.†, 592-93 (2010) (suggesting, in an article written “on behalf of the U.S. Chamber Institute for Legal Reform,” that the presumptive stay of discovery applicable in private securities class actions under the Private Securities Litigation Reform Act should be extended to all civil litigation).

¹⁹³ See generally Elizabeth G. Thornburg, *Just Say “No Fishing”: The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1 (2006).

¹⁹⁴ See, e.g., FED. R. CIV. P. 11, 12(b)(6), 26(g).

¹⁹⁵ See Effron, *supra* note 10, at 2036-37; *see also* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 277-78 (2007) [hereinafter Hoffman, *Presuit Investigatory Discovery*].

¹⁹⁶ This provision is discussed below. See *infra* notes 210-221 and accompanying text.

civil litigation,” there is “reason to believe . . . that lawyers and prospective claimants seek presuit discovery not superfluously, but as a tool for gathering information before suit on the limited occasions when such information is otherwise inaccessible to them through all other publicly available sources.”¹⁹⁷ He thus concludes that “factors suggest that lawyers and prospective claimants in Texas, as in most jurisdictions, may be frequently motivated to gather factual information prior to suit in order to evaluate the legal and practical viability of filing and pursuing the claim to settlement or judgment,”¹⁹⁸ not as a tool to pursue frivolous litigation.¹⁹⁹

4. Presuit Depositions: New Rule 27

Currently, Rule 27 authorizes pre-litigation depositions,²⁰⁰ and with a bit of tweaking the possibility of such discovery can be harnessed to respond to the new plausibility pleading mandate.²⁰¹ As a textual matter, Rule 27 is not clear about how widely available this discovery device is. Case law, however, firmly establishes that a Rule 27 pre-litigation deposition is available only in very limited circumstances when necessary to preserve testimony.²⁰² Thus, as currently interpreted, Rule 27 is rarely a useful discovery device.

The introduction of plausibility pleading provides a justification for reconsidering how accessible pre-litigation depositions should be. Perhaps the leading argument for strong limits on this procedural device is that it lacks a common law analog, and since the common law generally disallowed pre-litigation discovery, Rule 27 should be interpreted in a manner faithful to the common law restriction.²⁰³ Now that *Twombly* and *Iqbal* have increased the pleading threshold, consequently making it harder to access discovery, a departure from the common law tradition against compelled pre-litigation discovery can be more easily justified on systemic grounds as a means of

¹⁹⁷ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 266.

¹⁹⁸ *Id.* at 269.

¹⁹⁹ *But see id.* at 270 & n.151.

²⁰⁰ FED. R. CIV. P. 27. *See generally* Nicholas A. Kronfeld, Note, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 GEO. L.J. 593 (1990) (providing well-researched doctrinal account of Rule 27, paying careful historical attention to sources on which Advisory Committee's proposed language was based).

²⁰¹ *See* Dodson, *New Discovery*, *supra* note 10, at 86-88.

²⁰² Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 226-35; Kronfeld, *supra* note 200, at 602-03.

²⁰³ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 227-29; Kronfeld, *supra* note 200, at 605.

rebalancing the Rules. Reforming Rule 27 attacks a central problem with *Twombly* and *Iqbal*, namely difficulties created by the disjunction between their dislike and distrust of discovery and the pleading solution they applied to that concern. It would help plaintiffs avoid the discovery Catch-22 that can result from plausibility pleading.²⁰⁴

Arguing for more discovery, particularly a discovery device that is available *before* litigation even begins, is sure to be controversial given the persistent, hostile narrative against discovery. One response is to emphasize that there are endless options available to help assure that access to a new, expanded Rule 27 is properly limited. One option would be to create an entirely new type of action that is dedicated to litigating only one issue, namely whether a pre-litigation deposition should be allowed. To promote fairness and protect due process rights, this litigation should not be *ex parte*. Instead, notice should be provided to the deposition target and perhaps also to anticipated defendants. Procedural requirements can be imposed, such as requiring an affidavit explaining why the pre-litigation deposition is crucial to determining the viability of a traditional lawsuit. Other procedural constraints, such as a presumptive limit on the number of presuit depositions, can also be imposed consistent with already existing discovery limits on interrogatories and depositions.²⁰⁵

5. State Approaches

Numerous states provide avenues for limited pre-litigation discovery, in varying amounts. Many of these states used Rule 27²⁰⁶ as their starting point, but chose to go further. These state approaches provide models for designing pre-litigation discovery in federal court as a means of protecting plaintiffs from the Catch-22 that *Twombly* and *Iqbal* can create.²⁰⁷

Consideration has already been given to the terms under which such an expanded discovery approach should be made available. After reviewing numerous state pre-litigation discovery models, Professor Hoffman has suggested the following *ex ante* standards, which require a petitioner to provide:

²⁰⁴ See *supra* note 130 and accompanying text.

²⁰⁵ See Dodson, *New Discovery*, *supra* note 10, at 81; see also FED. R. CIV. P. 30(a)(2)(A)(i), (ii), (d)(1), 33(a)(1).

²⁰⁶ See *supra* notes 200-205 and accompanying text.

²⁰⁷ See *supra* note 130 and accompanying text.

- (i) the subject matter of the anticipated action (when suit is anticipated) or the nature of the inquiry that prompts the petitioner to seek a deposition to investigate a potential claim;
- (ii) the petitioner's interest in the subject matter of the deposition or other discovery;
- (iii) the parties whom the petitioner anticipates will have adverse interests;
- (iv) the substance of the testimony the petitioner expects to get from the deponent or the written information or documents sought; and,
- (v) the reason why the testimony, information, or documents are sought.²⁰⁸

Professor Hoffman also suggests a sixth factor, namely that a petitioner must “demonstrate [that] the information he seeks cannot otherwise be obtained.”²⁰⁹

Numerous state models that could be consulted about how to reform discovery in the federal district courts are set forth in the appendix. One such example comes from Texas. Texas Rule of Civil Procedure 202, which is entitled “Depositions Before Suit or to Investigate Claims,”²¹⁰ provides “the broadest state grant of investigatory discovery to private parties.”²¹¹ It authorizes pre-litigation petitions seeking either “to perpetuate . . . testimony . . . for use in an anticipated suit” or “to investigate a potential claim or suit.”²¹² The court “must order” a pre-litigation deposition if doing so “may prevent a failure or delay of justice in an anticipated suit” or where “the likely benefit . . . to investigate a potential claim outweighs the burden or expense of the procedure.”²¹³ Professor Hoffman, who conducted a survey of Texas lawyers and judges about Texas Rule 202,²¹⁴ reports that it “has been interpreted by courts as broadly as [its] language suggests.”²¹⁵ Only about 20% of lawyers indicated that judges limited “the scope of the subject matter for the presuit deposition,” and slightly “under 9% reported that the judge limited the scope

²⁰⁸ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 274.

²⁰⁹ *Id.*

²¹⁰ TEX. R. CIV. P. 202.

²¹¹ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 247. Professor Hoffman presents an informative history of Texas Rule 202. *See id.* at 241-45.

²¹² TEX. R. CIV. P. 202.1.

