Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After *Twombly* and *Iqbal*

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Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After Twombly and Iqbal

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For over half a century, federal courts have opened their doors to all plaintiffs who could craft a complaint that provided basic notice to the defendant of their claims. This threshold, called "notice pleading," was established by the Supreme Court in *Conley v. Gibson*[1]—a civil rights case brought by African-American railway workers challenging their union for failing to fairly represent their interests without regard to race. This seminal case established the rule that a complaint should only be dismissed if the plaintiff could prove "no set of facts in support of his claim that would entitle him to relief."[2] This made it easy for a plaintiff to initiate a lawsuit because the system was designed to test the merits of the plaintiff's case later on, once both sides had the chance to collect evidence through the discovery process and to use other pre-trial procedures. It was important not to let procedural gamesmanship bar ordinary people from seeking justice and relief through the courts.

Anchored in these principles, the Supreme Court consistently rejected efforts by the lower courts to raise the pleading standard, particularly in civil rights cases.[3] The Court remained steadfast in enforcing *Conley's* "no set of facts" standard, only requiring plaintiffs to set forth a "short and plain statement of the claim" that would give the defendant notice, as stated in Rule 8 of the Federal Rules of Civil Procedure.[4] It was important to give civil rights complainants, like everyone else, their day in court and let their cases be decided on the merits.

After over half a century, however, this generous pleading standard upon which courts had historically relied has come to an abrupt halt. In *Bell Atlantic Corp. v. Twombly*[5] (an antitrust class action by consumers against Internet and telephone service providers), the Supreme Court "retired" *Conley*'s permissive "no set of facts" language.[6] Instead of requiring plaintiffs to put forth facts showing their claims were *possible*, they now had to put forth facts showing their claims were *plausible*.[7] In *Ashcroft v. Iqbal*[8] (a constitutional civil rights case by Javaid Iqbal against top government officials), the Court clarified that the new standard applies

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[1] Conley v. Gibson, 355 U.S. 41 (1957).

[2] *Id.* at 45-46.

[3] *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[4] FED. R. CIV. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief.").

[5] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[6] *Id.* at 1969.

[7] *Id.* at 1966-69.

[8] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

to all civil actions, including discrimination claims.[9] And the way a judge would determine if something is plausible would be to use his "judicial experience and common sense."[10]

Today, all plaintiffs must clear this higher hurdle to get into federal court. The Federal Rules of Civil Procedure, which govern civil actions in federal court, apply to all cases in the same manner, regardless of the substantive right being pursued. In other words, the rules are supposed to be *trans-substantive*. But surviving this new bar has proved particularly formidable for civil rights plaintiffs. More than others, civil rights claimants are facing a tougher time getting access to the federal courts. *Twombly* and *Iqbal* threaten the viability of their potentially meritorious claims.

In this Issue Brief, I describe why civil rights claimants have a more difficult time surviving dismissal under the new pleading standard, and why this is a significant problem. I then explore what can be done about a particularly troubling issue—unequal access to information at the pleading stage. In the absence of a legislative act or Rules amendment—which could be months, if not years away—I suggest that judges permit plaintiffs to discover facts at the beginning of a case to show that their claims are plausible. I analyze the pros and cons of plausibility discovery and provide a roadmap that judges can use to permit such discovery. Finally, I conclude that plausibility discovery is an important tool to consider in the fight for court access and greater civil rights enforcement.[11]

I. Why Civil Rights Claims Are More Vulnerable to Dismissal Now

One of the problems with the higher pleadings bar is the harsher impact it may have on plaintiffs challenging discrimination. Intentional discrimination claims are more vulnerable to dismissal following *Twombly* and *Iqbal* for a number of reasons.

First, a plaintiff alleging intentional discrimination in her complaint often tells a story whose facts are consistent with both legal and illegal behavior; it could go either way. This is not surprising because, at the very beginning of a lawsuit, plaintiffs can only put forward information that they were able to gather through their own diligent investigation. No one has had a chance to engage in the formal discovery process, where the parties are compelled to turn over important information to the other side. But under the new pleading standard, plaintiffs must allege facts "plausibly suggesting (not merely consistent with)" illegal conduct.[12]

This makes it tricky for civil rights claims to survive dismissal. If a plaintiff alleges intentional discrimination, she ultimately has to prove that the defendant's adverse action was *because* of some impermissible factor; the plaintiff has to prove what *motivated* the defendant. But a defendant's conduct can suggest a discriminatory motive or a purely innocent one—

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[9] *Id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' . . . and it applies to antitrust and discrimination suits alike.").
[10] *Id.* at 1950.
[11] This Issue Brief is based on a prior article. *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010).
[12] *Twombly*, 127 S. Ct. at 1966.

indistinguishable from each other at the early pleading stage. For example, an applicant may not have been hired because of her gender (*i.e.*, an illegitimate reason) or her poor qualifications (*i.e.*, a legitimate reason). Until there has been some discovery, the facts available to the plaintiff may be consistent with both theories.

