

Responding to *Twombly* and *Iqbal*: Where Do We Go from Here?

Edward A. Hartnett*

As reflected in the title of their article, *Inventing Tests, Destabilizing Systems*, Professors Clermont and Yeazell contend that the Supreme Court in *Twombly* and *Iqbal* invented a “new and foggy test” for judging the sufficiency of a complaint and “have destabilized the entire system of litigation.”¹ As they see it, the Court’s approach is “thoroughly new,”² and the Court “effectively creat[ed] a civil procedure hitherto foreign to our fundamental procedural principles.”³

Elsewhere, I have offered a more-optimistic take on these cases, emphasizing the connections these decisions have with prior law and suggesting ways in which they can be tamed. As I see it, (1) the plausibility standard that Professors Clermont and Yeazell find unprecedented can be understood as equivalent to the traditional insistence that a factual inference be reasonable, (2) the *Twombly* and

* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. I thank Kevin Clermont for suggesting that the Iowa Law Review invite me to write this essay. I also thank him, as well as Stephen Burbank and Charles Sullivan, for their comments.

¹ Kevin Clermont & Stephen Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 2.).

² *Id.* (manuscript at 14.).

³ *Id.* (manuscript at 17.).

Iqbal framework can be treated as an invitation to present information and argument designed to dislodge a judge's baseline assumptions about what is natural, and (3) discovery can proceed during the pendency of a motion to dismiss.⁵ Rather than rehash those arguments here, I instead take up Professors Clermont and Yeazell's challenging question, "Where Do We Go from Here?"⁶ and address several of the proposals made to respond to *Twombly* and *Iqbal* by statute or rule amendment. I also offer my own proposal, confessing at that outset that it is not based on the sort of empirical data Professors Clermont and Yeazell seek, although it does hold the promise of producing some useful data for subsequent reform.

Most proposals are designed to tell courts what they may not do, providing little or no guidance about what they should do. One set of proposals seeks to restore the regime of *Conley v. Gibson*, either by citing that case by name, or by reciting its standard. A variant of this theme is to temporarily reset the law to its state on the day before *Twombly*. The thrust of such proposals is that the Court overruled *Conley*, and now Congress will overrule the overruling. For example, the proposed Notice Pleading Restoration Act of 2009 provides:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal

⁵ Edward A. Hartnett, *Taming Twombly – Even After Iqbal*, 158 U. PA. L. REV. 473 (2010). See Clermont and Yeazell, *supra* note 1 (manuscript at 24 n.68) (describing my approach as "plausible" (so to speak), even if "optimistic").

⁶ Clermont & Yeazell, *supra* note __1 (manuscript at 42.).

court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).⁷

Similarly, the proposed Open Access to Courts Act of 2009 provides: “A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.”⁸

Such *Conley*-restoration proposals run the risk of not achieving the goal their supporters have in mind. My point is not that the Supreme Court might simply defy legitimate congressional authority, but rather that, contrary to the implicit assumptions that appear to underlie these proposals, the Supreme Court in *Twombly* did not purport to overrule *Conley*. If it had done so, then the Court might be expected to respect the congressional overruling of the Court’s overruling, thus restoring the *Conley* regime. True, the Court noted that “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough,” and “puzzl[ed] the profession” for long enough to have “earned its retirement.”⁹ But the Court also explained its *understanding* of that language from *Conley*:

The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley*, then, described the breadth of

⁷ S. 1504, 111th Cong. (2009).

⁸ H.R. 4115, 111th Cong. (2009).

⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007).

opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.¹⁰

Bringing the “no set of facts” language back from retirement would not prevent the Court from adhering to its own understanding of that very language. If forced to “remember” rather than “forget” the “no set of facts” language, the Court could simply repeat:

The phrase is best *remembered* as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. The phrase, then, describes the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

If this be thought too brazen, the Court would still be left with providing *some* interpretation of the “no set of facts” language from Conley—language that it has already stated “a good many judges and commentators have balked at taking . . . literal[ly] as a pleading standard.”¹¹ It is likely to similarly balk, and join those judges and commentators who “explained [it] away.”¹² Indeed, it is virtually certain not to take the phrase literally, for as one of the commentators whom the Court

¹⁰ *Id.* at 563 (citations omitted).