²¹³ TEX. R. CIV. P. 202.4(a). One example of when the burden outweighs the benefit, and thus a petition for pre-litigation discovery can be denied, includes when trade secret information is sought. *See In re Hewlett Packard*, 212 S.W.3d 356, 362 (Tex. App. 2006).

²¹⁴ *See Hoffman, Presuit Investigatory Discovery*, *supra* note 195, at 247-48; *see also id.* at 250-61 (reporting survey findings).

²¹⁵ *Id.* at 245 & n.105.

of documents requested in connection with a Rule 202 petition and less than 5% reported that the judge did not allow the production of documents at all.”²¹⁶ Judicial responses were consistent with broad access to pre-litigation discovery, though not as generous as the lawyers’ responses indicated. Judges responded that they limited “the scope of the subject matter . . . 30% of the time; and the scope of documents to be produced was limited only 13% of the time” with “production of documents [being] entirely disallowed in 5 % of the cases.”²¹⁷

The possibility of using Texas Rule 202 to investigate whether a claim exists²¹⁸ stands in stark contrast to the approach in most other states, which reject that use, instead generally limiting pre-litigation discovery where it exists to identification of proper defendants. Texas lawyers find this more liberal scope of pre-litigation discovery useful, indicating that roughly 60% of the time they use Texas Rule 202 to investigate whether a claim exists.²¹⁹ Plaintiff-side lawyers who lobbied in favor of what became Texas Rule 202 had argued that such broad pre-litigation discovery would be useful for reducing non-meritorious suits.²²⁰ Their position appears creditable, as Professor Hoffman’s data indicate that, when the court has denied pre-litigation discovery petitions, thus providing an extra warning about the merits of a case, plaintiffs filed actual lawsuits only about 17-34% of the time.²²¹

6. Comparative Approaches

a. United Kingdom

The United Kingdom authorizes pre-litigation discovery.²²² The relevant rule requires an “application . . . supported by evidence,” and makes such discovery available when the parties at trial “likely” will be the same as those whose interests in the application are adverse; the respondent’s disclosure duty if an action had been initiated “would extend to the documents” as to which disclosure is sought; and pre-litigation disclosure “is

²¹⁶ *Id.* at 259.

²¹⁷ *Id.*

²¹⁸ TEX. R. CIV. P. 202.1(b).

²¹⁹ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 254-55 & n.120.

²²⁰ *Id.* at 244.

²²¹ *Id.* at 255.

²²² See Dodson, *New Discovery*, *supra* note 10, at 77 n.139 (citing CIVIL PROCEDURE RULES, 1998, Statutory Instrument 1998/3132, ¶ 31.16 (U.K.)).

desirable” in terms of fairness, to resolve the dispute without litigation, or to promote cost efficiency.²²³

b. Victoria, Australia

The Supreme Court in Victoria, Australia has adopted several rules authorizing pre-litigation discovery. One rule can be used to obtain limited discovery before commencing a lawsuit for the purpose of identifying the proper defendant.²²⁴ This provision is available where “reasonable inquiries” have been unavailing, and “it appears that some person has or is likely to have knowledge of facts, or has or is likely to have or has had or is likely to have had in that person’s possession any document or thing, tending to assist in such ascertainment.”²²⁵ In such a situation, the court may order attendance at a hearing for an oral examination, as well as document production.²²⁶

Another rule permits pre-litigation discovery of a limited nature against a known defendant to confirm whether an action exists.²²⁷ This rule empowers a court to order document production against a “prospective defendant” if “there is reasonable cause to believe that” a cause of action exists; “after making all reasonable inquiries” insufficient information exists to determine “whether to commence a proceeding”; and there exists “reasonable cause to believe that” the prospective defendant “has or is likely to have or has had or is likely to have had in that person’s possession any document” pertaining to whether a cause of action exists.²²⁸

7. Cost Shifting

Cost shifting reforms provide another avenue for revamping our federal civil litigation system in response to plausibility pleading. Cost shifting is an intriguing idea for several reasons. Possible reforms range from minor to major, from those that constitute small responses to plausibility pleading, to those that hold the potential to significantly alter our civil litigation model—indeed, to an extent far beyond plausibility pleading itself. Additionally, cost shifting can be implemented in

²²³ Civil Procedure Rules, 1998, S.I. 1998/3132, ¶ 31.16 (U.K.).

²²⁴ *General Civil Procedure 2005* (Vic.) reg 32.03 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_reg/sccpr2005433/s32.03.html.

²²⁵ *Id.* reg. 32.03(1).

²²⁶ *Id.* reg. 32.03(2).

²²⁷ *General Civil Procedure 2005* (Vic.) reg 32.05 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_reg/sccpr2005433/s32.05.html.

²²⁸ *Id.*

many different ways using many different tools. A few of the possibilities are presented below.

a. Statutory Fees

Statutory fees have long been used to accomplish substantive policy ends, such as to promote consumer protection actions²²⁹ as well as antitrust litigation²³⁰ and trademark protection.²³¹ They could be used for a similar purpose to respond to plausibility pleading, providing a procedural mechanism that promotes the substantive policy end of protecting access to the courthouse.

Statutory fees could be fashioned in many different permutations to accomplish this objective, such as being made available for pre-litigation discovery. For example, Congress could establish a statutory fee that a federal trial judge could grant to a prospective plaintiff if pre-litigation discovery was obstructed without merit, or in bad faith, or to a prospective defendant subjected to pre-litigation discovery but where no complaint was filed within a defined period.²³² Depending upon how Congress designed the statutory fee structure, it could accomplish various policy goals, such as encouraging or discouraging resort to pre-litigation discovery, minimizing litigation concerning entitlement to the statutory fee, or establishing the degree of judicial discretion on a statutory fee award.

b. American Rule

Another cost shifting option is to alter our adherence to the American Rule, under which each party generally bears its own litigation costs, including its own attorney fees and discovery costs.²³³ The American Rule might be partially altered by, for example, requiring plaintiffs to reimburse the responding party's

²²⁹ See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(2) (2012); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2).

²³⁰ See Clayton Act, 15 U.S.C. § 15(a) (authorizing treble damages).

²³¹ See 15 U.S.C. §§ 1117(c)-(d).

²³² Congress could also consider making statutory fees available for discovery in general, though doing so would likely be too problematic given the concern that such fees could become yet another source for litigation. Such concerns could certainly apply to statutory fees applicable to pre-litigation discovery, but should not be of a comparable magnitude given that pre-litigation discovery will presumably be quite limited.