This was true in *Iqbal*. There, Javaid Iqbal was detained and held on various charges immediately following the 9/11 terrorist attack because of his designation as a person of "high interest." Iqbal, a Pakistani who ultimately pled guilty to criminal charges and served his time, alleged that he had been mistreated by federal officials while in a special, maximum security unit, in violation of his constitutional rights. In particular, he contended that former Attorney General John Ashcroft and FBI Director Robert Mueller designated him a person of "high interest" and subjected him to harsh conditions of confinement on account of his race, religion, or national origin in violation of the First and Fifth Amendments. His complaint alleged that these constitutional violations were a matter of policy for which Ashcroft and Mueller were personally responsible. Iqbal's factual allegations were consistent with both illegal and legal conduct. The facts could explain invidious discrimination, on the one hand, or legitimate anti-terrorism activity, on the other. At the pleading stage, without the benefit of discovery, it was too early to tell.

Second, the new plausibility test—defined by "judicial experience and common sense"—is so subjective that it fails to give judges enough guidance on how to determine if a complaint should be dismissed. Based on differences among judges, one judge may dismiss a complaint while another concludes it should survive, solely because of the way each judge applies his or her "judicial experience and common sense." This is bound to create unpredictability, lack of uniformity, and confusion.

For example, studies indicate that there are significant differences in perception among racial groups over the existence and pervasiveness of race discrimination.[13] With the election of Barack Obama, the first African-American President, there has been a particularly acute focus on whether American society has become "post-racial." Following this historic election, many Americans have concluded that race discrimination is no longer a significant issue.[14]

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[13] *See* Gary Langer & Peyton M. Craighill, *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABC NEWS (Jan. 18, 2009), http://abcnews.go.com/PollingUnit/Politics/story?id=6674407&page=1 ("[African-Americans] remain twice as likely as whites to call racism a big problem (44 percent vs. 22 percent), and only half as likely to say African-Americans have achieved equality."); K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (2002), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf (finding that African-American employees are five times more likely than their white counterparts to believe that African-Americans are the most likely victims of discrimination; 50% of African-American employees believe employment practices are fair, in comparison to 90% of their white counterparts); Kevin Sack & Janet Elder, *Appendix, The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, *in* CORRESPONDENTS OF THE NEW YORK TIMES, HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART 385 (2001) (44% of African-Americans believe they are treated less fairly than whites in the workplace, while 73% of whites believe African-Americans are treated fairly).

[14] *See* Ian F. Haney López, *Post-Racial Racism: Policing Race in the Age of Obama* (forthcoming 2010) (manuscript at 142, 147), *available at* http://ssrn.com/abstract=1418212 ("Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral *and* that these institutions produce vast racial disparities."); *see, e.g.*, *PBS*

Consequently, some judges, like many Americans, may operate from the presumption that race discrimination is a thing of the past. This perception may lead to a judge's concluding that, based on the facts before him, intentional discrimination is implausible, especially in light of other alternative explanations available. Without a suitable legal standard in which to anchor the plausibility determination, judges are vulnerable to the criticism that their decisions are based on factors outside of the law. This excessive subjectivity can result in different outcomes depending not on the facts, but on who the judge is.

In *Iqbal* itself, the Supreme Court concluded that the factual allegations, taken as true, *were* consistent with intentional illegal discrimination.[15] The arrest and detention of thousands of Arab Muslim men as part of the FBI's post-9/11 terrorism investigation could mean that Ashcroft and Mueller intentionally designated such detainees as persons of "high interest" on the grounds of race, religion, or national origin. But a more benign reason could explain the same conduct. Perhaps Ashcroft and Mueller instituted a legitimate anti-terrorism policy that happened to have a disparate impact on Arab Muslim men because of the connection between the 9/11 attack and its perpetrators.[16] In comparing the plaintiff's intentional discrimination theory to the defendants' more innocent one, the Court rejected the plaintiff's as implausible on the grounds that it was less likely.[17] But a court is not supposed to weigh the relative merits of alternative theories at the pleading stage before both parties have had an opportunity to collect evidence to prove their case. These kinds of judgment calls are to be made by a jury after everyone has had a chance to gather evidence and make their case.

Finally, discriminatory intent is often difficult, if not impossible, to unearth before the parties have had some discovery. One reason for this is that discrimination has become more subtle and institutional. It can be harder to detect because it is less overt and transparent; instead it takes the form of stereotypes and unconscious bias.

