Plausible Theory, Implausible Conclusions

A Response to William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev 693 (2016).

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INTRODUCTION

Ten years after the Court first undertook to heighten pleading requirements, fierce debate continues to rage over its decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*.[2] Part of the debate has been doctrinal. Directed to set aside conclusory allegations, and then to decide if those remaining are plausible, trial courts struggle to consistently apply these unfamiliar steps at the pleading stage. Another part of the debate is empirical. Although researchers have studied the cases in the lower courts from many different angles,[3] Professor William Hubbard joins a band of skeptics who believe that the quantitative evidence is still inconclusive and that a clear picture of the decisions' effects remains elusive.[4] Starting from this aporetic premise, Hubbard says that while we wait to see if the empirical research can ever provide illumination, we need a new approach.

A Fresh Look at Plausibility Pleading[5] is a provocative paper that constructs a theory of pleading practice. From it, Hubbard makes predictions about what we should expect the impact of the plausibility pleading regime to be. His theory, which he develops based on a model of what rational plaintiffs and defendants do, leads him to both descriptive and normative claims, both of which depart from conventional academic accounts of the Court's decisions.

While his ultimate conclusions are surprising, he begins from a straightforward and well-accepted (at least among legal scholars)

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1 550 US 544 (2007).

2 556 US 662 (2009).

3 See David Freeman Engstom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 Stan L Rev 1203, 1230-34 (2013) (summarizing the research).

4 Hubbard's skepticism of *Twombly*'s negative effects precedes this current paper. See William H. J. Hubbard, *Testing for Change in Procedural Standards, With Application to* Bell Atlantic v. Twombly, 42 J Legal Stud 35 (2013). I discuss the conjunction of Hubbard's prior empirical work with this current paper at text accompanying notes 21 - 22.

5 William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev 693 (2016).

premise. His starting point is to recognize, consistent with the prior academic literature, that because litigation is expensive, the overwhelming majority of cases that are filed are cases in which the plaintiff has at least a decent chance of winning. That is to say, because it usually does not make financial sense for lawyers to file meritless lawsuits, they usually don't. And when a strong case is brought, Hubbard points out that the plaintiff has good reasons to make factually detailed and credible allegations so that the defendant (and the court) can recognize the strength of the claims being asserted.

So far, so good, but at this point Hubbard makes an unexpected and, as I'll show, unpersuasive turn. From the fact that lawyers have powerful incentive to bring meritorious cases, and to plead those cases with enough factual detail and convincingness to communicate the case's merit, Hubbard concludes it is reasonable to expect that the vast majority of plaintiffs should be able to survive pleading dismissal challenges. That is, Hubbard's descriptive claim is that since plaintiffs are usually bringing relatively strong cases, they should be able to plead their claims with sufficient detail to show that they are plausible. That leaves little work left for *Twombly* and *Iqbal* to do and so, he concludes, it is reasonable to predict that plausibility pleading is likely having only a modest effect in practice.

If Hubbard's descriptive claim were not provocative enough, he then makes the leap from this expository account to an even more astonishing normative conclusion. For most of the paper, Hubbard takes no position about current doctrine; his primary ambition is to construct a theory of pleading practice as a means for predicting *Twombly* and *Iqbal*'s impact, not to evaluate it. In the last part of the paper, however, Hubbard argues that the Court's decisions actually aid the liberal ethos of modern procedure. How, you might ask, could *Twombly* and *Iqbal*, cases that raise the bar that plaintiffs must meet to survive dismissal, possibly aid the liberal ethos? Hubbard's argument is that by dismissing weak cases at the pleading stage, plausibility pleading saves some plaintiffs from having to throw away money litigating a case that they were destined to lose. Remember, he repeats, "litigation is expensive" so it does not make sense, from the plaintiff's perspective, to pursue a claim that will eventually be dismissed.

Put another way, Hubbard's normative take on plausibility pleading is: *no point in delaying the inevitable!* But this refuge in fatalism is an apologist's argument that, among other difficulties, fails to value the essential difference between weighing conflicting factual proof at the pleading stage and at later stages of a case. We will return to Hubbard's normative claim in Part II. But first things first: I begin with the prediction he makes about plausibility pleading's likely effects in the lower courts.

