

## 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

Nearly a decade after the Supreme Court first undertook to heighten pleading requirements, fierce debate continues to rage over its decisions in *Bell Atlantic Corp v Twombly*<sup>1</sup> and *Ashcroft v Iqbal*.<sup>2</sup> 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.<sup>3</sup> Another part of the debate is empirical. Although researchers have studied the cases in the lower courts from many different angles,<sup>4</sup> 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.<sup>5</sup> Starting from this aporetic premise, Hubbard says that while the legal community waits to see if the empirical research can ever provide illumination, it needs a new approach.

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<sup>1</sup> 550 US 544 (2007).

<sup>2</sup> 556 US 662 (2009).

<sup>3</sup> See Kevin M. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L Rev 821, 840–45 (2010) (predicting this kind of confusion in the aftermath of *Iqbal*).

<sup>4</sup> See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 Stan L Rev 1203, 1230–34 (2013) (summarizing the research).

<sup>5</sup> To be more precise, Hubbard is more skeptical than agnostic about the existence of the negative impacts of the Court's decisions. Hubbard's skepticism of *Twombly*'s negative effects precedes this current article. See William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J Legal Stud 35, 59 (2013). I discuss the conjunction of Hubbard's prior empirical work with his latest article in the text accompanying notes 33–36.

*A Fresh Look at Plausibility Pleading* is a provocative article that constructs a theory of pleading practice. From it, Hubbard makes predictions about the expected impact of the plausibility pleading regime. His theory, which he develops based on a model of what rational litigants and lawyers 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) 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."<sup>6</sup> 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 case is brought, Hubbard points out, the plaintiff's lawyer 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.<sup>7</sup>

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 incentives to bring meritorious cases, and to plead those cases with enough factual detail and convincingness to communicate the case's merit, Hubbard concludes that expecting the vast majority of claims to withstand dismissal is reasonable.<sup>8</sup> That leaves little work left for *Twombly* and *Iqbal*, and so, he concludes, it is reasonable to predict that plausibility pleading is likely having only a modest effect in practice.<sup>9</sup>

If Hubbard's descriptive claims were not provocative enough, he then makes the leap from this expository account to an even more astonishing normative conclusion. For most of the article, Hubbard takes no position about current doctrine; his primary ambition is to construct a theory of pleading practice to predict *Twombly* and *Iqbal*'s impact, not to evaluate it. In the last part of the article, however, Hubbard argues that the Court's decisions actually aid the "liberal ethos" of modern procedure, a phrase often used to refer to the general intent of the 1938 rulemakers to

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<sup>6</sup> William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev 693, 701 (2016).

<sup>7</sup> *Id.* at 702, 706–13.

<sup>8</sup> *Id.* at 705.

<sup>9</sup> *Id.*

minimize the importance of technicalities in the rules (which specifically included a design to minimize pleading dismissals) so as to facilitate judicial access and resolution of cases on the merits.<sup>10</sup> How, you might ask, could cases that raise the bar that plaintiffs must meet to survive dismissal at the pleading stage possibly aid the liberal ethos? Hubbard's argument is that, by dismissing weak claims at the pleading stage, plausibility pleading saves some plaintiffs and their lawyers from having to throw away money litigating a case that they were destined to lose.<sup>11</sup> Remember, he repeats, "litigation is expensive," so it does not make sense to pursue a claim that will eventually be dismissed.<sup>12</sup>

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 fails to value the essential difference between weighing conflicting factual proof at the pleading stage and at later stages of a case, among other difficulties. I 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 *IQBAL*'S EFFECTS

In Parts I.B and I.C, I show why we can have little confidence in Professor Hubbard's theoretical estimate of plausibility pleading's likely effects. But before addressing the difficulties with his descriptive account, it is important—for two independent reasons—to consider more closely the cornerstone premise regarding

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<sup>10</sup> See Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum L Rev 433, 439 (1986):

Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the "liberal ethos," in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.

See also A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo Wash L Rev 353, 353 (2010):

Those of us who study civil procedure are familiar with the notion that federal civil procedure under the 1938 Rules was generally characterized by a "liberal ethos," meaning that it was originally designed to promote open access to the courts and to facilitate a resolution of disputes on the merits.