Another reason it is hard for plaintiffs to unearth discrimination is the unequal access the parties have to evidence. In the absence of discovery, it is particularly difficult for civil rights claims to survive dismissal when plaintiffs cannot get access to information that is exclusively in

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Newshour: Debate on Race Emerges as Obama's Policies Take Shape (PBS television broadcast Sept. 16, 2009), *available at* http://www.pbs.org/newshour/bb/politics/july-dec09/rage_09-16.html. For example, in a discussion among columnists and academics with Gwen Ifill, Democratic pollster Cornell Belcher concluded:

> We're two very different countries racially, where right now you have a majority of whites who, frankly, do think we're post-racial because they think African-Americans have the same advantages as they do, while African-Americans do not. And you have a large swath of whites right now who are just as likely to see reverse discrimination as an issue as classic discrimination.

Id. But see Associated Press, *Ex-President Sees Racism in Outburst*, N.Y. TIMES, Sept. 16, 2009, at A14 (attributing Joe Wilson's outburst during President Obama's health care speech as "based on racism" and noting that "[t]here is an inherent feeling among many in this country that an African-American should not be president"); Jeffrey M. Jones, *Majority of Americans Say Racism Against Blacks Widespread*, GALLUP, Aug. 4, 2008, http://www.gallup.com/poll/109258/Majority-Americans-Say-Racism-Against-Blacks-Widespread.aspx.

[15] *Iqbal*, 129 S. Ct. at 1951 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin.").

[16] *Id.*

[17] *Id.*

the defendant's possession, such as defendant's intent or institutional practices. This unequal access to information—informational inequality—between the parties is unfair. A good illustration of this was found in *Ledbetter v. Goodyear Tire & Rubber Co.*[18] There, the plaintiff, Lilly Ledbetter, brought suit against her employer, Goodyear, well after the statute of limitations had expired because she was not aware of her employer's initial discriminatory decision to pay her less than her male colleagues.[19] Not surprisingly, like so many employees,[20] she was not privy to the fact that she was being systematically underpaid[21]—an inequity that did not escape Congress.[22] In numerous ways, ordinary people are at a significant disadvantage when challenging the misconduct of employers, corporations, and other institutions because of this informational inequality.

Plaintiffs are caught in a Catch-22. They must put facts in their complaint to nudge their claim from possible to plausible. Often the only way to get such facts is through discovery. But the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, plaintiffs' complaint dies on the vine, not because it lacks merit, but because plaintiffs do not have the same access to information that the defendant does. By raising the pleading bar to plausibility, the Supreme Court has created an untenable situation for plaintiffs challenging discrimination where there is informational inequality.

II. Why the Increased Risk of Dismissals is a Problem

The fact that civil rights cases now run the risk of being dismissed more often in federal courts is a major problem. This risk undermines civil rights enforcement and compromises deterrence. Pursuant to the legislative scheme of various civil rights statutes, everyday people are empowered to act as private attorneys general to enforce the law. The federal courts, in particular, have historically been a forum civil rights plaintiffs have relied on for justice.[23] Where the legislative and executive branches have been unwilling or unable to enforce civil rights, the judicial branch has stepped in to play a vital role. Preliminary studies of civil rights

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[18] Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2177 (2007) (holding plaintiff's claim was barred because of the statute of limitations).

[19] *Id.* at 2165–66.

[20] Pay information is often confidential, and disparities in pay may not evince discrimination until years of salary data can be accumulated. *Id.* at 2178–79 (Ginsburg, J., dissenting); *see* Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004) (discussing how social norms and corporate policy may discourage discussion of salaries in the workplace and citing, for example, that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries).

[21] *Ledbetter*, 127 S. Ct. at 2182.

[22] The effect of this holding was ultimately reversed by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

[23] *See* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 84 (2005) ("[T]he federal judicial system has often protected minorities and other disenfranchised groups from the tyranny of local government and private actors."); *see also* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("[F]ederal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges.").

cases post-*Twombly* and *Iqbal* suggest that the more rigorous pleading standard is resulting in a greater dismissal rate for such cases.[24] Examples are appearing across the country.[25]

The tougher pleading standard also undermines one of the most fundamental rights upon which the American legal system is based—the right to be heard. The Supreme Court has long recognized the importance of this value, as expressed in the Constitution: "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . . ."[26] Depriving someone of access to the court system undermines fundamental notions of fairness and due process that are the cornerstones of our legal system. Moreover, denying plaintiffs access to the courts undermines the well-established preference that cases be decided on the merits rather than on procedural grounds. Whenever possible, the merits should not be subordinated to procedural "technicalities."

Finally, the plausibility pleading standard's detrimental impact on civil rights claims and claimants may lead individuals to call into question the legitimacy of the legal system. Where some victims of injustice are selectively excluded and denied the laws' benefits, they may view the legal system as illegitimate and unworthy of respect.