²³³ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); see also Spencer, *Understanding Pleading Doctrine*, *supra* note 68, at 31 n.146; Spencer, *Plausibility Pleading*, *supra* note 141, at 452. The primary exception is taxation of routine costs, which are normally modest and which Congress has both defined and authorized. See 28 U.S.C. §§ 1920, 1923 (2012).

costs for pre-litigation discovery or any limited discovery before a ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim. A broader approach might require, or at least create the potential for, each side to pay all or part of the discovery costs it imposes upon the other side. The Advisory Committee has embraced this reform through a proposed amendment to discovery Rule 26(c)(1)(B) that expressly grants courts the power to include “the allocation of expenses” into protective orders, which is well on its way to becoming law.²³⁴

Allowing departures from the American Rule with regard to discovery costs has the significant advantage—absent in our current system—of forcing a party that seeks discovery to internalize the responding party’s costs.²³⁵ Should this reform be pursued, Professor Dodson’s suggestions—that discovery cost shifting against plaintiffs should be rejected when they locate “evidence of culpability,” or if the responding party “stonewalls proper discovery requests”²³⁶—should be incorporated. Unfortunately, the Advisory Committee proposal omits any such safeguards beyond stating in the relevant Committee Note that “[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”²³⁷

c. Bonds

Cost shifting can also be accomplished by imposing bond requirements for accessing pre-litigation discovery, though this option should be carefully considered given potential problems with it.²³⁸ Professor Dodson has suggested that what he calls “New Discovery”—a reformed discovery regime that responds to plausibility pleading²³⁹—“could include a presumptive rule

²³⁴ See Advisory Committee on Federal Rules of Civil Procedure, Proposed Amendments to the Federal Rules of Civil Procedure 10, 34 (June 14, 2014), in SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 34, at app. B-10, B34; see also *supra* note 35.

²³⁵ See Dodson, *New Discovery*, *supra* note 10, at 82.

²³⁶ *Id.* at 83.

²³⁷ Proposed Amendments to the Federal Rules of Civil Procedure 25, in SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 34, at app. B-45.

²³⁸ See Bone, *Modeling Frivolous Suits*, *supra* note 111, at 572-76 (explaining that bonding can reduce frivolous litigation by imposing costs but can skew outcomes in an undesirable way).

²³⁹ See Dodson, *New Discovery*, *supra* note 10, at 55.

that the plaintiff bears the burden of all New Discovery costs, perhaps enforced through a bond requirement.”²⁴⁰

As with other reform possibilities, numerous options exist for how to implement a bond requirement. The bond amount would have to be set. It could be linked to the scope of litigation, such as by setting it at a percentage of damages sought,²⁴¹ or in relation to an estimated cost of pre-litigation discovery. A party prevailing against the plaintiff could be authorized to proceed against the plaintiff’s bond to recoup discovery costs. Since bond requirements act to discourage litigation, ideally one would be paired with a counterincentive that rewards litigation, such as establishing a regime under which a prevailing plaintiff is reimbursed for all or part of its discovery costs, such as through alteration of the American Rule.²⁴²

B. Non-Discovery Reform Options

It is possible to address plausibility pleading’s Catch-22 discovery problems²⁴³ through non-discovery mechanisms. I discuss a few below.

1. New Rule 12(e): Reinvigorate Motion for More Definite Statement

Twombly and *Iqbal* call for disregarding conclusory allegations,²⁴⁴ but the manner in which they do so is one of the most criticized aspects of the new plausibility pleading regime they introduced. While such a blackletter rule has long existed,²⁴⁵ there is a widespread belief that *Twombly* and *Iqbal* applied it in a new way that will result in unpredictable and inconsistent

²⁴⁰ *Id.* at 82.

²⁴¹ This would only work when damages are for a stated sum certain, which is not required in federal court. *See* FED. R. CIV. P. 8(a)(3); 27 FEDERAL PROCEDURE, LAWYERS EDITION § 62:59 (2008).

²⁴² *See supra* Part III.A.7.b (discussing American Rule).

²⁴³ *See supra* note 130 and accompanying text.

²⁴⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557, 564 & n.9 (2007); *see also* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298-99, 1314-15 (2010).

²⁴⁵ *See* 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 12.34(1)(b) (3d ed. 2009); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004 & Supp. 2011). *But see* Clermont & Yeazell, *supra* note 7, at 836 & nn.52-53 (contending that Rules, forms, and case law often allowed conclusory allegations).

application,²⁴⁶ aggrandizing judicial discretion at the cost of dismissing some meritorious claims.²⁴⁷

One response to this new pleading regime is to more frequently invoke Rule 12(e), which requires plaintiffs to provide a more definite statement in their complaints,²⁴⁸ especially with regard to those conclusory allegations that *Twombly* and *Iqbal* require to be disregarded. This is especially justified given the new manner in which these cases treat conclusory allegations. *Iqbal* uses the conclusory concept not in its traditional manner—when “the allegations track formulaic language” merely reciting the elements of a claim—but instead to identify the pleading as “stat[ing] facts at too high a level of generality.”²⁴⁹ In response, a court could rule on a Rule 12(b)(6) motion by demanding a more definite statement under Rule 12(e) (while perhaps holding the Rule 12(b)(6) motion in abeyance).²⁵⁰ Doing so will alert a plaintiff to a need to provide greater factual detail so as to satisfy the new plausibility pleading standard, and provide the opportunity to do so.

This approach, however, is far from ideal. The biggest problem with plausibility pleading is the impact it will have on cases in which information asymmetry exists between the parties.²⁵¹ Where a plaintiff lacks access to the information necessary to provide greater factual specificity, a Rule 12(e) more definite statement ruling will most likely make no difference because the plaintiff has no means of gaining access to the needed information. Thus, this reform promises to make little difference if implemented on its own. It will be a meaningful reform only if implemented along with others, particularly discovery reforms responsive to plausibility pleading—of the kinds discussed

²⁴⁶ Unsurprisingly, for example, there is no agreement among courts about whether general allegations of discriminatory intent or defendant’s knowledge are conclusory. Compare *Jones v. Hashagen*, No. 4:09-CV-887, 2010 WL 128316, at *4 (M.D. Pa. Jan. 12, 2010) (conclusory), and *Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1201-02 (N.D. Cal. 2009), with *Santiago v. Walls*, 599 F.3d 749, 758-59 (7th Cir. 2010) (not conclusory), and *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at *2 (N.D. Ill. Oct. 26, 2009).

²⁴⁷ See, e.g., Bone, *Comment on Iqbal*, *supra* note 7, at 867-70; Clermont & Yeazell, *supra* note 7, at 837-38, 840-42; Dodson, *New Discovery*, *supra* note 10, at 60-61; Miller, *supra* note 71, at 25-26; Schneider, *supra* note 7, at 530, 544-45. *But see* Hartnett, *supra* note 8, at 498-503; Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1089-91 (2009); Steinman, *supra* note 244, at 1316, 1334-39.

²⁴⁸ FED. R. CIV. P. 12(e).

²⁴⁹ Bone, *Comment on Iqbal*, *supra* note 7, at 860; see also Dodson, *New Discovery*, *supra* note 10, at 61 (“nonconclusoriness requires some meaningful factual grounding”).

²⁵⁰ See, e.g., *Fikes v. City of Daphne*, 79 F.3d 1079, 1083 & n.6 (11th Cir. 1996); *Bouknight v. Dist. of Columbia*, 538 F. Supp. 2d 44, 49 (D.D.C. 2008).

²⁵¹ See *supra* notes 86-90 and accompanying text.

above²⁵²—that will provide tools a plaintiff can use in an attempt to redress the identified pleading deficiency.