¹¹ *Id.* at 562.

¹² *Id.*

cited observed, “Literal compliance . . . could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment.”¹³

And until the Supreme Court decided to address the question, what would lower federal courts do? Would they take the *Conley* standard literally? Adopt the Supreme Court’s prior understanding of that language? Adhere to the old ways in which it had been explained away? Come up with new ways to explain it away?

Professor Stephen Burbank does not seek a permanent restoration of *Conley*. Instead, he is particularly concerned about what he sees as process deficiencies in *Twombly* and *Iqbal*, and proposes an emergency-stopgap measure to temporarily reset the law to its state on the day before *Twombly*, “pending thorough study by appropriate institutions through processes that are open and inclusive.”¹⁴ His proposal provides:

Except as expressly provided by an Act of Congress enacted heretofore or hereafter or by a Federal Rule of Civil Procedure effective hereafter, the law governing (a) dismissal or striking of all or any part of a pleading containing a claim or defense for failure to state a claim, indefiniteness, or insufficiency and (b) judgment on the pleadings,

¹³ Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998). The Court in *Twombly* quoted from the same paragraph as the sentence in the text. *Twombly*, 550 U.S. at 562.

¹⁴ “*Has the Supreme Court Limited Americans’ Access to Court?*”: *Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 22 (2009) (Prepared Statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania).

shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007.¹⁵

Under Professor Burbank's proposal, the Supreme Court is directed to decide cases in accordance with its precedent in place on May 20, 2007. But it already purported to do so in *Twombly*. Someone who believed that *Twombly* properly interpreted the Federal Rules and Supreme Court precedent on May 21, 2007—and seven Justices so believed (although one or two might have second thoughts)—may well continue to so believe. Perhaps lower courts would simply adhere to their own precedent that was in place prior to *Twombly*, but Professor Burbank does not want those courts to follow lower-court precedent that was inconsistent with pre-*Twombly* Supreme Court precedent.¹⁷ Instead, the Burbank proposal invites courts of appeals (and district courts) to act free from the stare decisis effect of prior court-of-appeals decisions, following such otherwise-binding precedent only if they conclude they are consistent with pre-*Twombly* Supreme Court precedent.¹⁸ But once again, presumably the lower courts that decided cases prior to *Twombly* thought that they were acting consistently with then-existing Supreme Court precedent. And if there are some judges who consciously acted in bad faith defiance of the law announced by their judicial superiors, why should we expect them to be

¹⁵ Burbank, *supra* note ___, at 22.

¹⁷ *Id.*

¹⁸ *Id.*

more respectful of Congressional authority? After all, the Supreme Court, not Congress, has the power to reverse their judgments.

Professor Burbank's proposal is modeled on a provision of the Civil Rights Act of 1991 that reset an aspect of the law of disparate impact to the day before the decision in *Wards Cove*.¹⁹ This provision is hardly worthy of emulation, precisely because it was unclear what pre-*Wards Cove* law required on the relevant issue.²⁰

¹⁹ See 42 U.S.C. § 2000e-2(k)(1)(C) (stating that the plaintiff's demonstration with respect to an alternative employment practice "shall be in accordance with the law as it existed on June 4, 1989," the day before *Wards Cove* was decided); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

²⁰ See BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 111 (3d ed. 1996) (describing the murky case law that was in effect prior to *Wards Cove*). As Professor Charles Sullivan has explained:

The 1991 Civil Rights Act also defined an "alternative employment practices" surrebutal for plaintiffs. Although the possibility of a plaintiff responding to an employer's proof of business necessity by adducing evidence of a less discriminatory alternative can be traced back to *Albemarle*, the 1991 amendments codified the possibility for the first time. The statute now provides that a plaintiff may prevail in a disparate impact case by identifying an alternative employment practice that the defendant refuses to adopt. The meaning of this provision is unclear. Congress did not define "alternative employment practice" but instead said the law existing immediately before the *Wards Cove* decision should define the concept. However, *Wards Cove* first introduced the term "alternative employment practice," although there are precursors in *Albemarle*'s reference to "other tests or selection devices without a similarly undesirable racial effect."