III. What Can Be Done to Address the Problem?

In response to these problems, numerous scholars, practitioners, and advocacy groups have generated a variety of innovative and promising potential solutions. They include legislation that would turn the clock back to the notice pleading standard,[27] amendments to the

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[24] *See* Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1838 (2008) ("[A] *Twombly* civil rights action was 39.6% more likely to be dismissed than a random case in the set. This result was statistically significant to the 0.05 level."); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1030, 1041–42 (2% increase in dismissal rate of employment discrimination cases post-*Twombly*).

[25] *See, e.g.*, Diaz-Martinez v. Miami-Dade Cnty., No. 07-20914-CIV, 2009 WL 2970468, at *9 (S.D. Fla. Sept. 10, 2009) (relying on *Twombly*, court dismissed § 1983 claim for conspiracy to deprive plaintiff his civil rights on grounds that allegations of parallel constitutional violations alone did not suggest an agreement between police defendants, and discovery was not appropriate); Dorsey v. Ga. Dep't of State Rd. & Tollway Auth. SRTA, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at *5–7 (N.D. Ga. Aug. 10, 2009) (dismissing § 1983 hostile work environment claim and others on grounds that plausibility standard under *Twombly* not met under Rule 12(c) motion on the pleadings); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *8–10 (N.D. Cal. July 27, 2009) (dismissing claims of discrimination on basis of national origin, religious beliefs, and other constitutional violations because plaintiff did not show discriminatory purpose under *Iqbal*); Kyle v. Holinka, No. 09-cv-90-slc, 2009 WL 1867671, at *1–3 (W.D. Wis. June 29, 2009) (dismissing equal protection claims brought by prisoners against prison officials for alleged racial segregation).

[26] Truax v. Corrigan, 257 U.S. 312, 332 (1921); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) ("[T]here is *intrinsic* value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her . . . .").

[27] *See, e.g.*, Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

Federal Rules,[28] and various other approaches. Many are collecting data and studying the issue, including the Federal Judicial Center, the Civil Rules Advisory Committee, and various academics.[29] These efforts to construct a permanent, institutional fix to the pleadings problem are laudable and important work.

However, in the absence of a change in the Federal Rules or Congressional action—which may be months, if not years, away—it is imperative that civil rights litigators figure out how they can use the tools currently available to them to fight for access to the courts and continued enforcement of the civil rights statutes. The question becomes: What can be done in the meantime?

One such alternative is "plausibility discovery." Plausibility discovery is limited, targeted discovery made available to the parties at the pleading stage in response to a defendant's Rule 12(b)(6) motion to dismiss on the grounds that a plaintiff's claims are implausible. Plaintiffs should consider requesting plausibility discovery and courts should consider granting it where there is informational asymmetry between the parties. Adapting discovery in this way would level the playing field for civil rights claimants and ensure that the trans-substantive application of the Rules does not work an injustice against civil rights claims.

IV. Making the Case for Plausibility Discovery

A. Plausibility Discovery is Authorized

Federal judges have considerable discretion when managing the cases that come before them. This authority appropriately ensures that cases move smoothly and fairly through the system. As stated in the very first rule of the Federal Rules of Civil Procedure, judges are required to balance the twin goals of efficiency and justice when managing cases.[30] They have a duty to construe and administer the procedural rules in a "just, speedy, and inexpensive" manner.[31]

Among the many management tools at a judge's disposal is discovery. Discovery is most often used once the case has gotten underway so the parties can gather information about the merits of the case. The parties are forced to answer tough questions under oath (in writing or perhaps in front of a court reporter) and to exchange documents and other valuable evidence.

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[28] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 95-105 (2010) (comparing rulemaking and legislative options).

[29] *See, e.g.*, Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. (forthcoming 2010), *available at* http://ssrn.com/abstract=1666770 (providing empirical data challenging assumptions regarding benefits and costs of heightened pleading).

[30] *Id.*

[31] Rule 1 of the Federal Rules of Civil Procedure states: "These rules govern the procedure in all civil actions . . . in the United States district courts . . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

Discovery plays a critical role, often leading the parties to settle the case or to challenge its viability in a summary judgment motion.[32]

While discovery normally takes place in the middle of a lawsuit, it is not uncommon for discovery to occur earlier. Judges regularly order discovery to deal with a variety of threshold matters—a practice the Supreme Court has endorsed.

For example, when a plaintiff wants to challenge systemic discrimination, he might choose to bring the case as a class action so he can act on behalf of himself and others like him. In order to proceed as a class action, the plaintiff has to persuade the judge that the criteria of Rule 23 of the Federal Rules of Civil Procedure are satisfied. It is common practice for judges to permit the parties to take limited, narrow discovery on the question of whether a case should be certified as a class action. This is especially important for plaintiffs, who often do not have a corporation's policies or records that would demonstrate a company-wide pattern or practice that makes class certification appropriate.