2. Context-Specific Heightened Pleading—The Rule 9(b) Paradigm

Rather than altering pleading doctrine through judicial fiat, as occurred in *Twombly* and *Iqbal*, a better option is to do so through the Rules Enabling Act process by requiring heightened pleading for specific types of cases. Rule 9(b) already provides for context-specific heightened pleading for fraud actions.²⁵³ Professors Clermont and Yeazell have suggested pursuing this option, writing that one possibility is to “revise Rule 9 to include more classes of cases, while abrogating *Twombly* and *Iqbal* as a general rule.”²⁵⁴ The Advisory Committee has echoed their suggestion.²⁵⁵

Another way to accomplish the same end is to alter pleading standards through legislation, as Congress has shown some interest in doing to abrogate *Twombly* and *Iqbal*,²⁵⁶ and as it has done in securities law²⁵⁷ and in connection with the Y2K scare.²⁵⁸

C. Fundamental Changes Toward New Discovery Models

Addressing the discovery concerns that animated *Twombly* and *Iqbal* can be accomplished through highly innovative initiatives that fall outside of traditional discovery reforms. Some of these could significantly alter our litigation system. I present several possibilities below.

²⁵² See *supra* Part III.A.

²⁵³ FED. R. CIV. P. 9(b).

²⁵⁴ Clermont & Yeazell, *supra* note 7, at 854 & n.121.

²⁵⁵ JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 6 (2010) (explaining that one option for responding to plausibility pleading “is to expand on the categories of claims flagged for ‘heightened pleading’ by Rule 9(b)” and noting that “[t]wo of the categories often mentioned . . . are claims of conspiracy and actions that involve official immunity”).

²⁵⁶ See *supra* note 175.

²⁵⁷ See The Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 78u-4(b)(1)(B), (b)(2) (2012) (imposing heightened pleading requirements on securities fraud actions); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

²⁵⁸ See Dodson, *Comparative Pleading*, *supra* note 8, at 456 (citing 15 U.S.C. § 6607(b)-(d)).

1. Use of Discovery Neutral: Toward an Inquisitorial System?

Continuing along the continuum that spans a purely adversarial litigation system and a purely inquisitorial one leads to another discovery reform that merits consideration, which is to take partial control of discovery away from the parties and give it to a neutral.²⁵⁹ This, of course, is far from a new proposal.²⁶⁰ In the federal district court system, federal magistrates²⁶¹ are well placed to perform these additional duties, though at present they likely lack the necessary resources to do so. Federal magistrates already play important roles in discovery, with many federal judges delegating to them the primary responsibility of overseeing discovery.²⁶² This reform option, though dramatic in the sense of moving us further toward an inquisitorial system, is best described as innovative rather than revolutionary in the sense that it merely continues our evolution toward giving the judiciary increased case management responsibilities while decreasing party control in litigation.²⁶³ Another option is to use special masters.²⁶⁴

One concern about this reform is that the neutral might be given inadequate power to actually change the discovery dynamic, and thus would simply constitute an ineffective, additional bureaucratic office. To mitigate this concern, the neutral could be given the power, and perhaps duty, to issue a report and

²⁵⁹ This reform could be adopted as a complement to judicial screening, a reform that Professor Bone has suggested for reducing the possibility of frivolous litigation. See Bone, *Modeling Frivolous Suits*, *supra* note 111, at 593-96.

²⁶⁰ *E.g.*, Easterbrook, *Discovery as Abuse*, *supra* note 28, at 644-45.

²⁶¹ Federal magistrate positions are statutory creations. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1108 (1968).

²⁶² See Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 651-52 (1989); see also 28 U.S.C. § 636(b)(1)(A) (2012); David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 457 (1997). The Rule drafters themselves initially contemplated that "possibly it [would be] desirable" to have magistrates (or some other neutral, such as a master) closely oversee discovery to protect against abuse. Subrin, *History of Federal Discovery Rules*, *supra* note 56, at 717 (internal quotations and citation omitted).

²⁶³ See generally Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 63-75 (1995) (reviewing techniques that federal trial courts have used to increase judicial case management); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). One notable trend since the Federal Rules of Civil Procedure were adopted in 1938 is their persistent amendment to authorize greater judicial oversight of litigation, including with regard to discovery. See Kessler, *supra* note 11, at 1191-92; *e.g.*, FED. R. CIV. P. 16 advisory committee's notes 1983 and 1993 amendments.

²⁶⁴ David R. Cohen, *E-Discovery Special Masters Slash Costs in Pennsylvania*, CORP. COUNS. (Apr. 22, 2014), <http://autonomy.corporatecounsel.law.com/e-discovery-special-masters-slash-costs-in-pennsylvania/>.

recommendation at a litigation's end about the extent to which each party satisfied its discovery obligations and acted in good faith, findings that could be linked to the potential for the shifting, in whole or in part, of discovery costs.²⁶⁵

A great obstacle to using magistrates as neutrals is the adequacy of magistrate resources. As Professor Kessler has explained, movement toward an inquisitorial model comes with costs because such a system requires a larger bureaucracy than currently exists in our judiciary, which is modeled primarily on an adversarial system.²⁶⁶ Depending on the scope of this reform, new investments could range from additional magistrates, additional support staff, additional office space and logistical support, etc. All of this costs money, which will be a major stumbling block, in addition to the political and philosophical battle over whether it is advisable to move further toward an inquisitorial system.²⁶⁷

2. E-Discovery Liaisons

The U.S. Seventh Circuit Court of Appeals has been conducting an Electronic Discovery Pilot Program,²⁶⁸ and one of its recommendations, the use of e-discovery liaisons,²⁶⁹ is a promising discovery reform. This is particularly so given that traditional concerns about discovery—burdens, costs, difficulties of compliance, and gaming opportunities—are magnified in the e-discovery context.²⁷⁰ In 2009, the Seventh Circuit appointed a committee to study e-discovery.²⁷¹ “The pilot program was designed to develop and test principles aimed at decreasing the expense, burden, and time of e-discovery in modern litigation.”²⁷²

²⁶⁵ The possibility of cost-shifting reforms in discovery is discussed above. See *supra* notes 229-242 and accompanying text.

²⁶⁶ Kessler, *supra* note 11, at 1221-23, 1253-54 & n.373, 1270-71.

²⁶⁷ For an argument in favor of moving further toward an inquisitorial system, particularly with regard to discovery, see Kessler, *supra* note 11, at 1260, 1270-73.

²⁶⁸ The Seventh Circuit has established a website for the program at www.discoverypilot.com.

²⁶⁹ See Marc Gottridge et al., *Practical Principles for E-Discovery in the 21st Century: Phase One Results of the Seventh Circuit's Electronic Discovery Pilot Program*, 78 U.S.L.W. 2679, 2680 (May 18, 2010).

²⁷⁰ See ACTL/IAALS, FINAL REPORT, *supra* note 11, at 2; Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790-91 (2010).

²⁷¹ See SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE MAY 20, 2009—MAY 1, 2010 at 1 (2010), <http://www.discoverypilot.com/sites/default/files/phase1report.pdf>.

²⁷² Gottridge, *supra* note 269, at 2679.