See also Spencer, 78 Geo Wash L Rev at 354 (cited in note 10) ("Also promoting the vision of open access espoused by the drafters was the introduction of simplified 'notice pleading,' which was designed to minimize greatly the number of cases dismissed on the pleadings.").

<sup>11</sup> Hubbard, 83 U Chi L Rev at 753 (cited in note 6) ("[A] dismissal simply reveals what would likely be an inevitable outcome anyway . . . but without the investment in time and money necessary to get the case through discovery to summary judgment.").

<sup>12</sup> *Id.* at 701.

lawyer screening on which his theory 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 prevent the vast majority of potential claims, including most weak claims, from being filed.<sup>13</sup> One of the leading studies found that contingent fee lawyers in Wisconsin accepted only about a third of prospective clients who walked through their doors.<sup>14</sup> A survey of Texas lawyers in 2000 by Professors Stephen Daniels and Joanne Martin reported a roughly similar acceptance rate: these attorneys took on representation at rates ranging from one-third of potential client opportunities, at the high end, to less than one-fifth.<sup>15</sup> A follow-up survey by Daniels and Martin in 2006 not only confirmed the prior findings but found that even more stringent screening was taking place.<sup>16</sup>

It is also clear that acceptance rates vary significantly by case category. For instance, the percentage of medical malpractice cases that lawyers decline to take is far higher than the overall

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<sup>13</sup> See, for example, David A. Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 Vand L Rev 1085, 1102–04 (2006); Daniel J. Capra, *'An Accident and a Dream: Problems with the Latest Attack on the Civil Justice System*, 20 Pace L Rev 339, 392–93 (2000), citing Leon S. Pociński, Stuart J. Dogger, and Barbara P. Schwartz, *The Incidence of Iatrogenic Injuries*, in *Appendix: Report of the Secretary's Commission on Medical Malpractice* 50, 50 (GPO 1973); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 Judicature 22, 29 (July–Aug 1997); Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, 70 Wis Law (Mar 1997), archived at <http://perma.cc/4BWK-63TS> (summarizing the available empirical evidence that contingent fee lawyers effectively screen out nonmeritorious cases); Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am U L Rev 1393, 1426 (1993); Kevin M. Clermont and John D. Currihan, *Improving on the Contingent Fee*, 63 Cornell L Rev 529, 571–72 (1978); Earl Johnson Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 L & Society Rev 567, 567–68 (1980–81).

<sup>14</sup> Kritzer, 81 Judicature at 24, 26 (cited in note 13).

<sup>15</sup> Stephen Daniels and 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, 1812 (2002).

<sup>16</sup> Stephen Daniels and Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 Emory L J 1445, 1482–84 (2016).

rate.<sup>17</sup> In one survey of medical malpractice attorneys, a majority reported that they declined at least 95 percent of clients who sought their representation.<sup>18</sup> There is some evidence that plaintiff-side employment lawyers turn down 95 percent of cases.<sup>19</sup> A more recent and narrowly focused study of personal injury lawyers found that only about 15 percent of potential plaintiffs who contacted a lawyer were successful in securing representation.<sup>20</sup>

We also know that attorneys take multiple factors into consideration when they screen cases. Of course, a key factor is the likelihood of achieving a favorable result (whether by judgment or settlement). Calculating those odds 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 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 are the questions 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 multilayered process.<sup>21</sup>

Hubbard points out that the lawyer's gatekeeping role is "well understood,"<sup>22</sup> 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

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<sup>17</sup> See Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 *Tex L Rev* 1943, 1976 (2002).

<sup>18</sup> Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 *Vand L Rev* 151, 185–86 (2014). Another survey of prospective claimants who consulted with at least one lawyer about bringing suit reported that only about 3 percent ever filed a lawsuit. LaRae I. Huycke and Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 *Annals Internal Med* 792, 796 (1994).

<sup>19</sup> Theodore Eisenberg and Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 *J Empirical Legal Stud* 111, 143–44 (2009). See also David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *Yale L J* 616, 708 n 301 (2013) (citing evidence that "lawyers play a substantial case-screening role within the current system" for employment discrimination cases).

<sup>20</sup> David A. Hyman, Bernard Black, and Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 *U Ill L Rev* 1563, 1594.