Another example of when judges permit early, targeted discovery is in the context of qualified immunity. When a plaintiff sues a government official for violating her constitutional or federal rights, the defendant may assert qualified immunity as a defense. This safe haven is available if the officer's conduct did not violate clearly established law of which a reasonable person would have known.[33] Qualified immunity balances two competing interests—holding government officials accountable for abuse of power, while also protecting them from "harassment, distraction, and liability" unreasonably incurred in the line of duty.[34] Because qualified immunity is meant to protect an official not only from liability, but the lawsuit itself, defendants will raise the defense as soon as possible in a Rule 12(b)(6) motion.[35] In an effort to protect a government official before litigation really gets underway, judges permit early, targeted discovery to determine if the official is entitled to the defense. A judge may hold off ruling on the 12(b)(6) dismissal motion or may deny it altogether, so that some discovery can be taken on this crucial question. Narrow and early discovery on the immunity issue enables courts to strike the right balance between protecting government officials from meritless litigation and giving plaintiffs with meritorious claims access to the court.

Another circumstance where judges will permit the parties to take some focused discovery at the beginning of a lawsuit is to determine jurisdiction. When a defendant challenges the underlying facts of a complaint on the grounds that the court lacks either subject matter jurisdiction or personal jurisdiction, a judge may order discovery on this gateway issue. At the

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[32] *See* FED. R. CIV. P. 56(c)(2) ("The judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.").

[33] Pearson v. Callahan, 129 S. Ct. 808, 815 (2009).

[34] *Id*; *see* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.").

[35] *See* FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted").

very outset, the judge can determine if the case should be dismissed or can go forward based on this limited exploration.[36]

As demonstrated, judges are already front-loading discovery and using it to resolve a variety of preliminary litigation matters.[37] Judges should consider doing the same to resolve the plausibility question.

B. Plausibility Discovery is Justified on Policy Grounds

Not only is plausibility discovery authorized, it is justified on policy grounds. Prior to the plausibility pleading standard, there was very little need for a judge to give a plaintiff an opportunity to discover facts showing he was entitled to relief. The generous notice-pleading standard under *Conley* enabled plaintiffs to plead cases more easily and to more likely survive dismissal, as many courts readily admit.[38] The informational inequality between the parties, while always there, did not have the same deleterious effect on a plaintiff's capacity to overcome a Rule 12(b)(6) challenge. Whether the complaint's factual allegations were true could be fleshed out in discovery and tested later through summary judgment or at trial. But post-*Iqbal*, this is not the case. The same plaintiff may find his complaint vulnerable to premature dismissal because of the more rigorous pleading standard. Consequently, a different approach is needed.

In arguing that the parties should be allowed plausibility discovery at the pleading stage, plaintiffs' biggest obstacle is that the complaint admittedly has not met the pleading standard.

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[36] However, where a defendant challenges a complaint on its *face* as lacking jurisdiction, the courts have not engaged in the same discovery.

[37] Moreover, nothing explicitly prohibits plausibility discovery in the rules.

[38] *See* Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009):

> As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations.

Id.; Young v. City of Visalia, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6–7 (E.D. Cal. Aug. 18, 2009) (concluding "In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (*i.e.*, 'bare allegations') is no longer viable" and dismissing complaint that lacked facts sufficient to plausibly state a valid *Monell* claim (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978))); Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) (dismissing Title VII hostile work environment and retaliation claims, and noting that "[p]laintiff's second amended complaint may have survived under *Conley v. Gibson*" for a claim that was conceivable but not plausible); Ansley v. Fla. Dep't of Revenue, No. 4:09CV161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009) (dismissing Title VII employment discrimination case, and concluding: "These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not."); Argeropoulos v. Exide Techs., No. 08-CV-3760 (JS), 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009) (dismissing Title VII hostile work environment claim that might have survived *Conley*'s "no set of facts" standard, but fails under *Iqbal* because without more information about national origin, animus claim is conceivable but not plausible); Kyle v. Holinka, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) ("[*Iqbal* and *Twombly*] implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . . Under the Supreme Court's new standard, an allegation of discrimination needs to be more specific.").

Indeed, in *Iqbal* itself, the Supreme Court concluded that "[b]ecause [Iqbal's] complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."[39] How can such discovery be justified?

For starters, the Supreme Court did not address—much less reject—permitting discovery solely to discern if a complaint makes a plausible claim where informational inequality exists. Given the Catch-22 civil rights complainants find themselves in, how could their complaint meet the pleading standard? Plausibility discovery directly addresses this unfairness.

Moreover, in *Iqbal*, the Court's unwillingness to permit even cabined discovery was in the context of plaintiff's asking the Court to relax the pleading standard on the ground that subsequent merits discovery would be limited.[40] In contrast, plaintiffs requesting plausibility discovery would not be asking for a lower pleading standard, but simply a means to meet the current one.