The Seventh Circuit program required each party to appoint its own e-discovery liaison.²⁷³ The liaison could be “an attorney (in-house or outside counsel), a third party consultant, or an employee of the party”²⁷⁴ or, actually, anyone else. What was critical was not the liaison’s identity but the liaison’s competence and authority. As envisioned in the Seventh Circuit project, “an e-discovery liaison must”:

- (a) be prepared to participate in e-discovery dispute resolution;
- (b) be knowledgeable about the party’s e-discovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party’s electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.²⁷⁵

Thus, for example, a large corporation, which might have sufficient internal information technology knowledge, could appoint an information technology staff member as the liaison to work with counsel.²⁷⁶

The idea for e-discovery liaisons holds promise because the Seventh Circuit’s initial evaluation of this reform indicates that both judges and practitioners considered it to be very helpful.²⁷⁷ These positive findings continued through the pilot program’s most recent report, which covered the period through May 2013.²⁷⁸ Importantly, there is abundant opportunity to tailor this reform to address policy concerns. Concerns about the additional costs that e-discovery liaisons would impose could be addressed by making the naming of liaisons optional rather than mandatory; or clarifying that e-discovery liaisons are mandatory only for certain cases, such as large cases meeting a high damages threshold; or creating a presumption that small cases are exempt from any liaison mandate.

²⁷³ SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE MAY 20, 2009—MAY 1, 2010, *supra* note 271, at 5.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 12-13.

²⁷⁶ Gottridge, *supra* note 269, at 2682.

²⁷⁷ *Id.* at 2681.

²⁷⁸ See SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: INTERIM REPORT ON PHASE THREE MAY 2012—MAY 2013 at 1 (2013), http://www.discoverypilot.com/sites/default/files/phase_three_interim_report.pdf.

Particularly if e-discovery liaisons were made mandatory, even if only for certain categories of cases, adoption of this reform could become sufficiently widespread as to contribute to the continued creation of an entire new industry, essentially an industry of independent “e-discovery experts” with specialized knowledge in the law (to competently advise and consult on the procedural and legal aspect of e-discovery issues or disputes) and technology (to competently advise and consult on technological e-discovery issues). Market forces could be harnessed to respond to this need, which could lead to new specializations for attorneys who combine legal knowledge with technical expertise, or to new firms that employ attorneys and information technology specialists, all of whom work in tandem to provide e-discovery services.

3. Discovery ADR

Another possible discovery reform that could also lead to the creation of a new industry, or the significant expansion of an existing one, is to use alternative dispute resolution (ADR) mechanisms, probably either arbitration or mediation, to help resolve discovery disputes.²⁷⁹ ADR has flourished in large measure due to its promise to reduce the costs and delays that exist in litigation. Attempts could be made to extend that promise by using ADR to reduce the costs and delays that can occur during discovery.

An advantage of this approach, especially if it leverages existing court-connected ADR opportunities,²⁸⁰ is that it could likely be implemented at a lower cost than embracing a new, expanded role for federal magistrates (an option discussed above²⁸¹). If nothing else, reduced overhead costs might be expected, as ADR efforts could occur in existing free space in courthouses or in existing space at the firms of either party counsel or ADR professionals. Lower costs might also be expected because this effort could benefit from an existing labor force, as many courts already use court-connected ADR and have a plentiful supply of lawyers and non-attorney ADR professionals to do it. Some additional costs would likely be incurred in providing new and relevant training so that these ADR efforts would be effective in addressing discovery concerns, but likely these costs

²⁷⁹ See Cohen, *supra* note 264 (recounting that panels of e-discovery special masters are available to act as discovery mediators).

²⁸⁰ See Kessler, *supra* note 11, at 1191 & n.43.

²⁸¹ See *infra* notes 259-267 and accompanying text.

would pale in comparison to the costs that would be incurred in moving farther along toward an inquisitorial system through, for example, an increase in the ranks of federal magistrates.

4. Private FOIA Rights

Freedom of information (FOI) rights in public information, which allow private parties to demand access to information that the government holds, are a common legal feature of many government systems.²⁸² FOI regimes have been rapidly expanding, with a 2006 review reporting that 66 countries had passed some form of FOI legislation.²⁸³ Though often such regimes are weak and inadequate, with even the best often being criticized as ineffectual, they do raise an interesting question about informational transparency: are there any circumstances in which the interests promoted by governmental transparency are sufficiently similar to those promoted by private transparency that similar transparency regimes can be justified in both realms?

Informational transparency advocates have argued that FOI rights should extend beyond the government, to all entities that receive public funding, including nonprofit organizations, private companies, contractors, and foundations, as well as to any entity that carries out a function of public interest, such as private hospitals, schools, and prisons.²⁸⁴ Indeed, numerous examples exist of nations deciding that FOI rights should be extended against at least some private entities. Denmark's FOI laws apply mostly to public bodies, but a unique clause extends coverage to private energy suppliers.²⁸⁵ The Dominican Republic's law on access to information allows the public to seek information from both governmental and private organizations that receive public money.²⁸⁶ In Estonia, FOI laws cover all "holders of information," including various species of the private sector that carry out public

²⁸² See Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 246.

²⁸³ John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 85 (2006); see also Lydia Polgreen, *Right-to-Know Law Gives India's Poor a Lever*, N.Y. TIMES, June 28, 2010, at A1.

²⁸⁴ See Ackerman & Sandoval-Ballesteros, *supra* note 283, at 99; see also Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 215 (2006) ("FOI is a subject that will have to be addressed to global corporations because of their power to act like governments and to dominate national governments and regional governance.").

²⁸⁵ The Danish Access to Public Administrations Files Act (Act No. 572, 19 Dec. 1985), available at <http://www.legislationline.org/documents/action/popup/id/6833>.

²⁸⁶ Ley No. 200-04, *Ley General de Libre Acceso a la Información Pública* (2006) (D.R.), available at <http://digeig.gob.do/j/images/docs/Ley20004.pdf> (last visited Mar. 24, 2015).

duties such as in health care and education.²⁸⁷ Finland's FOI laws were amended in 1999 to extend the transparency principle to corporations that perform public duties, including pension funds.²⁸⁸ The United Kingdom's FOI laws extend discretionary coverage to private organizations when those businesses are performing "functions of a public nature."²⁸⁹

An even broader regime exists in South Africa, where FOI rights are actually enshrined in the constitution and can extend to private entities regardless of whether they receive public funds or perform public functions. "South African FOI law stands out in its blanket application to all 'bodies' in both the public and private sectors."²⁹⁰ The South African Constitution includes a Bill of Rights, of which section 32 states:

Access to Information

- (1) Everyone has the right of access to
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.²⁹¹

This approach is designed to promote the public interest through protection of citizens' rights, not only from dangers emanating from governmental secrecy,²⁹² but also from private interests as well.²⁹³ Coverage is not dependent upon receipt of public funds or performance of public functions. Rather, the underlying philosophy

²⁸⁷ Public Information Act of 2000 (Est.), available at <http://www.legislationline.org/en/topics/country/33/topic/3>.

²⁸⁸ Act on the Openness of Government (Act No. 621/1999) (Fin.), available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990621.pdf> (last visited Feb. 17, 2015).

²⁸⁹ Freedom of Information Act, 2000, c. 36 § 5(1)(a) (U.K.), available at http://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga_20000036_en.pdf.

²⁹⁰ Ackerman & Sandoval-Ballesteros, *supra* note 283, at 111 (citation omitted).