I. ESTIMATING *TWOMBLY* AND *IBQAL*'S EFFECTS

In Parts I(B) and (C), I show why Hubbard's descriptive claim is unreliable. But before addressing the difficulties with his theoretical estimate of plausibility pleading's likely effects, it is important—for two independent reasons—to consider more closely the cornerstone premise regarding lawyer screening on which his theory of pleading is built. Doing so reveals an important insight concerning the prior empirical studies that claim to have found that the Court's decisions have had no effect on the rate at which Rule 12(b)(6) motions are granted. This brief detour is also important because, as we will see, while Hubbard's starting premise about lawyer screening is fundamentally sound, from it he reaches the wrong conclusion.

A. Lawyer Screening

An abundant theoretical and empirical literature has shown that lawyers working on contingency filter the vast majority of potential claims, including most weak claims, from being filed.[6] One of the leading studies found that contingent fee lawyers in Wisconsin accepted only about one-third of prospective clients who walked through their doors.[7] A later survey of Texas lawyers reported a roughly similar acceptance rate: these attorneys took on representation at a rate of about one-third of potential client opportunities, at the high end, to less than one-fifth.[8] It is also clear that acceptance rates vary significantly by case category. For instance, in medical malpractice cases, the percentage of cases lawyers decline to take is far higher than the overall rate.[9] In one survey of medical malpractice attorneys, a majority reported that they declined 95-99%

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[6] See, for example, Herbert M. Krtizer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, Wis Law, Mar. 1997 (summarizing the available empirical evidence that contingent fee lawyers effectively screen out nonmeritorious cases); Herbert M. Krtizer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 Judicature 22 (July-Aug 1997); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 Cornell L Rev 529, 571-72 (1978); Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am U L Rev 1393, 1426 (1992); Earl Johnson, Jr., *Lawyers' Choice: A theoretical Appraisal of Litigation Investment Decisions*, 15 Law & Soc'y Rev 567, 567-68 (1981); David A. Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand L Rev 1085, 1100-04 (2006); Daniel Capra, *'An Accident And a Dream:' Problems With the Latest Attack on the Civil Justice System*, 20 Pace L Rev 339, 393 (2000) (citing Leon Pocincki, et al., *U.S. Dep't of Health, Education and Welfare, The Incidence of Iatrogenic Injuries, in Appendix: Report of the Secretary's Commission on Medical Malpractice* 50 (1973)).

[7] Kritzer, 81 Judicature 22, 22 (cited in note 6).

[8] Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex L Rev 1781 (2002).

[9] Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say*, 80 Tex L Rev 1943, 1976 (2002);

of those who sought their representation.[10] There is some evidence that plaintiff employment lawyers turn down 95% of the case opportunities they are given.[11] A more recent and narrowly focused study of personal injury lawyers found that only about 15% of those who contacted a lawyer were successful in securing representation.[12]

We also know that attorneys take multiple factors into consideration when they screen cases. The big picture inquiry is evaluating the likelihood of winning (and by "winning" lawyers broadly are thinking about the odds of obtaining any favorable outcome, whether by judgment or, more likely, by settlement). Calculating the odds of winning necessarily breaks down further into numerous, more granulated considerations, such as the accessibility and nature of evidentiary proof, the client's history and character, and any and all legal hurdles to recovery. Lawyers also consider how *much* they may win, factoring in all potential damages, along with any caps on that potential recovery. And, layered on top of these considerations, there is also the question of how much risk a lawyer is willing to take on in bringing a case, and the extent to which that risk can be spread across the lawyer's entire book of business. In sum, screening is a multi-layered process.[13]

Hubbard points out that the lawyer gatekeeping role is "well understood," but he does more than just repeat the prior understanding. Indeed, this is where Hubbard is at his best. He takes the prior account and links it to recent studies (by the Federal Judicial Center) of median case values and litigation costs.[14] By doing so, Hubbard helps quantify how strong a case likely needs to be before a lawyer will bring it. His basic economic model is straightforward: a plaintiff is willing to bring suit if the expected judgment (the amount of the judgment multiplied by the probability of actually getting that judgment) is greater than the cost of litigating. A lawyer is willing to take a case on contingency fee using a similar approach: a lawyer

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[10] Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 Vand L Rev 151, 154 (2014). Another survey of prospective claimants who consulted with at least one lawyer about bringing suit reported that only about 3% ever filed a lawsuit. LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 Ann Intern Med 792, 796 (1994).