In short, I do not believe that restoration of *Conley* is the way to go from here.

Another direction that has been proposed is to either sharply reduce or completely eliminate the power of a court to rely on the conclusory nature or the plausibility of an allegation. Professors Clermont and Yeazell suggest that Rule 8 might be amended to eliminate any need for a pleading to be nonconclusory or plausible.²¹ Professor Michael Dorf, who criticized the attempt to legislatively restore *Conley*, for reasons much like those above,²² has suggested the following statute:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not deem a pleading inadequate under rule 8(a)(2) or rule 8(b)(1)(A) of the Federal Rules of Civil Procedure, on the ground that such pleading is conclusory or implausible, unless the court may take judicial notice of the implausibility of a factual allegation.²³

Similarly, Professor David Shapiro has suggested:

Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 963 (2005) (footnotes omitted).

²¹ Clermont & Yeazell, *supra* note 1 (manuscript at 50).

²² Michael C. Dorf, *Should Congress Change the Standard for Dismissing a Federal Lawsuit?*, FINDLAW, July 29, 2009, <http://writ.news.findlaw.com/dorf/20090729.html>.

²³ Posting of Michael C. Dorf to Dorf on Law, An Alternative to Senator Specter's Notice Pleading Bill, http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice_28.html (July 29, 2009, 3:13 EST).

Except as otherwise expressly provided by statute or in these rules, an allegation of fact, or of the application of law to fact, shall [must?] not be held insufficient on the grounds that it is conclusory and/or implausible, unless the rules governing judicial notice require a determination that the allegation is not credible.²⁴

These proposals might be read as attempts to reduce the plausibility analysis to the level of judicial notice; that is, to allow courts to disregard allegations as implausible, but to define as “plausible” any allegation that cannot be rejected as a matter of judicial notice. Read this way, however, such proposals are not responsive to the *Iqbal* majority’s own view of its decision. The majority in *Iqbal* denied that it was relying on a claimed power to reject allegations that judges view as “unrealistic,” “nonsensical,” “chimerical,” or “extravagantly fanciful” in either *Iqbal* or *Twombly*.²⁵

Of course, legislation designed to overrule a judicial decision can hardly be expected to be in accord with that judicial decision. But there is a difference between a disagreement about the correct answer to a question and a disagreement about what the question is. An attempt to overrule a judicial decision that adopts a different view of what the question is runs the risk of the Court and Congress speaking past each other, with the result that the statute misfires.

²⁴ Posting of David Shapiro to Civil Procedure Listserv, civ-pro@listserv.nd.edu (July 7, 2009) (on file with author).

²⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

Here, the *Iqbal* majority might respond to legislation such as that proposed by agreeing that courts generally lack the power to disregard factual allegations as implausible, reiterating:

To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "contract, combination or conspiracy to prevent competitive entry," . . . because it thought that claim too chimerical to be maintained.²⁷

Plausibility, as *Iqbal* uses the term,²⁸ is about inference from allegation to conclusion, not about the believability of factual allegations.

Alternatively, these proposals might be understood as seeking to eliminate the plausibility analysis entirely. Read this way, they are much like the proposed Open Access to Courts Act of 2009.²⁹ It plainly recognizes that plausibility is about inference from allegation to conclusion, and flatly prohibits such an approach at the pleading stage: "A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged."³⁰

²⁷ *Id.* (citing *Twombly*, 550 U.S. at 551).

²⁸ *Id.*

²⁹ So understood, the point of the reference to judicial notice is simply to avoid any implication that the statute might override otherwise-applicable principles of judicial notice.

³⁰ H.R. 4115, 111th Cong. § 2 (2009).

Should judges really be disempowered from policing inferences for reasonableness? I have previously used the example of a litigant who asserts in a pleading that one should infer from the fact that the CEOs of the two defendant corporations both have green eyes that they conspired to restrain competition.³² A more humorous example of unreasonable inferential thinking can be seen in the following dialogue from a popular movie:

Question: Would you consider Margaret a good dancer?

Answer: You can tell by the way she drinks soda pop she is a good dancer.