²⁹¹ S. AFR. CONST. 1996, ch. 2, § 32, available at <http://www.justice.gov.za/legislation/acts/1996-108.pdf> (last visited Feb. 17, 2015).

²⁹² See Birkinshaw, *supra* note 284, at 213 (explaining that FOI as a fundamental human right "is based upon protect[ing] . . . individuals against one-sided, deceitful, inefficient, oppressive, arbitrary, cowardly, and bullying government," while noting that South Africa bases its FOI approach upon constitutionalism); see also Ackerman & Sandoval-Ballesteros, *supra* note 283, at 118 (recounting that United States FOI Act was implemented in part to empower Congress against the secretive executive branch).

²⁹³ See Ackerman & Sandoval-Ballesteros, *supra* note 283, at 100 (opining that clause (1)(b) of the South African FOI constitutional provision "is the most important, since it requires private corporations and nonprofit organizations to follow transparency laws as well.").

is that any privately-held information belongs to the public so long as it has a “demonstrable and sufficient connection to the exercise or protection of any rights.”²⁹⁴ The burden lies on the information holder, even when a private entity, to establish why it is justified in non-disclosure.²⁹⁵

In 2000, South Africa implemented the legislation called for in clause 2, making South Africa’s constitutional right of access to information enforceable through the Promotion of Access to Information Act (PAIA).²⁹⁶ Consistent with clause (1)(b)’s broad mandate of private transparency, the PAIA “provides an individual right of access to information in private hands, where that information relates to the exercise or protection of rights . . . [and] permits the state to exercise the right of access to information in private hands.”²⁹⁷ This extension of FOI rights against private entities can be justified on the basis that private companies can abuse both power and individual rights in the same way as a corrupt government can.²⁹⁸

In contrast to the regimes discussed above, the United States’ approach to its FOI regime is quite crabbed. In the United States, FOI laws apply only against governmental agencies, and do not even include public bodies such as “Congress, the courts, or the White House Chief Counsel”; “private bodies and contractors that receive public monies”; or entities that perform public functions like prison management or overseeing prison conditions.²⁹⁹ These omissions are increasingly controversial given the particularly American trend toward privatization, in which the federal government delegates public tasks to private corporations, nonprofit organizations, independent contractors, and quasi-governmental entities.³⁰⁰ Other important limiting factors include that obtaining information in the United States under its FOI

²⁹⁴ Birkinshaw, *supra* note 284, at 215-16 (quoting IAIN CURRIE & JONATHAN KLAAREN, *THE PROMOTION OF ACCESS TO INFORMATION ACT COMMENTARY* 19 (2002)).

²⁹⁵ *Id.*

²⁹⁶ Promotion of Access to Information Act 2 of 2000 (S. Afr.) (2000); *see also* Phoebe Bolton, *The Public Procurement System in South Africa: Main Characteristics*, 37 PUB. CONT. L.J. 781, 784 (2008).

²⁹⁷ Birkinshaw, *supra* note 284, at 215.

²⁹⁸ *See id.*

²⁹⁹ Ackerman & Sandoval-Ballesteros, *supra* note 283, at 100, 110; *see, e.g.*, *Abbott v. Trog*, No. 2:09CV00015, 2010 WL 199909, *8 (E.D. Mo. Jan. 14, 2010) (denying records pertaining to bunk and cell assignments at a county jail because defendants were not federal agencies subject to FOIA); *Goddard v. Whitmer*, No. 09-CV-404-JMH, 2010 WL 116744, at *2 (E.D. Ky. Jan. 6 2010) (rejecting document request seeking allegations of judicial bias because federal courts are not subject to FOIA); *Tyree v. Hope Village, Inc.*, 677 F. Supp. 2d 109, 110 (D.D.C. 2009) (explaining that a privately run half-way house is “not an agency subject to . . . the FOIA”).

³⁰⁰ *See* Ackerman & Sandoval-Ballesteros, *supra* note 283, at 123.

laws is often expensive, and in addition the processing time can be lengthy, in part because United States law sets no firm time limits for responses.³⁰¹

CONCLUSION

In *Twombly* and *Iqbal*, bare Supreme Court majorities unwisely adopted plausibility pleading—thereby revolutionizing pleading doctrine—as a response to perceived discovery problems. That choice was regrettable. It was inadvisable, incomplete, and imprudent, improperly aggrandizing judicial power at the cost of the well-established Rules Enabling Act rulemaking process, which provides the preferable method for revising the Rules in general and pleading and discovery rules in particular.

Recently, and post-*Twombly* and *Iqbal*, the Advisory Committee has invoked the Rules Enabling Act process to reform discovery. It has chosen a strategy of generally limiting discovery. This choice is particularly unfortunate because, in response to plausibility pleading, what is needed is an expansion in the range of discovery options so as to promote better-tailored discovery. More discovery options can lead to less discovery in the aggregate by providing more tools for customizing discovery to the needs of a given case, and in that way respond to the discovery concerns that troubled the *Twombly* and *Iqbal* majorities. Reforming discovery in this way is consistent with the views of those procedural reformers who succeeded in implementing the Rules. Those reformers wanted flexibility in transsubstantive rules so as to “make it possible to tailor procedures to the requirements of each case in a ‘rational’ way,”³⁰² and presumed that the Rules would be “continually changed and improved.”³⁰³ A noble goal motivated these reformers: to maximize the rate at which cases were resolved in accordance with their underlying merit, rather than for other technical reasons. Plausibility pleading strikes at the heart of that goal. It would be shameful if plausibility pleading were allowed to subvert this goal for no other reason than a lack of imagination.

³⁰¹ *Id.* at 107 & n.109-10. The United States FOIA provides a 20-day period for a covered agency to decide how to respond to the request. 5 U.S.C. § 552(a)(6)(A) (2012). However, no firm timeline exists for production of the requested information, which need only be provided “promptly.” 5 U.S.C. § 552(a)(6)(C)(i) (2012).

³⁰² Bone, *Mapping Dispute Boundaries*, *supra* note 63, at 79; *see also* Subrin, *Adjusting “One Size Fits All,” supra* note 56, at 394.

³⁰³ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 304 (1938).

This article has attempted to show that discovery reforms offer a better response to any discovery problems that animated *Twombly* and *Iqbal* than does plausibility pleading, and to show that the range of such discovery reforms is limited only by our imagination. If discovery abuse is the problem—certainly a valid concern if it exists—then reforming discovery is a much more appropriate response than imposing an entirely novel pleading doctrine through judicial edict.³⁰⁴

APPENDIX

Below are numerous state models that could be plumbed for ideas about how to reform discovery in the federal district courts.