Finally, the *Iqbal* Court expressed significant skepticism, within a particularly unique and tragic context, over whether judges could use careful case management to reign in discovery against high level government officials. It was in the direct aftermath of the 9/11 terrorist attack that the Court grappled with whether and how to protect the nation's top law enforcement leaders from potentially distracting and intrusive discovery. The question of qualified immunity was particularly acute.[41] The Court's skepticism, however, is belied by its general approval of the lower courts' broad power and discretion to manage discovery to address various preliminary litigation matters.

In fact, plausibility discovery arguably *furthers*, rather than contravenes, the Supreme Court's goal of prohibiting defendants from being forced to engage in burdensome discovery and expending significant time, resources, and attention on meritless litigation. By permitting the parties plausibility discovery, district courts can more easily resolve those cases that are close calls—resulting in early dismissals that protect defendants from burdensome merits discovery where appropriate. This approach not only benefits plaintiffs, but defendants as well.

For example, in *Kregler v. City of New York*,[42] the district court permitted plausibility discovery where a former firefighter's First Amendment § 1983 retaliation claim was a close call.[43] Rather than deny the defendant's motion to dismiss outright and subject the defendant to potentially expensive and time consuming merits discovery,[44] the court instead permitted the parties to engage in targeted discovery on the plausibility issue.[45] Although the court ultimately granted defendant's 12(b)(6) motion on the pleadings alone, its consideration of additional

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[39] *Iqbal*, 129 S. Ct. at 1954.
[40] *Id.* at 1953-54.
[41] *See* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 509-12 (2010).
[42] Kregler v. City of New York (*Kregler I*), 608 F. Supp. 2d 465 (S.D.N.Y. 2009).
[43] *Id.* at 476 (complaint would "barely survive dismissal at this point").
[44] S*ee id.* at 476–77 (describing how denying defendants' dismissal motion would likely lead to extensive merits discovery that would "culminate—many months, or even years from now, and at a financial cost of tens if not hundreds of thousands of dollars in a motion for summary judgment that in all probability would turn on resolution [of] the same threshold issues . . . .").
[45] *Id.* at 475; *see also* Kregler v. City of New York (*Kregler II*), 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009).

evidence—through documents and testimony by the plaintiff—persuaded the court that plaintiff's retaliation claim was implausible.[46] But for this targeted plausibility discovery, the defendant might have had to engage in full blown merits discovery prior to challenging plaintiff's retaliation claim again through summary judgment—a more time consuming and costly alternative.[47]

Another objection to plausibility discovery is the valid concern that plaintiffs should not be permitted to go on a "fishing expedition," especially at a defendant's expense. Plaintiffs are expected to conduct an adequate investigation before filing a lawsuit, as required by Rule 11(b)(3) of the Federal Rules of Civil Procedure.[48] This objection would be fair if plaintiffs failed to act diligently as required by the rule. But here, plaintiffs' shortfall does not arise from any wrongdoing on their part. They are requesting plausibility discovery at the pleading stage because the defendant is the one with all the information. The rationale for forbidding such discovery falls away. Rule 11(b)(3) only requires that plaintiffs conduct an "inquiry reasonable under the circumstances," which may mean that sometimes plaintiffs cannot draft a complaint with facts demonstrating plausibility.[49]

A similar rationale justifies the more liberal construction given to complaints filed by prisoners who proceed *in forma pauperis*.[50] Because they have virtually no opportunity to conduct a pre-complaint investigation, the courts give them a break. For example, in *Rodriguez v. Plymouth Ambulance Service*, a prisoner who filed a § 1983 claim pro se[51] was given the "opportunity to engage in limited discovery to ascertain the identity" of certain individual medical staff members who were allegedly deliberately indifferent to his serious medical condition in violation of the Eighth Amendment.[52] Recognizing the prisoner's "opportunities for conducting a precomplaint inquiry" as "virtually nil,"[53] the court refrained from dismissing the

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[46] *See Kregler II*, 646 F. Supp. 2d at 574–75, 578–81.
[47] *See id.* at 581.
[48] Rule 11(b) states:

> By presenting to the court a pleading . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

FED. R. CIV. P. 11(b)(3).
[49] Post-*Iqbal*, it behooves a plaintiff facing this type of evidentiary inequality to specifically identify those factual contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," FED. R. CIV. P. 11(b)(3), in the event they are lacking at filing. This explicit acknowledgment places the court on notice that plausibility discovery is warranted, and potentially shields plaintiffs from a Rule 11(b)(3) challenge. *See, e.g.*, *Kregler I*, 608 F. Supp. 2d at 475 (deciding to hold a pre-dismissal preliminary hearing to flesh out the complaint's plausibility and to discern if plaintiff properly conducted a pre-suit investigation required by Rule 11(b)(3)).
[50] Latin for "in the manner of a pauper," meaning "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs." BLACK'S LAW DICTIONARY 783 (7th ed. 1999).
[51] Latin for "on one's own behalf; without a lawyer," meaning "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer." BLACK'S LAW DICTIONARY 1236-37 (7th ed. 1999).
[52] Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 819, 821–22, 832 (7th Cir. 2009).
[53] *Id.* at 821.