Question: Uh . . . , How is that? How is the soda pop relevant to dancing?

Answer: I don't understand, sir.³⁴

Lest the concern that pleaders might assert unreasonable inferences itself seem fanciful, note that Professor Herbert Hovenkamp, in his essay published in this same edition of the *Iowa Law Review Bulletin*, believes that the *Twombly* complaint itself included a “non sequitur.”³⁵

³² Hartnett, *supra* note ____, 4 (manuscript at 13 n.63__).

³⁴ THE PROPOSAL (Touchstone Pictures 2009), scene *available at* <http://www.youtube.com/watch?v=hp0XDAhOABg> (beginning at 1:098 minute marker). Part of what makes the scene so funny is that the character providing the answers finds his own inference so obvious; perhaps he has some specialized knowledge that neither the questioner nor I share and that he fails to provide.

³⁵ Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases*, 95 IOWA L. REV. BULL. (forthcoming 2010) (manuscript at 11 n.39).

Several of these proposals also seek to prohibit a court from relying on the conclusory nature of a pleading or allegation. This approach is directly responsive to the *Iqbal* opinion, which states, “It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”³⁶

But prohibiting a court from ever relying on the conclusory nature of an allegation threatens to make Rule 12(b)(6) useless as a means of testing the substantive legal adequacy of a claim. That is because the function of labeling an allegation conclusory is to disentitle that allegation to the presumption of truth; eliminating the power of a court to rely on the conclusory nature of an allegation eliminates the power of a court to refuse to give an allegation the presumption of truth. (If it does not have this effect, and a court remains able to refuse to give an allegation the presumption of truth by affixing some other label—such as “unwarranted deductions”³⁸—then the prohibition is of no real effect.) All a pleader

³⁶ *Iqbal*, 129 S. Ct. at 1951.

³⁸ See 5B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 521--44 (3d ed. 2004) (noting that courts have treated the terms “legal conclusions,” “unwarranted deductions,” “unwarranted inferences,” “unsupported conclusions,” and “sweeping legal conclusions cast in the form of factual allegations” as “more or less synonymous” terms—none of which are entitled to the presumption of truth). Note that this

need do is include an allegation asserting the conclusion that the defendant's actions violated some specified right of the plaintiff. If that conclusion must be accepted as true, a pleader can avoid a dismissal for substantive insufficiency at will.

Consider the extreme example of substantive insufficiency discussed by Professor Dorf: a claim against a neighbor for failing to invite the plaintiff to a dinner party. Suppose the plaintiff were to include the allegation, "By failing to invite me to the dinner party, defendant acted in an extreme and outrageous manner and thereby committed the tort of intentional infliction of emotional distress." If the court must give this allegation a presumption of truth, the claim cannot be dismissed. And if the court cannot rely on the conclusory nature of this allegation, on what basis can it refuse to presume its truth?

The escape hatch in some proposals for judicial notice will not work, because it is hardly an adjudicative fact that is "generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."³⁹ Nor can it be

passage from Wright, Miller, and Cooper was published in 2004, long before *Twombly* and *Iqbal*.

³⁹ FED. R. EVID. 201(b) (permitting judicial notice of adjudicative facts that are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

disregarded as an allegation regarding a pure question of law, because it isn't. It is an allegation concerning an application of law to fact—precisely the kind of allegation that Professor Shapiro explicitly proposes to protect.⁴⁰ While other proposals are less explicit in this regard, if they do not protect allegations concerning an application of law to fact, then they do not achieve what they seek to achieve—for the allegations that the Court refused to credit in *Twombly* and *Iqbal* can readily be characterized as concerning the application of law to fact.

In short, proposals that seek to sharply reduce or completely eliminate the power of a court to rely on the conclusory nature or the plausibility of an allegation seem to me to either not achieve their purpose, or to make Rule 12(b)(6) ineffective as a means of testing the substantive sufficiency of a complaint. They are not the way to go either.