STATE DISCOVERY MODELS

I. ALABAMA

Alabama Rule of Civil Procedure 27, which is partly modeled on Rule 27,³⁰⁵ is entitled “Discovery Before Action or Pending Appeal” and authorizes the filing in state court of verified petitions seeking depositions, discovery of documents and things, or physical and mental examinations of persons,³⁰⁶ so long as the purpose is to perpetuate testimony.³⁰⁷ Alabama Rule 27 mandates that such petitions must show (1) an inability to bring a cognizable action; (2) “the subject matter of the expected action and the petitioner’s interest” in it; (3) the facts the petitioner wishes to establish, and why; (4) names or descriptions, as well as known addresses, of expected adverse parties; and (5) names and addresses of “persons to be examined” and the substance of their expected testimony.³⁰⁸

II. CONNECTICUT

Similar to Alabama’s approach, Connecticut state law authorizes the filing of a verified petition seeking pre-litigation

³⁰⁴ See Steinman, *supra* note 244, at 1312-13 (agreeing that, if plausibility pleading is implemented as a new, heightened pleading standard, discovery reform would have been a better alternative route).

³⁰⁵ *Ex Parte* Anderson, 644 So. 2d 961, 963 (Ala. 1994), *overruled by Ex parte* Ferrari, Nos. 1130679 & 1130726, 2015 WL 480890, *17-18 (Ala. Feb. 6, 2015).

³⁰⁶ ALA. R. CIV. P. 27, 34, 35.

³⁰⁷ *Ex parte* Ferrari, 2015 WL 480890, at *9-18.

³⁰⁸ ALA. R. CIV. P. 27; see Dodson, *New Discovery*, *supra* note 10, at 77.

discovery,³⁰⁹ though the particulars differ. The Connecticut statute appears to presumptively limit such discovery to written interrogatories (unavailable in Alabama)³¹⁰ or oral depositions, each solely to perpetuate testimony.³¹¹ The Connecticut statute empowers Connecticut courts to “make orders for the production of documents and things and the entry upon land for inspection and other purposes, and for the physical or mental examination of persons.”³¹² In Connecticut, such discovery is available through a “bill of discovery,” which is an independent equitable discovery action.³¹³ A “petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought,” and that there is “no other adequate means of enforcing discovery of the desired material.”³¹⁴ To avoid unwarranted intrusions, discovery is limited to facts “material to the plaintiff’s cause of action,” and petitioner must “demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action” and provide as much detail about the material sought as is “reasonably available.”³¹⁵ The probable cause standard can require presentation of evidence.³¹⁶ Use of the probable cause standard is interesting because, if carried over into the federal civil litigation context, it provides a conceptual safeguard against abusive discovery while benefiting from extensive federal court experience with probable cause in the Fourth Amendment context.³¹⁷

III. FLORIDA

“Florida courts . . . recognize a prospective party’s right to bring an equitable bill of discovery . . . to determine the proper party to sue or to gather additional factual information.”³¹⁸ This authority emanates from Florida Rule of Civil Procedure 1.290, which is entitled “Depositions Before Action or Pending

³⁰⁹ CONN. GEN. STAT. § 52-156(a).

³¹⁰ *Ex parte Ferrari*, 2015 WL 480890, at *8-9.

³¹¹ CONN. GEN. STAT. §§ 52-156(a)(1), (3).

³¹² *Id.* § 52-156(a)(3).

³¹³ *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994); Dodson, *New Discovery*, *supra* note 10, at 77-78.

³¹⁴ *Berger*, 644 A.2d at 337 (citation omitted).

³¹⁵ *Id.* (citations omitted).

³¹⁶ *See Cadle Co. v. Drubner*, 777 A.2d 1286, 1288-89 (Conn. App. Ct. 2001).

³¹⁷ *Cf. Clermont & Yeazell*, *supra* note 7, at 855-56 (proposing discovery gatekeeping mechanism by drawing analogy to search warrant issued on probable cause).

³¹⁸ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 239.

Appeal.”³¹⁹ Rule 1.290 is “patterned closely after Federal Rule 27.”³²⁰ The drafters of Rule 1.290 indicated that it

is intended only for the perpetuation of testimony; it is not a discovery procedure. It is not to be used for the purpose of discovery before action is commenced. A party may not “fish” for some ground for bringing suit. The requirement that the petitioner be presently unable to bring his action or cause it to be brought does not encompass the situation of a petitioner who has a matured claim but lacks knowledge of all the facts.³²¹

The procedure is commenced by filing a verified petition, which must address the same five factors as required in Alabama Rule 27.³²²

The leading Florida Supreme Court case explains that an equitable bill of discovery under state law “lies to obtain the disclosure of facts within the defendant’s knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court.”³²³

By statute, Florida also has a mandatory “complex presuit investigation procedure” for medical malpractice cases,³²⁴ as a result of “the insistence of the defense bar.”³²⁵ The statutes, contained in chapter 766,³²⁶ require adverse parties facing potential litigation to cooperate in “informal discovery,”³²⁷ “under penalty of sanctions.”³²⁸ Such informal discovery can be quite extensive, including unsworn statements, documents or things, physical and mental examinations, and written questions.³²⁹

³¹⁹ FLA. R. CIV. P. 1.290.

³²⁰ FLA. R. CIV. P. 1.290, authors’ comment 1967. For more on Federal Rule 27, see *supra* notes 200-205 and accompanying text.

³²¹ FLA. R. CIV. P. 1.290, authors’ comment 1967; see also Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 239 (“Florida courts have rarely exercised the full scope of such authority, however, finding that the equitable bill may not be used to investigate potential claims, only to gather information in support of claims already known to the prospective plaintiff.”).

³²² FLA. R. CIV. P. 1.290(a)(1); cf. *supra* text accompanying note 308 (listing five factors required under Alabama Rule 27).

³²³ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 239 (quoting *First Nat’l Bank of Miami v. Dade-Broward Co.*, 171 So. 510, 510-11 (Fla. 1937)).

³²⁴ FLA. STAT. § 766.203 (2014); *Florida Hosp. Waterman v. Stoll*, 855 So. 2d 271, 276 (Fla. Dist. Ct. App. 2003). See generally *Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 948-51 (Fla. 1999); *Kukral v. Mekras*, 679 So. 2d 278, 280-81 (Fla. 1996).

³²⁵ Dodson, *New Discovery*, *supra* note 10, at 75.

³²⁶ FLA. STAT. §§ 766.104(1), (3), 766.106(3), (5)-(7), 766.204-.205.

³²⁷ *Id.* § 766.104(1).

³²⁸ Dodson, *New Discovery*, *supra* note 10, at 75.

³²⁹ FLA. STAT. § 766.106(6) (2014).

IV. ILLINOIS

Illinois authorizes an independent pre-litigation discovery action to identify proper defendants.³³⁰ Such discovery is available through the filing of a verified petition, and only upon leave of the court.³³¹ The rule's text requires that the petition explain "the reason the proposed discovery is necessary" and "the nature of the discovery sought."³³² One intermediate appellate court has ruled that "the petition must be verified"; "state [] with particularity facts . . . establish[ing] a cause of action"; "seek [] only the identity of the potential defendant and no other information necessary to establish the cause of action"; and be "subjected to a hearing" so the court can determine that the petition "sufficiently states a cause of action . . . against the unnamed potential defendant."³³³ The discovery available includes depositions.³³⁴

V. NEW YORK

New York provides for pre-litigation discovery "to aid in bringing an action, to preserve information or to aid in arbitration . . . but only by court order."³³⁵ Before obtaining such an order, New York courts have required petitioners to "demonstrate that [they] already possess [] a cause of action."³³⁶ Petitioners must also show that "the information sought is material and necessary to the actionable wrong."³³⁷ These restrictions are used to limit access to this pre-litigation discovery device.