[11] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 Yale L J 530, at n 301 (citing sources); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 Emp Legal Stud 111, 143 (2009) ("It is unlikely that employment attorneys fail to substantially screen their cases on the merits.").

[12] David A. Hyman, Bernard Black, Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U Ill L Rev 1564, 1594.

[13] James H. Stock & David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 Class Action Rep 584 (1993)).

[14] Hubbard, 83 U Chi L Rev at 704-10 (cited in note 5) (citing Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* *42 (Federal Judicial Center, Oct 2009), archived at http://perma.cc/FVU8-GNKG).

usually will not bring suit unless the expected fee (the lawyer's contingency percentage multiplied by the expected judgment) is greater than the cost of litigating the case to judgment. (Hubbard adds additional layers of refinement to his model, but the description I've given so far captures its essential features and is sufficient for present purposes.)

Into this economic model, Hubbard then plugs in the FJC's recent findings on median case values and litigation costs. Based on the survey responses of plaintiff lawyers, the median cost of discovery (in cases in which there was any discovery at all) was $15,000. Median case values were reported as $160,000. Inserting these figures into his model, Hubbard estimates that lawyers typically do not take a case unless they have at least a one-in-four chance of prevailing on the merits. While nothing in Hubbard's argument depends on a precise figure, his modeling work helpfully makes the prior theoretical and empirical findings more concrete and up to date.[15]

Hubbard's updating of the prior understanding that case screening is taking place for the vast bulk of filed cases is important for two reasons. First, his work provides an important insight into prior studies that report finding the Court's decisions to be having no effect on the dismissal rate.[16] Hubbard himself published one such prominent no-effect study.[17] But if, as Hubbard convincingly shows, lawyers screen out most meritless and very weak cases, then a change in pleading standard will have an effect in only a small number of special cases. That is, we would only see an effect (i) where attorney gatekeeping fails, (ii) the previous pleading standard would not have resulted in dismissal, and (iii) under the current standard the plaintiff is unable to stave off dismissal by pleading additional facts. In consequence, there is no realistic way that dismissal rate studies such as his would be able to see any effect from the Court's decisions by looking at all motions filed in all cases. Put another way, Hubbard (unintentionally, to be sure) demonstrates in this paper that his prior empirical research (and all similarly constructed studies of judicial behavior) was predestined to see no significant effect.

There's another important reason to have focused attention on Hubbard's starting premise. While Hubbard's updating of the prior understanding that lawyers effectively screen for merit is spot on, from this starting premise he draws the wrong conclusion. It does

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[15] Id at 710 ("If a plaintiffs' attorney will not take a case unless he has about a one-in-four chance of winning on the merits, then a complaint will not be filed unless the plaintiff has already convinced her attorney that her claim has a decent shot of winning—but this already puts the plaintiff's claim well past the threshold of plausibility.").

[16] See, for example, Joe S. Cecil et al., *Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conf. Advisory Comm. on Civil Rules* (2011).

[17] Hubbard, 42 J Legal Stud 35 (cited in note 4).

not follow, as he says it does, that the turn to plausibility pleading has been harmless. Rather, the insight that attorneys are already screening for merit at a threshold above that which *Twombly* and *Iqbal* require should have led him to the only conclusion that logically follows from this predicate: that the move to plausibility pleading was unnecessary. After all, the Court largely justified the move by insisting that the civil justice system is awash with "groundless claims,"[18] "anemic cases"[19] and cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence."[20] If lawyers are already keeping most meritless and weak cases from being filed, the Court's rationalization for imposing a more rigorous pleading filter for all cases is shattered.

Of course, a lawyer's decision to file a case does not necessarily mean it has merit. Hubbard identifies a number of circumstances that may be exceptions to the screening norm. Of these various circumstances, Hubbard singles out as the most important exception high-stakes cases in which the plaintiff's litigation costs are significantly lower than the defendant's. Here he's mostly talking about class action suits (or other complex litigation cases). As Hubbard points out, in high-stakes, weak cases a settlement not on the merits can make economic sense since the defendant may conclude it is better off by avoiding future litigation costs and buying all risk, however small, of a potentially enormous adverse judgment.