Finally, Professor Art Wolf has suggested that Rule 8 be amended to remove the requirement of “showing that the pleader is entitled to relief,” and instead emphasize the notice function of pleading.⁴¹ Under this approach, Rule 8 would require “a short and plain statement giving [sufficient] notice of the claim upon which relief can be granted” or “a short and plain statement of the claim upon

⁴⁰ Shapiro, *supra* note 22.

⁴¹ See Posting of Art Wolf to Civil Procedure Listserv, civ-pro@listserv.nd.edu (Oct. 20, 2009) (on file with the author) (illustrating the changes Wolf would make to Rule 8).

which relief can be granted so that a party can [may] reasonably prepare a response.”⁴²

But compliance with the notice requirement of Rule 8, even if amended along the lines proposed, does not guarantee that a complaint cannot be dismissed under Rule 12(b)(6). As Judge Posner explained, pre-*Twombly* (and pre-*Restyling*):

[Plaintiff’s] characterization of Rule 8(a)(2) [as embodying the ‘notice pleading’ philosophy of the civil rules] is correct. All that’s required to state a claim in a complaint filed in a federal court is a short statement, in plain (that is, ordinary, nonlegalistic) English, of the legal claim. Form 9 in the forms appendix to the civil rules gives as an example, “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway”; and Rule 84 states that the forms in the forms appendix “are sufficient under the rules and are intended to indicate the simplicity and brevity of statements which the rules contemplate.” The courts keep reminding plaintiffs that they don’t have to file long complaints, don’t have to plead facts, don’t have to plead legal theories. . . .

Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss. This confuses form with substance. Rule 8(a)(2) specifies the conditions of the formal adequacy of a pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit. Suppose the complaint had alleged that the defendants had violated Illinois or federal law by failing to obtain a license to manufacture cigarettes. The complaint would comply with Rule 8(a)(2), but, assuming no such

⁴² *Id.* (stating Wolf’s alternatives for Rule 8).

license is required, it would be highly vulnerable to dismissal under Rule 12(b)(6).⁴⁴

So long as a pleader is required to state a “claim upon which relief can be granted”—and so long as a motion to dismiss for “failure to state claim upon which relief can be granted” is authorized—a court must be able to not assume the truth of some allegations in complaints, even in complaints that provide ample notice. The explicit authorization in *Twombly* and *Iqbal* to do so would remain untouched by an amendment such as that proposed by Professor Wolf.

It is not the way to go.

What, then, is the way to go?

As I see it, any response should focus on the core issue at stake in debates about *Twombly* and *Iqbal*: should a plaintiff be able to obtain discovery in an effort

⁴⁴ *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999). Notice that Judge Posner saw no need to assume the truth of the allegation that the defendants had violated Illinois or federal law by failing to obtain a license to manufacture cigarettes. Professor Stephen Burbank has explained:

[W]e can now clearly see that *Twombly*’s plausibility requirement has more to do with Federal Rule 12(b)(6) than it does with Federal Rule 8, confirming the message suggested by careful attention to the role of the language in *Conley* that the *Twombly* Court repudiated. That said, it is unfortunate that the Court . . . obscured this message in loose talk about the notice-giving function of pleadings under the Federal Rules, which has nothing to do with Federal Rule 12(b)(6) as opposed to Federal Rule 12(e).

Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009

WIS. L. REV. 535, 550–51.

to uncover evidence without which he or she cannot prevail? Accordingly, I propose the following:

Rule 12(j): Allegations Likely To Have Evidentiary Support After a Reasonable Opportunity for Discovery

If, on a motion under Rule 12(b)(6) or 12(c) that has not been deferred until trial, the claim sought to be dismissed includes an allegation specifically identified as provided in Rule 11(b)(3) as likely to have evidentiary support after a reasonable opportunity for discovery, the court must either (1) assume the truth of the allegation, or (2) decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery. In deciding whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery, the court must consider the parties' access to evidence in the absence of discovery and state on the record the reason for its decision.

If the court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery, under the standards of Rule 26, and deny the motion to dismiss. If the court decides that the allegation is not likely to have evidentiary support after a reasonable opportunity for discovery, the court must treat the motion as one for summary judgment under Rule 56, and provide all parties a reasonable opportunity to present all the material that is pertinent to the motion.