[T]he courts in New York have interpreted the language in the state rule narrowly to preclude prospective plaintiffs from using presuit discovery to "fish" around to see if they have a legal claim to assert. Thus, even though section 3102 could be read even more expansively, the courts have attempted to limit the rule so that it may not be used to investigate whether a cause of action exists, to confirm the proper party

³³⁰ ILL. S. CT. R. 224(a)(1)(i) (providing that independent discovery action is available "for the sole purpose of ascertaining the identity of one who may be responsible in damages"). Discovery under this rule is unavailable where "the identity of any potential defendant is already known." *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666, 673 (Ill. App. 2010).

³³¹ ILL. SUP. CT. R. 224(a)(1)(ii) & committee comments Aug. 1, 1989.

³³² *Id.* 224(a)(1)(ii).

³³³ *Maxon*, 929 N.E.2d at 673.

³³⁴ See ILL. S. CT. R. 224(a)(1)(ii).

³³⁵ N.Y. C.P.L.R. § 3102(c) (McKinney 2011).

³³⁶ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 238.

³³⁷ *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 707 N.Y.S.2d 159, 161 (App. Div. 2000).

to sue, or to supplement factual allegations regarding a claim already known to exist.³³⁸

New York courts thus guard against § 3102 being used to pursue a fishing expedition to determine if a case exists.³³⁹ Instead, it can only be used “to preserve evidence” for a claim already known to exist, or “to identify potential defendants.”³⁴⁰

VI. OHIO

Under Ohio Civil Procedure Rule 34(d)(1), “a person who claims to have a potential cause of action may file a petition to obtain discovery.”³⁴¹ Commentary to Rule 34(d) indicates that it was intended to provide an opportunity “to determine the identity of a potential adverse party,” to “provide [] a mechanism for a party who may have a cause of action to ascertain the identity of potential defendants” prior to filing suit.³⁴² The intent was to “promote [] efficiency, avoid [] the joining of unnecessary defendants, and reduce [] the time and expense of identifying those parties who may ultimately be liable for damages.”³⁴³

Before resorting to such a petition, the party seeking information “shall make reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought.”³⁴⁴ If that effort is unavailing, the information can be pursued through a petition filed with the court, which “shall include all of the following”:

- (a) A statement of the subject matter of the petitioner’s potential cause of action and the petitioner’s interest in the potential cause of action;
- (b) A statement of the efforts made by the petitioner to obtain voluntarily the information from the person from whom the discovery is sought;
- (c) A statement or description of the information sought to be discovered with reasonable particularity;
- (d) The names and addresses, if known, of any person the petitioner expects will be an adverse party in the potential action;

³³⁸ Hoffman, *Presuit Investigatory Discovery*, *supra* note 195, at 237-38.

³³⁹ *Holzman*, 707 N.Y.S.2d at 160-61.

³⁴⁰ *Id.* at 160.

³⁴¹ OHIO R. CIV. P. 34(d)(1); *see also* Dodson, *New Discovery*, *supra* note 10, at 77 n.139, 78 & n.146.

³⁴² OHIO R. CIV. P. 34(d), staff notes 1993.

³⁴³ *Id.*

³⁴⁴ OHIO R. CIV. P. 34(d)(1).

(e) A request that the court issue an order authorizing the petitioner to obtain the discovery.³⁴⁵

The court “shall” grant the petition if (1) “discovery is necessary to ascertain the identity of a potential adverse party”; (2) the “petitioner is otherwise unable to bring the contemplated action”; or (3) the “petitioner made reasonable efforts to” voluntarily obtain the information.³⁴⁶

Ohio Rule 34 allows a petitioner to obtain pre-litigation discovery of facts that are necessary to determine if a valid cause of action exists against a known adverse party.³⁴⁷ Thus, Ohio courts give Ohio Rule 34 a more generous interpretation than, for example, New York courts do to C.P.L.R. § 3102.³⁴⁸

VII. PENNSYLVANIA

As Professor Dodson has noted, Pennsylvania Rule of Civil Procedure 4003.8(a) allows pre-litigation discovery “when the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.”³⁴⁹ This is a relatively new provision, having been implemented only in 2007.³⁵⁰ There remains a dearth of authority on exactly how the procedure is implemented and what discovery it grants to plaintiffs. Under preexisting Pennsylvania law, plaintiffs have been allowed to initiate pre-complaint discovery by filing a writ of summons.³⁵¹ Available discovery clearly includes oral depositions and written interrogatories,³⁵² though it is unclear if it includes document production.³⁵³ When requesting pre-complaint discovery, plaintiffs must satisfy an elevated probable cause

³⁴⁵ *Id.*

³⁴⁶ OHIO R. CIV. P. 34(d)(3).

³⁴⁷ *Benner v. Walker Ambulance Co.*, 692 N.E.2d 1053, 1055 (Ohio Ct. App. 1997).

³⁴⁸ *See supra* notes 335-340 and accompanying text for relevant restrictions applicable to § 3102.

³⁴⁹ Dodson, *New Discovery*, *supra* note 10, at 76 (quoting PA. R. CIV. P. 4003.8(a)).

³⁵⁰ PA. R. CIV. P. 4003.8. Previously, Pennsylvania law had authorized some pre-complaint discovery, though not through an independent equitable action. *See McNeil v. Jordan*, 894 A.2d 1260, 1268-79 & n.19 (Pa. 2006); *Cole v. Wells*, 177 A.2d 77, 80 (Pa. 1962).

³⁵¹ *See* PA. R. CIV. P. 4007.1(c); *McNeil*, 894 A.2d at 1278 n.24.

³⁵² *See* PA. R. CIV. P. 4001(c), (d), 4005(a), 4007.1(c).

³⁵³ An argument is available that the full panoply of discovery devices that exist under the Pennsylvania Rules should extend to pre-litigation discovery because there is nothing in those Rules explicitly to the contrary. *See* PA. R. CIV. P. 4001(c), (d). On the other hand, the Pennsylvania Rules applicable to oral depositions and written interrogatories explicitly mention pre-litigation discovery, which implies that they are the only discovery devices available prior to filing a complaint.

standard.³⁵⁴ Once a plaintiff satisfies its burden, the responding party may object, in which case the court is authorized to “require the plaintiff to state with particularity how the discovery will materially advance the preparation of the complaint.”³⁵⁵

VIII. TEXAS

The Texas provision for presuit discovery is discussed above.³⁵⁶

³⁵⁴ *McNeil*, 894 A.2d at 1278. Although *McNeil* pre-dates Rule 4003.8, the Rule’s official commentary points out that 4003.8 is a codification of the *McNeil* holding. Although Rule 4003.8’s text omits *McNeil*’s probable cause requirement, it has been imposed through judicial decision. See *Cooper v. Frankford Health Care Sys.*, 960 A.2d 134, 140, 142-43 (Pa. Super. Ct. 2008).

³⁵⁵ PA. R. CIV. P. 4003.8(b).

³⁵⁶ See *supra* notes 210-221 and accompanying text.