While the reality that case screening is not perfect may suggest that the move to plausibility pleading can be justified as a way to catch screening failures, two points bear keeping in mind about these exceptional cases. First, they are exceptional cases, as Hubbard rightly emphasizes.[21] This is a vital point because it cannot be squared with the Court's indefensible decision to impose more stringent pleading requirements transsubstantively.[22]

Second, in any event Hubbard's theory is unable to tell us—as he imagines it can—that plausibility pleading is likely making only a "little difference" or, at most, "effecting a subtle, rather than dramatic, change in law and practice."[23] While lawyers have plenty of incentive to only bring meritorious cases and then plead them adequately, the Court's heightened pleading standard may still be preventing them from doing so. That's the central problem to which I now turn in Parts I(B) and (C), below.

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[18] *Twombly*, 550 US at 559 (internal citation omitted).

[19] Id.

[20] Id.

[21] Hubbard, 83 U Chi L Rev at 705 (cited in note 5) (noting that "[a]t least in cases broadly representative of the bulk of federal civil litigation, . . . the only cases that will be filed will be cases in which the plaintiff pleads facts stating a plausible claim").

[22] *Iqbal*, 556 US 662, 684 ("Our decision in in *Twombly* expounded the pleading standard for 'all civil actions'").

[23] Hubbard, 83 U Chi L Rev at 698, 705 (cited in note 5).

B. Asymmetries of Information

The first critical difficulty with Hubbard's conclusion that plausibility pleading is likely having only modest effects in practice is that it assumes the facts needed to plead a claim are available. Yet the troubling problem of information asymmetries, which was raised immediately after *Twombly*,[24] remains unresolved. When the plaintiff's claim depends upon access to crucial information that is privately held by the defendant and not accessible except through discovery, a strict pleading filter will end up wrongly screening out some meritorious cases.[25]

Hubbard acknowledges the problem of information asymmetry, but his attempt to show that the problem is less concerning than scholars have previously thought is unconvincing. Hubbard observes:

> To be clear: there are surely many potential plaintiffs who have been injured by the wrongdoing of a potential defendant, who have no facts suggesting this to them, but who nonetheless would, after full discovery, have a strong case and secure a large judgment on the merits. These plaintiffs, unfortunately, will not receive the judgment that the objective (but, before discovery, unknown) facts of their cases merit. But to be equally clear: this will happen even with no pleading standard. The bar to their recovery is not pleading. The bar is that it is simply not worth it to sue.[26]

But it is incorrect to say that "the bar to their recovery is not pleading." For plaintiffs who were actually harmed, but lack access before suit to the facts needed to prove it, the bar is heightened pleading. After all, this is a category of plaintiffs who, by Hubbard's own account, "have been injured by the wrongdoing of a potential defendant" and "would, after full discovery, have a strong case and secure a large judgment on the merits." When relevant information is primarily in the possession of the defendant, plausibility pleading can create a Catch-22: the plaintiff needs access to information to plead sufficiently; but a pleading stage dismissal denies her the information that would have enabled her to plead a non-conclusory, plausible claim.[27] And the situation Hubbard references is precisely the one we

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[24] Randal C. Picker, Twombly, Leegin, *and the Reshaping of Antitrust*, 2007 Sup Ct Rev 161, 164-65; Lonny 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, 1260-64 (2008).

[25] Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L Rev 849, 871-76, 878-79 (2010).

[26] Hubbard, 83 U Chi L Rev at 716 (cited in note 5).

[27] Kevin M. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L Rev 821, 838 (2010) ("The plaintiff who needs discovery to learn

should be greatly concerned about: that is, instances in which someone with a meritorious claim knows enough to think that wrongdoing occurred but does not yet have access to facts to allege a non-conclusory, plausible claim.

There is another reason why Hubbard is wrong to claim that the information asymmetry problem is unrelated to pleading. Beyond the risk that plausibility pleading will prematurely dismiss cases that would have been "strong" had they been given access to "full discovery," lawyers will sometimes screen out meritorious cases in light of the strict pleading standard the Court has imposed. Consider an employment discrimination case. The plaintiff's lawyer may conclude that there is a decent chance that discovery will turn up evidence—at least enough to get past summary judgment—that his client was dismissed for an improper reason. In a notice pleading regime (and, *a fortiori*, in Hubbard's hypothetical no-pleading regime), that lawyer will file suit against the employer. But under a stricter pleading filter the plaintiff's lawyer who previously would have filed suit may now be unwilling to do so if he thinks it's likely that they will end up with a judge inclined to dismiss under the stricter pleading test. Plausibility pleading, thus, acts as a bar to meritorious cases both because lack of access to the facts at the outset means that plausibility pleading will result in some false negative dismissals, and also because lawyers will sometimes refuse to file meritorious cases in light of the strict pleading hurdle.