complaint and instead ordered discovery before ruling on the dismissal motion.[54] The Seventh Circuit explained that the "principle is not limited to prisoner cases" but instead "applies to any case in which . . . identification of the responsible party may be impossible without pretrial discovery."[55] The court recognized that while eventually the plaintiff would have to discover information sufficient to overcome a Rule 12(b)(6) dismissal under *Twombly* and *Iqbal*, his initial inability did not warrant immediate dismissal.[56] This rationale would seemingly apply to civil rights cases in other contexts.

V. How Plausibility Discovery Would Work in Practice: A Roadmap for Judges

So how would plausibility discovery actually work in practice? Let's assume someone believes her civil rights have been violated, so she conducts a thorough investigation and then files a lawsuit in federal court alleging discrimination based on the facts available at this time. She and her lawyer have done their best to gather evidence about the case, but because there has been no formal discovery, they do not have the defendant's policy documents or testimony indicating discriminatory motive. Not surprisingly, the defendant counters that plaintiff's claim is implausible because her facts could suggest discrimination or some other perfectly innocent explanation. Thanks to *Iqbal*, the defendant files a Rule 12(b)(6) motion to dismiss plaintiff's case, believing that he has a greater shot at it being granted. So how can a plaintiff get access to the federal court where she has a potentially meritorious civil rights case but informational inequality has compromised her ability to demonstrate she has a plausible claim for relief? The following is a roadmap for how a judge can preserve court access, while adhering to his mandate to provide efficient and just procedural outcomes.

First, the judge should establish that informational inequality exists. Informational inequality exists where the defendant has exclusive or primary control over the information necessary for the plaintiff to make a plausible showing to the court. Examples include facts about a defendant's state of mind (such as intent to discriminate), secret agreements (such as conspiracies), and companywide policies and statistics.[57] Given that plausibility discovery is justified where there is unequal access to information between the plaintiff and defendant, this must be the starting point. It is important for the judge to understand that despite the plaintiff's due diligence, she came up empty handed because the cards were stacked against her. To make sure that a plaintiff acted diligently, a judge may order the plaintiff to explain what efforts she made pre-filing and why she should get pre-dismissal discovery to bridge the plausibility gap.[58] Upon this showing by the plaintiff, a judge should recognize the informational inequality.

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Claims most likely implicated include civil rights (such as § 1983 and employment discrimination), antitrust, products liability, and environmental law.
[58] The court may consider using an iteration of some or all of the criteria for a Rule 56(f) request for discovery:

> To request discovery under Rule 56(f), a party must file an affidavit describing: (1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to raise a genuine issue of material fact; (3) what efforts the affiant has made to obtain them; and (4) why the affiant's efforts were unsuccessful.

Second, the judge should defer ruling on the motion to dismiss. A judge should not rule on the Rule 12(b)(6) motion because if he does, he may lack jurisdiction to order any discovery.

Third, the judge should order plausibility discovery. Having determined that there is informational asymmetry and put the motion to dismiss on hold, the judge may order plausibility discovery at the plaintiff's request. Of course, ordering this discovery only makes sense if there is a reasonable chance it will bear fruit. The scope and form of the discovery should be worked out by the parties with the court's approval. At this juncture, the goal is for the court to order very narrow discovery, focused exclusively on unearthing facts identified as necessary for demonstrating plausibility. Having initially persuaded the court that the playing field is tilted against her, she should now demonstrate that it would not take much to level it. Care must be taken to ensure that plausibility discovery does not become merits discovery. To protect the defendant from the cost and burden of unwarranted merits discovery, plausibility discovery must be narrowly-defined and limited to just what is necessary to cross the viability threshold. To facilitate this process, a court may request that the parties meet and confer and create a proposed discovery plan, using Rule 26(f) for guidance, which the court can approve or modify as needed.

Fourth, the judge should allow plaintiff to amend her complaint. Once the parties have had an opportunity to take limited discovery on the question of plausibility, the plaintiff will likely move to amend her complaint to incorporate the new facts she has found. Pursuant to Rule 15(a)(2), "[t]he court should freely give leave when justice so requires"[59] and under Rule 8(e), "[p]leadings must be construed so as to do justice."[60] Judges generally promote a liberal leave policy, permitting leave whenever possible.[61] In fact, under the new pleading standard, as complaints fail to meet the plausibility test, many judges are liberally granting plaintiffs leave to amend. However, where the complaint's implausibility is due to an informational inequality, an opportunity to re-plead does little good without some narrow discovery to ameliorate the problem.