<sup>21</sup> See James H. Stock and David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 *Class Action Rep* 584, 588–94 (Jan–Feb 1993).

<sup>22</sup> Hubbard, 83 *U Chi L Rev* at 710 (cited in note 6).

Federal Judicial Center (FJC) of median case values and litigation costs.<sup>23</sup> 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 usually will not bring suit on contingency 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,<sup>24</sup> but the description I've given so far captures its essential features and is sufficient for present purposes.)

Hubbard then plugs the FJC's recent findings on median case values and litigation costs into this economic model.<sup>25</sup> Based on the survey responses of plaintiff's lawyers, the median cost of litigation (in cases in which there was any discovery) was \$15,000.<sup>26</sup> Median case values were reported as \$160,000.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

Of course, a lawyer's decision to file a case does not necessarily mean it has merit. Put another way, attorney gatekeeping is not perfect, and Hubbard identifies a number of circumstances in which it may make economic sense to file a very weak case.<sup>30</sup> Of these various circumstances, the most important exception

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<sup>23</sup> Id at 704–12, 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 (FJC, Oct 2009), archived at <http://perma.cc/FVU8-GNKG>.

<sup>24</sup> Hubbard, 83 U Chi L Rev at 702–13 (cited in note 6).

<sup>25</sup> Id at 709.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Hubbard, 83 U Chi L Rev at 710 (cited in note 6).

<sup>29</sup> Id:

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.

<sup>30</sup> Id at 705–06 (identifying lawyers' roles, asymmetric information, irrationality, the possibility of settlement, and high stakes as factors that complicate this analysis).

Hubbard discusses is cases in which the costs of litigation are modest relative to the case's potential worth.<sup>31</sup> Here, he's mostly talking about class action suits or other forms of complex litigation. In high-stakes cases, the normal screening filter may not work because the plaintiff's lawyer may be able to justify bringing a very weak claim if the cost of bringing suit is small compared with a potentially enormous recovery. When a high-stakes but weak case is brought, the defendant may conclude that the defendant is better off settling, regardless of the merits, because through settlement the defendant can avoid future litigation costs and bury all risk, however remote, of a very large adverse judgment. Hubbard thus predicts that plausibility pleading is having some effect in this special category of cases, which he rightly recognizes represents a small percentage of all civil actions.<sup>32</sup>

There are two good reasons for highlighting Hubbard's efforts to show that case screening is taking place for the vast bulk of filed cases. The first of those reasons is that his work provides an important insight into prior studies that have found that the

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<sup>31</sup> *Id.* at 723–28.

<sup>32</sup> Hubbard, 83 U Chi L Rev at 723–28 (cited in note 6). Hubbard acknowledges that the high-stakes, low-value cases he is talking about represent only a small percentage of all filed cases, but it is important to underline just how infrequent it likely is that such suits are filed and lead to the kind of not-on-the-merits settlements that many critics decry. There is no good evidence to support the assertion, frequently made by groups like the US Chamber of Commerce, that businesses regularly face a scourge of high-dollar class action cases that they are effectively blackmailed into settling. See, for example, Andrew J. Pincus, "The State of Class Actions Ten Years after the Enactment of the Class Action Fairness Act": *Hearing before the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary* \*2, 12–15 (US Chamber of Commerce, Feb 28, 2015), archived at <http://perma.cc/H7T6-S45X> (alluding to "flagrant abuses of class actions"). Such assertions ignore recent judicial decisions that have made it significantly harder to certify class action cases. See, for example, *Wal-Mart Stores, Inc v Dukes*, 564 US 338, 360–67 (2011). Moreover, for numerous reasons, including that the Court has heightened pleading requirements, we know that over the last two decades public-interest class action cases have become rarer. Pointing specifically to class actions brought on behalf of low-income people, Professor Myriam Gilles notes that "access to class-wide relief for low-income groups has declined precipitously" since the mid-1990s. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L J 1531, 1536 (2016). Even public-interest class action cases against government agencies and officials, when the primary relief sought is structural reform, not damages, now face more difficult obstacles than ever before, as Professor David Marcus has shown. David Marcus, *The Public Interest Class Action*, 104 Georgetown L J 777, 782, 790–95 (2016). Professor Joanna C. Schwartz has also pointed out that courts routinely dismiss class action claims that they find to be without merit, and that the ones that avoid an early dismissal are not regularly settled soon thereafter by defendants to avoid burdensome discovery costs. Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L Rev 655, 663–65 (2016). Schwartz has noted that the best available evidence shows that class actions are settled and tried at about the same rate as non-class action cases. *Id.*