Finally, since it was part of Hubbard's central ambition to construct a model of rational behavior to predict plausibility pleading's effects, he should have taken greater account of the perverse incentives that a strict pleading test creates. Given that the Court's decisions make it harder for the would-be plaintiff to gain access to relevant information, we can reasonably expect that whenever it is within a wrongdoer's ability to keep such information hidden, it now has even greater incentive to do so.[28] It follows that plausibility pleading can be expected to exacerbate information asymmetries, increasing the likelihood of false negative dismissals.

C. Merits Inquiries At The Pleading Stage

In addition to not having an adequate answer for the problem of information asymmetry, Hubbard also blinks at the fundamental infirmity of plausibility pleading's design. When Hubbard asserts that to survive a motion to dismiss a plaintiff need only plead the facts that make her think her claim is meritorious, he fails to confront that

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the required factual particulars is the person whom the Court has newly put in jeopardy.").

[28] Alex Reinert, Pleading As Information-Forcing, 75 Law & Contemp Probs 1, 33 (2012).

the Court's decisions ask judges to make merits determinations that they are not well equipped to make at the pleading stage.

The original rulemakers recognized that a factual sufficiency test at the pleading stage is unlikely to be an accurate screen. "Experience has shown," Charles Clark said, ". . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function."[29] Plausibility pleading similarly cannot be relied upon to identify and distinguish wheat from chaff, as our wisest and most perspicacious scholars have warned.[30] Ironically, the Court presumed confidence in trial judges to filter for merit accurately at the outset of the case, even as it doubted the ability of these same judges to effectively manage their cases at the pleading and discovery stages.[31]

The problem of false negative dismissals is exacerbated by the increased frequency of motions to dismiss post-*Twombly* and *Iqbal*. What evidence we have clearly indicates that there have been substantial percentage increases in the filing rate. Overall, it is up more than 50% since 2009, with even larger percentage increases in particular case categories. Suppose we ignore the possibility that *Twombly* and *Iqbal* have changed the average merit of cases facing Rule 12(b)(6) motions.[32] Even then, with a steady or only slightly increasing grant rate, the math would be troublingly straightforward:

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[29] 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 ABA J 976, 977 (1937).

[30] *See, e.g.*, Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L J 1, 21 (2010) ("The Supreme Court's change in policy seems to suggest a regression in time, taking federal civil practice back toward code and common law procedure and their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint or code motion to dismiss—all of this without any real reason to believe that demanding stricter pleading provides an adequate basis for identifying meritless claims."); Stephen B. Burbank and Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv Civ Rights-Civ Lib L Rev 399, 405 (2011) ("Many cases that were entitled to a jury trial--or any trial for that matter--and that would be found meritorious after discovery, will now be dismissed at the pleading stage."); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 Duke L J 597, 650 (2010) (decrying that "withholding access to discovery will inevitably prevent some meritorious claims from being heard and will relax business entities' concern for the legal consequences of schemes abusing economic power"); Clermont and Yeazell, 95 Iowa L Rev at 838 (cited in note 27) (issuing early warning that *Twombly* and *Iqbal* will likely "reduce the frequency of well-founded suits that now require the assistance of discovery to make their merits clear"); Bone, 85 Notre Dame L Rev at 879 (cited in note 25) (critiquing *Iqbal*'s "thick screening model" and noting that it "will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery").

[31] Jonah B. Gelbach *Material Facts in the Debate Over* Twombly *and* Iqbal, 68 Stan L Rev 369 (2016).

[32] On this issue see Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 Yale L J 2270 (2012).

more motions, multiplied by a higher error rate, equates to greater risk that meritorious claims are being dismissed. (And if there have been substantial changes in the quality of cases facing Rule 12(b)(6) motions following *Twombly* and *Iqbal*, then it is impossible to reconcile how Hubbard can be right that pleading standards generally do not affect litigation practice.)