This proposal has something to offer plaintiffs, defendants, and the judicial system. From the perspective of plaintiffs who lack evidentiary support for a particular allegation, this proposal protects them from their worst fear under *Twombly* and *Iqbal*: having their claims dismissed because any possible supportive evidence is in the hands of the defendant, without a court ever directly confronting the question of whether they would likely be able to get such supportive evidence if given the opportunity for discovery. If the court assumes the truth of the allegation and nonetheless dismisses, it will not be because of the inability to access supporting evidence. If the court does not assume the truth of the allegation, it

must decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery and, if so, allow appropriate discovery. And in making this determination, the proposal specifically directs judges to consider the parties' access to evidence in the absence of discovery.⁴⁵

From the perspective of defendants, this proposal offers a means of getting reasonably prompt judicial attention to the question of whether the defendant can avoid the costs of discovery, either because the plaintiff loses even if discovery turns up what he or she seeks or because there is no reason to think that discovery will turn up what he or she seeks.

From the perspective of the judicial system, this proposal gives parties an incentive to focus their attention (and the court's) on what are likely to be the determinative issue, or issues in the case. Those allegations identified under Rule 11(b)(3) are more likely than other issues to be determinative, or at least more likely to be determinative in the pretrial context.

The provision for conversion to a summary judgment motion is designed to deal with situations where plaintiffs think they already have evidentiary support for a particular allegation, but realize that a judge might disagree. If identifying an allegation under Rule 11(b)(3) meant that a judge would simply disregard the allegation in deciding a 12(b)(6) motion when the judge thought that discovery

⁴⁵ See Clermont & Yeazell, *supra* note 1 (manuscript at 47) (suggesting a procedure that "might take into account any resource inequality or information asymmetry between the parties").

would not likely lead to supporting evidence, plaintiffs might be rather wary of making such identifications. Under this proposal, if the judge refuses to allow discovery, the result is not that the allegation is disregarded; instead, plaintiffs have an opportunity to present the evidence they do have, in an effort to convince the court that there is a triable issue even without discovery on that point. Thus, plaintiffs would have an incentive to properly identify such allegations, because they would get the protection of the new provision. They have a countervailing incentive, however, to not identify too many of their allegations this way, for that would likely make a judge rather skeptical.

By identifying an allegation under Rule 11(b)(3), a pleader also indicates that the allegation is intended as a factual allegation, not a conclusion applying the law to the facts. But it does a pleader no good to try to invoke Rule 11(b)(3) in order to masquerade a conclusion applying the law to the facts as a factual allegation, because a court can simply conclude that discovery is not likely to lead to the evidence supporting the allegation. Consider again the extreme example of substantive insufficiency discussed by Professor Dorf: a claim against a neighbor for failing to invite the plaintiff to a dinner party. Suppose the plaintiff were to include the allegation, “By failing to invite me to the dinner party, defendant acted in an extreme and outrageous manner and thereby committed the tort of intentional infliction of emotional distress. Pursuant to Rule 11(b)(3), this allegation is likely to have evidentiary support after a reasonable opportunity for discovery.” Under the proposal, a court could decide that this allegation is not likely to have evidentiary

support after a reasonable opportunity for discovery, convert the motion to one for summary judgment, and enter judgment in favor of the defendant—unless the plaintiff provided some other basis for the claim.

Some may object that under this proposal a plaintiff may not get access to discovery without convincing a judge that discovery is likely to produce evidentiary support for his or her allegations. In a legal system in which private litigation is used as a decentralized alternative to executive investigation and enforcement, and to some extent as an alternative to government welfare programs, one should certainly be careful about limiting the ability of private litigation to conduct investigations. Yet Rule 11 has long instructed plaintiffs that they should not be filing claims for which they lack evidentiary support unless discovery is likely to produce the needed evidentiary support. Those who think that private parties should be able to use litigation to launch investigations even when that investigation is unlikely to produce evidentiary support for their allegations will not like this proposal. But they already are unhappy with Rule 11. Moreover, it must be remembered that even though we place much power in the hands of private litigants to conduct discovery, at the end of the day, discovery is backed by the power of the state. Is it really so objectionable that before state power is used to compel someone to turn over their files that some government official be convinced that there is a good reason to do so? Recall that prior to 1970 document discovery

was only available by making a motion and convincing the court that there was good cause for ordering production.⁴⁶