Court's decisions are having no effect on the dismissal rate.<sup>33</sup> Hubbard himself published one such prominent no-effect study.<sup>34</sup> But if, as Hubbard convincingly shows, lawyers screen out most meritless and very weak cases,<sup>35</sup> then it should be clear that a change in pleading standard will have an effect in only a small number of special cases. That is, we would see an effect only when (i) attorney gatekeeping fails, (ii) the previous pleading standard would not have resulted in dismissal, and (iii) the plaintiff is unable to stave off dismissal under the current standard by pleading additional facts.<sup>36</sup> In consequence, it is unrealistic to expect 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 article 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 not follow, as he says it does, that the turn to plausibility pleading has been harmless. While lawyers have plenty of incentive to bring only meritorious cases and then plead them adequately, the Court's heightened pleading standard may still be preventing them from doing so, as I explain in Parts I.B and I.C. Instead, the insight that attorneys are already screening for merit at a threshold above that which *Twombly* and *Iqbal* require should have led Hubbard to the only conclusion that logically follows from this predicate: 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 claim[s]," "anemic cases," and "cases with no reasonably founded hope that the discovery process will reveal relevant evidence."<sup>37</sup> If lawyers already keep most meritless and weak cases from being

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<sup>33</sup> See generally, for example, Joe S. Cecil, et al, *Motions to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* (FJC, Mar 2011), archived at <http://perma.cc/H7PD-WXUK>.

<sup>34</sup> See generally Hubbard, 42 J Legal Stud at 35 (cited in note 5).

<sup>35</sup> See Hubbard, 83 U Chi L Rev at 702–05 (cited in note 6).

<sup>36</sup> Professors Theodore Eisenberg and Kevin M. Clermont have previously made the same point about the prior no-effect studies. Theodore Eisenberg and Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 Cornell L Rev 193, 201–04 (2014).

<sup>37</sup> *Twombly*, 550 US at 558–59 (quotation marks and brackets omitted).



filed, the Court's rationalization for imposing a more rigorous pleading filter transsubstantively is shattered.

To be sure, attorney gatekeeping is not going to filter out all meritless and weak cases. But while the reality that case screening is not perfect may suggest a role for plausibility pleading, that assumes we can be confident that this pleading test is an accurate (or, if not, at least a tolerably inaccurate) means of catching screening failures. As I show below, we can have no such confidence.

## B. Asymmetries of Information

A 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*,<sup>38</sup> 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.<sup>39</sup>

To be sure, asymmetric information can occur in either direction. When the information imbalance favors the claimant at the outset of a case, even those with weak claims can leverage their position to bargain for settlements larger than their true merit warrants.<sup>40</sup> But, with regard to Hubbard's descriptive claim that plausibility pleading is not having much effect in practice, the important question is: How do information imbalances that favor the defendant (such as those in cases that turn on the defendant's state of mind or on wrongful conduct that occurred in private) interact with a strict pleading filter? And the answer, as many scholars have noted, is that, 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

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<sup>38</sup> See, for example, Randal C. Picker, *Twombly*, Leegin, and the Reshaping of Antitrust, 2007 S Ct Rev 161, 164–65; Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us about Judicial Power over Pleadings*, 88 BU L Rev 1217, 1260–67 (2008).

<sup>39</sup> See 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).

<sup>40</sup> See Robert G. Bone, *Twombly*, *Pleading Rules*, and the Regulation of Court Access, 94 Iowa L Rev 873, 924–25 (2009).

information that would have enabled her to plead a nonconclusory, plausible claim.<sup>41</sup>

Hubbard acknowledges the problem of information asymmetry, but his attempt to show that the problem is less concerning than scholars had 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.<sup>42</sup>

But it is incorrect to say that “[t]he bar to their recovery is not pleading.”<sup>43</sup> 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.”<sup>44</sup> And the situation Hubbard references is precisely the one we 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 nonconclusory, 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

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<sup>41</sup> See Clermont and Yeazell, 95 Iowa L Rev at 830 (cited in note 3) (“The plaintiff who needs discovery to learn the required factual particulars is the person whom the Court has newly put in jeopardy.”). See also Bone, 85 Notre Dame L Rev at 878–79 (cited in note 39).