Finally, even if we thought the risk acceptable that some meritorious cases will be wrongly dismissed if plausibility pleading promised to filter out a greater number of meritless ones, not all cases deserve equal weight. Private enforcement of public rights, most of which the legislative branch has authorized, should arguably be weighted more heavily.[33]

II. QUESTIONING THE INEVITABLE

Although he spends most of his paper constructing a theory of pleading practice as a means for predicting *Twombly* and *Iqbal*'s impact, Hubbard's descriptive claim springs out of the same fountain from which his ultimate normative assessment of plausibility pleading is drawn. Obviously, if he is wrong that the doctrine only filters out nonmeritorious cases, then he cannot defend his conclusion that heightened pleading aids the liberal ethos. I've already tried to show that he is wrong about plausibility pleading precisely because of the risk it poses that meritorious cases will be erroneously dismissed or deterred from being filed in the first place. Rather than revisiting these points, in the limited remaining space available I want to focus on other dimensions to Hubbard's assessment.

Recall that Hubbard's normative claim is that the Court's decisions actually aid the liberal ethos of modern procedure by keeping the plaintiff from wasting her money litigating a case that she was destined to lose anyway. Hubbard's argument is problematic for three related reasons.

First, the suggestion that some plaintiffs are better off if the dismissal happens at the outset of a case effectively excuses the worst abuses to which a plaintiff could be subjected by plausibility pleading. After all, the claim that an early dismissal is better than a late one could equally be said of dismissals not on the merits by a blatantly biased judge.

Hubbard actually tries to make the case that plausibility pleading aids even plaintiffs who face intentionally prejudiced decision-makers. He does so by drawing an analogy to playing a poker game

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[33] Miller, 60 Duke L J at 73 (cited in note 30) ("The cases that warrant the greatest concern and consideration after *Twombly* and *Iqbal* are those that advance a statutorily authorized, private compensatory regime and those that are designed to have a regulatory effect by rectifying or stopping activity proscribed by a federal statute or federal common law."); Stephen B. Burbank, Sean Farhang, and Herbert M. Kritzer, *Private Enforcement*, 17 Lewis & Clark L Rev 637 (2013).

with a crooked dealer. Would you rather know that the deck is stacked against you before or after you've placed your bet, Hubbard asks rhetorically? His answer to this Hobson's choice is that you would always want to know before you bet if the game is rigged (assuming, he adds, that you would have another chance to play again when it isn't). But his analogy is as perfectly flawed as plausibility pleading itself. When it comes to crooked dealers and biased judges, teleological arguments are not a very compelling way to defend outcomes.

Second, because plausibility pleading makes it harder to identify dismissals based on the merits from those that are not, the Court's decisions have made it even easier for consciously-biased judges to act.[34] And it is no answer to suggest, as Hubbard does, that plaintiffs who believe they have a meritorious case must be basing that belief on "*facts*" (his emphasis), and therefore can surely overcome a Rule 12(b)(6) challenge.[35] This argument conflates the conclusoriness and plausibility aspects of *Twombly* and *Iqbal*. Whether there are pleaded facts is really a question about conclusoriness, not about the plausibility of the allegations. This is a serious and consequential conflation on his part as it allows him offer up a "facts" straw man rather than confronting the subjective and indeterminate test that invites unfettered judicial judgment as to the legitimacy of claims. That should give cause for concern, especially given the anti-plaintiff influence emanating out of the Court's decisions. That message is not veiled, and courts that want to exercise their authority to dispose of cases they perceive to be unwelcome will not miss it.

But concerns about plausibility pleading are certainly not limited to, and do not depend upon, intentionally biased decision-makers. Even when judges try to overcome their instinct to be influenced by preexisting generalized views, if more specific information is not available they will not always succeed, as studies have shown.[36] This research raises particular concern about a doctrine that insists judges filter for merit at a point in the case when there may be very little individuating information on which to rely. Sometimes, there may only be just enough to lead judges to believe that they are not being influenced by their general stereotypes or pre-existing views.

There is one last, but crucial point to be made about Hubbard's suggestion that a plaintiff may be better off having her case dismissed at the pleading stage. His argument fails to recognize that when

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[34] Burbank and Subrin, 46 Harv Civ Rights-Civ Lib L Rev at 405 (cited in note 30) (observing that since "[t]rial judges now explicitly have enormous discretionary power to dismiss complaints, . . . it has become even easier than in the past for judges who disfavor [discrimination] cases to dismiss them prior to discovery. The same is true for any lawsuit, such as tort and antitrust cases, in which the most important evidence is in the minds and files of defendants").

[35] Hubbard, 83 U Chi L Rev at 715 (cited in note 5).