Others might fear that any time a judge concludes that discovery is not likely to produce evidentiary support for an allegation identified under Rule 11(b)(3), counsel will be subject to sanctions for violating Rule 11.⁴⁷ But counsel should no more be sanctioned when a court disagrees with his or her assessment of the likelihood of discovery being productive than when a court disagrees with his or her assessment that “legal contentions are warranted by existing law.”⁴⁸ In both

⁴⁶ The requirement of a court order was eliminated in 1970 because courts had so readily issued such orders. *See* FED. R. CIV. P. 34 advisory committee’s note (noting that about half of the motions seeking a court order “were uncontested and in almost all instances the party seeking production ultimately prevailed”). I find that an especially dubious form of argument (whether in the context of discovery, grand-jury indictments, applications for electronic surveillance, permission to spend money, or otherwise) because it ignores that the reason for the high approval rate may be that the applicants internalize the criteria and do not ask for that which will not be approved. It tells us little about what those seeking permission will do if they no longer have to ask for permission.

⁴⁷ *See* Posting of Tobias B. Wolff, Professor, University of Pennsylvania Law School, twolff@law.upenn.edu, to civ-pro@listserv.nd.edu (June 7, 2009) (on file with the Iowa Law Review) (discussing the interaction of Rules 8(a)(2) and 11(b)(3)).

⁴⁸ FED. R. CIV. P. 11(b)(2).

instances, a court can conclude that counsel was wrong, but reasonable.⁴⁹ Sanctions are not appropriate for mere error; they are only appropriate for unreasonable error.⁵⁰

Some might object that this proposal places too much discretionary power in the hands of district judges and magistrate judges, leading to considerable variation in case outcomes. I have considerable sympathy with this concern. But our litigation

⁴⁹ It is common for courts to distinguish between being wrong and being unreasonably wrong, notably in the contexts of qualified immunity and federal habeas corpus for those in custody pursuant to a judgment of a state court. *See Williams v. Taylor*, 529 U.S. 362, 365 (2000) (emphasizing, in the context of habeas corpus, that “an *unreasonable* application of federal law is different from an incorrect application of federal law”). *See generally Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that public officials are protected by qualified immunity if their actions are consistent with a reasonable, if mistaken, view of the law). This is true even if the underlying legal standard is one of reasonableness. *Anderson v. Creighton*, 483 U.S. 635 (1987) (applying the *Harlow* standard to officials alleged to have violated the Fourth Amendment by conducting an unreasonable search and rejecting the argument that it is not possible to say that one “reasonably” acted unreasonably) .

⁵⁰ *See* FED. R. CIV. P. 11(b) (requiring certification “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances”).

system is full of such discretionary power, and far more radical changes would be necessary to uproot it. Moreover, absent radical changes to our discovery system, the choice is not between discretionary power and no discretionary power, but between discretionary power exercised by judges and discretionary power exercised by private litigants. The proposal also includes a provision designed to improve transparency, and to provide data that might be useful in establishing more-precise guidance in particular situations. Courts are instructed to state on the record the reason for their decisions. These statements could be collected by the Federal Judicial Center, much as sentencing statements are collected by the Federal Sentencing Commission, and evaluated for recurring patterns. Such evaluations could, in turn, provide a basis for rulemaking or legislation that codified a dominant approach to a recurring pattern, or adopted one of the competing approaches to a recurring pattern. It could also provide a basis for rejecting the way courts handle a recurring pattern.

So where do we go from here? While I do not claim that this proposal will lead to the promised land of procedure, I do believe that this proposal is an improvement over the current law and better than other proposed legislative and rulemaking responses to *Twombly* and *Iqbal*. Perhaps a better proposal would emerge after more data were compiled, but this one is explicitly designed to generate important additional data. Surely this proposal could be improved by the perspectives of others in the academy, on the bench, or at the bar. Nevertheless, in

deciding where we go from here, stumbling in the right direction is better than standing still or trying to go backwards.