<sup>42</sup> Hubbard, 83 U Chi L Rev at 716 (cited in note 6).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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 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, because 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, the wrongdoer now has even greater incentive to do so.<sup>45</sup> 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 the fact that 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,” Dean Charles Clark wrote, “that we cannot expect the proof of the case to be made through the pleadings,

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<sup>45</sup> See Alex Reinert, *Pleading as Information-Forcing*, 75 L & Contemp Probs 1, 32–33 (2012).

and that such proof is really not their function.”<sup>46</sup> Plausibility pleading similarly cannot be relied on to identify and distinguish wheat from chaff, as our wisest and most perspicacious scholars have warned.<sup>47</sup> 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 stage.<sup>48</sup>

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 has been a substantial percentage increase in the filing rate for such motions. Overall, the filing rate increased more than 50 percent following *Twombly* and *Iqbal*, with even larger percentage increases in particular case categories.<sup>49</sup> Suppose we ignore the possibility that *Twombly* and *Iqbal* have changed the average merit

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<sup>46</sup> 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).

<sup>47</sup> See, for example, 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.

(citation omitted). See also, for example, Stephen B. Burbank and Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv CR-CL 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 3) (issuing an 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 878–79 (cited in note 39) (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”).

<sup>48</sup> See Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 Stan L Rev 369, 380–81 (2016).

<sup>49</sup> See Cecil, et al, *Motions to Dismiss for Failure to State a Claim after Iqbal* at \*9 (cited in note 33) (noting an increase in the percentage of civil cases with a motion to dismiss for failure to state a claim filed within ninety days of the case’s filing from 4 percent in 2005–2006 to 6.2 percent in 2009–2010).

of cases facing Rule 12(b)(6) motions.<sup>50</sup> Even then, with a steady or only slightly increasing grant rate, the math would be troublingly straightforward: 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.<sup>51</sup> In this connection, think back to the exceptional category of class action cases. We should be especially concerned if meritorious public-interest class actions, especially those that seek to recover financial damages on behalf of low-income groups, and structural-reform litigation against government agencies and officials are not being brought at all or are being improperly dismissed. If these kinds of cases cannot be sustained, then the consequences will be felt by the most vulnerable members of our society—and vital opportunities to deter future wrongdoing will be lost.

## II. QUESTIONING THE INEVITABLE

Although he spends most of his article constructing a theory of pleading practice as a means for predicting *Twombly* and *Iqbal*'s impact, Professor 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 filters out only nonmeritorious cases, then he cannot defend his conclusion that heightened pleading aids the

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<sup>50</sup> At least one study has explored this issue in greater detail. 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, 2306–10 (2012).

<sup>51</sup> See Miller, 60 Duke L J at 73 (cited in note 47) (“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.”). See also generally Stephen B. Burbank, Sean Farhang, and Herbert M. Kritzer, *Private Enforcement*, 17 Lewis & Clark L Rev 637 (2013).

liberal ethos.<sup>52</sup> 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 are actually beneficial to the plaintiff because they keep her from wasting her money litigating a case that she was destined to lose anyway.<sup>53</sup> 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 does try to make the case that plausibility pleading aids even plaintiffs who face intentionally prejudiced decisionmakers. He does so by drawing an analogy to playing a poker game 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.<sup>54</sup> 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).<sup>55</sup> 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 distinguish 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.<sup>56</sup> And it is no answer to suggest, as Hubbard

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<sup>52</sup> Hubbard, 83 U Chi L Rev at 748 (cited in note 6) (arguing that, given high litigation costs and the role of attorney gatekeeping, "it is no foregone conclusion that plausibility pleading represents a departure from the liberal ethos").

<sup>53</sup> Id at 753.

<sup>54</sup> See id at 751–52.

<sup>55</sup> See id.