[36] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L Rev 1124, 1126-27 (2012).

judges are asked to weigh conflicting factual proof at later stages of litigation—at summary judgment, during trial, or post-trial through evidentiary sufficiency review—doctrinal safeguards exist to reduce the chance of error. These safeguards are hardly foolproof, of course, as cases like *Scott v. Harris* reflect.[37] But, on the whole, the risk of erroneous decisions at these later stages of a case is far less than at the pleading stage. There are numerous reasons for this, including that the legal standards in these other contexts are more established, as well as that the parties have had a full opportunity to marshal all available evidence, which the court must then evaluate on its own terms, subject to requirements of admissibility.[38]

The comparison with summary judgment is particularly apt. Both a Rule 56 summary judgment and a Rule 12(b)(6) motion to dismiss for failure to state a plausible claim ask whether the factual assertion the claimant is making is reasonable. However, the risk of disposing of claims for which a reasonable factfinder may give relief is substantially lessened by the structural design of the summary judgment rule. By contrast, plausibility pleading requires that judges assess factual merit with far fewer safeguards to ensure reliable decision-making.[39]

FINAL THOUGHTS

For all the ink that has been spilled in the last ten years about the Court's decisions, careful thinking is always in short supply and so Hubbard's thought-provoking paper is an important contribution to the literature. It just turns out that the most persuasive part of his work is not his descriptive prediction of *Twombly* and *Iqbal*'s effects. Nor is it the normative assessment he offers of the Court's heightened pleading doctrine. Instead, the most persuasive part of Hubbard's paper—and, potentially, his most valuable contribution—is the work he does to deepen understanding of the plaintiff lawyer's gatekeeping role. That contribution is quite significant for two reasons.

By providing current quantitative evidence to update and confirm the case screening effect, Hubbard illuminates a key reason why some

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[37] Scott v. Harris, 550 US 372 (2007); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 Harv L Rev 837 (2009).

[38] *Crawford-El v. Britton*, 523 US 574, 600 n.20 (1998) (recognizing that the trial judge has "discretion to postpone ruling on a defendant's summary judgment motion if the plaintiff needs additional discovery to explore 'facts essential to justify the party's opposition'" (quoting Rule 56(f))).

[39] Clermont and Yeazell, 95 Iowa L Rev at 838 (cited in note 27) (noting that "the most startling aspect of *Twombly* and *Iqbal* is that they call for 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").

of the prior empirical studies (including his own prior research) have found that the Court's decisions have had no effect on the overall grant rate. Because lawyers already screen out most meritless and very weak cases, a change in pleading standard will likely lead to more dismissals in only a small subset of filed cases. Of course, these are precisely the cases that should concern us greatly. (And, it bears adding, we are only talking now about the grant rate; in addition to the danger that meritorious suits are not being filed in light of the strict pleading standard, the Court's transsubstantive move to plausibility pleading can also be criticized on process grounds for the far-ranging effects it is likely having.[40])

Finally, whether he realized it or not, Hubbard also undermines the Court's primary justification for stiffening pleading standards. If attorneys are already screening for merit at a threshold above that which plausibility pleading requires, then the Court's basis for imposing this more rigorous pleading filter on all cases cannot be defended. While the die has already been cast as to *Twombly* and *Iqbal*, one can only hope that Hubbard's work will help convince prominent pro-business groups, like the U.S. Chamber of Commerce and Lawyers for Civil Justice, to rethink their oft-repeated, but unsupported, assertions of rampant frivolous litigation. Perhaps that is too much, but it is worth mentioning that these organizations have relied on Hubbard's previous work in support of other procedural issues on their reform agendas.[41] So, who knows? If they can be persuaded, Hubbard's paper will have been impactful almost beyond measure.

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[40] Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U C Davis L Rev 1483, 1540-41 (2013).

[41] See, for example, Lawyers for Civil Justice, DRI- Voice of the Defense Bar, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel, *The Time is Now: The Urgent Need for Discovery Rule Reforms*, submitted to the Civil Rules Advisory Committee, Oct. 31, 2011, at 12 (citing and relying on William H.J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group 2011)); Brief of Amicus Curiae Lawyers for Civil Justice in Support of Appellants, *In re Actos (Pioglitazone) Products Liab. Litig. Exec. Comm. et al v. Takeda Pharmceutical Company, Ltd, et al*., No. 6:11-MD-2299 (citing and relying on final version of Professor Hubbard's *Preservation Costs Survey*).