<sup>56</sup> See Burbank and Subrin, 46 Harv CR–CL L Rev at 405 (cited in note 47):

Trial judges now explicitly have enormous discretionary power to dismiss complaints . . . . [I]t 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

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.<sup>57</sup> This argument conflates the conclusoriness and plausibility aspects of *Twombly* and *Iqbal*. Whether there are pleaded facts is really a question about whether the pleading is conclusory, not about the plausibility of the allegations. This is a serious and consequential conflation on his part as it allows him to 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 antiplaintiff sentiment emanating out of the Court’s decisions.<sup>58</sup> 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 on, intentionally biased decisionmakers. Even when judges try to overcome their instinct to be influenced by preexisting, generalized views, studies have shown that if more specific information is not available they will not always succeed.<sup>59</sup> 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 preexisting 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 judges are asked to weigh conflicting factual proof at later stages of litigation—at summary judgment, during trial, or after trial through evidentiary sufficiency review—doctrinal safeguards exist to reduce the chance of error. These safeguards are

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any lawsuit, such as tort and antitrust cases, in which the most important evidence is in the minds and files of defendants.

<sup>57</sup> Hubbard, 83 U Chi L Rev at 715 (cited in note 6).

<sup>58</sup> See *Twombly*, 550 US at 557–58 (“[S]omething 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.”) (quotation marks omitted); *Iqbal*, 556 US at 678–79 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

<sup>59</sup> See Jerry Kang, et al, *Implicit Bias in the Courtroom*, 59 UCLA L Rev 1124, 1128–32 (2012).

hardly foolproof, of course, as cases like *Scott v Harris*<sup>60</sup> reflect.<sup>61</sup> 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 the fact that the legal standards in these other contexts are more established, as well as the fact 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.<sup>62</sup>

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 decisionmaking.<sup>63</sup>

#### CONCLUSION

For all the ink that has been spilled about the Court's decisions, careful thinking is always in short supply, so Professor Hubbard's thought-provoking article 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 article—and, potentially, his most valuable contribution—is the work he does to deepen the understanding of the plaintiff's lawyer's gatekeeping role. That contribution is quite significant for two reasons.

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<sup>60</sup> 550 US 372 (2007).

<sup>61</sup> Compare *id.* at 380–81 (stating that video evidence rendered the plaintiffs “version of events so utterly discredited . . . that no reasonable jury could have believed him”), with Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv L Rev 837, 867–70 (2009) (finding that interpretations of the *Scott* videotape varied widely between demographic groups).

<sup>62</sup> See *Crawford-El v Britton*, 523 US 574, 599 n 20 (1998), quoting FRCP 56(f) (“The [trial] judge does, however, have 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.’”).

<sup>63</sup> See Clermont and Yeazell, 95 Iowa L Rev at 834 (cited in note 3) (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”).



By providing current quantitative evidence to update and confirm the case screening effect, Hubbard illuminates a key reason why some 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.<sup>64</sup>

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 probusiness groups, like the US 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 to ask, 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.<sup>65</sup> So, who knows? If they can be persuaded, Hubbard's article will have been impactful almost beyond measure.

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<sup>64</sup> Moreover, beyond changes in outcomes, the Court's transsubstantive move to plausibility pleading can also be criticized on process grounds for the far-ranging effects it is likely having. See Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 UC Davis L Rev 1483, 1540–41 (2013) (identifying the administrative process burdens of the Court's decisions associated with the increased incidence of Rule 12(b)(6) filings, changes in the mix of motions filed from legal to factual insufficiency challenges, and "novel doctrinal applications that create great instability in [ ] legal decision-making").

<sup>65</sup> See, for example, *The Time is Now: The Urgent Need for Discovery Rule Reforms* \*12 n 33 (Civil Rules Advisory Committee, Oct 31, 2011), archived at <http://perma.cc/4U54-9FHK>, citing generally William H.J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group, Sept 8, 2011), archived at <http://perma.cc/HNJ9-UQQR>; Brief of Amicus Curiae Lawyers for Civil Justice in Support of Appellants, *In re Actos (Pioglitazone) Products Liability Litigation*, Case No 14-31256 \*14 n 7 (5th Cir, not filed following stay), citing generally William H.J. Hubbard, *Preservation Costs Survey: Summary of Findings* (Civil Justice Reform Group, Feb 18, 2014), archived at <http://perma.cc/X27W-FMB3>.