Fifth and finally, the judge should rule on the motion to dismiss. Considering the plaintiff's amended complaint, the judge should rule on the defendant's 12(b)(6) motion to dismiss.[62] The plaintiff will have had a fair opportunity to enhance her complaint with facts

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Gualandi v. Adams, 385 F.3d 236, 244 (2d Cir. 2004).

[59] FED. R. CIV. P. 15(a)(2).

[60] FED. R. CIV. P. 8(e).

[61] *See* Foman v. Davis, 371 U.S. 178, 182 (1962).

[62] Plausibility discovery does not require a court to convert a defendant's 12(b)(6) motion into a Rule 56 summary judgment motion. If a defendant takes some limited discovery to counter plaintiff's evidence of a plausible claim, and the judge considers such extrinsic evidence, he will be required under Rule 12(d) to convert the Rule 12(b)(6) motion into a Rule 56 summary judgment motion. *See* Rule 12(d), which states:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

FED. R. CIV. P. 12(d).

revealed through plausibility discovery and the defendant will have a renewed opportunity to rebut the amended complaint. Under this approach, a judge appropriately balances the goals of justice and efficiency.

VI. Plausibility Discovery as the Next Step

The concept of discovery at the pleading stage to determine plausibility is admittedly in its infancy. However, it is starting to gain some traction.[63] For example, in *Swanson v. Citibank, N.A.*[64]—a civil rights case alleging discrimination—prolific scholar and Seventh Circuit Judge Richard Posner recognized in his dissenting opinion, "If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss."[65] Preeminent procedural scholar and professor for 40 years, Arthur R. Miller, also recognizes plausibility discovery as a viable option for dealing with informational inequality:

> A . . . possibility might be authorizing early, limited, and carefully sequenced discovery following the interposition of a motion to dismiss . . . . Contained discovery before the motion's resolution could provide a fruitful middle ground for evaluating challenges to cases that lie between the traditional Rule 12(b)(6) motion based on the complaint's legal or notice-giving sufficiency and a motion based on the complaint's failure to meet the factual plausibility precepts of *Twombly* and *Iqbal*.[66] . . .
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> The *Iqbal* Court indicated that the current structure of Rule 8 forbids any access to discovery if the plausibility standard has not been met. That point is neither irrefutable nor immune from rule revision. . . . Nor is there any mandatory or automatic stay of discovery while a Rule 12(b)(6) motion is pending. . . . The district court judge therefore could permit discovery—presumably, but not necessarily, limited to matters relating to the issue of plausibility—prior to or during the pendency of the motion to dismiss and could then consider anything relevant that emerged.[67]

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[63] *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 932–35, 934 n.256 (2009) (describing pleading-stage discovery as "promising"); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 161 (2008) (arguing for limited initial discovery on specific issues at the pleading stage for civil rights cases); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1351-56 (2010).

[64] Swanson v. Citibank, N.A., 614 F.3d 400, 412 (7th Cir. 2010).

[65] *Id.* at 412 (Posner, J., dissenting) (citing cases; Malveaux, *supra* note 11; and Hartnett, *supra* note 41, at 507-14).

[66] Miller, *supra* note 28, at 107.

[67] *Id.* at 109 (citing cases; congressional testimony; Malveaux, *supra* note 11, at 69; and Hartnett, *supra* note 41, at 507-14).

The justices dissenting in *Twombly* and *Iqbal* recognized the value of a similar procedure, "phased discovery,"[68] based on the same concept of protecting the defendant from merits discovery while permitting the parties some threshold discovery rather than granting defendant's Rule 12(b)(6) motion. In Justice Stevens's dissent in *Twombly*, he suggested that had he been the district court judge, he would have permitted plaintiffs to take some targeted depositions of executive defendants rather than summarily dismissing plaintiffs' claims.[69] In *Twombly*, the plaintiffs had proposed a plan of "phased discovery," comprised of an initial phase of discovery "limited to the existence of the alleged conspiracy and class certification," to be followed by "more expansive, general discovery" if the class claims survived summary judgment.[70] This phased discovery proposal was, according to Justice Stevens, "an appropriate subject for negotiation."[71]

Similarly, the Second Circuit in *Iqbal* was receptive to a phased discovery plan that would have protected senior government officials from premature merits discovery by requiring front-line officials to be subjected to discovery first.[72] The Second Circuit noted that even if a complaint survives a Rule 12(b)(6) challenge, the district court may "exercise[] its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe" issues pertaining to qualified immunity.[73] In Justice Breyer's dissent in *Iqbal*, he cited with approval the ways in which discovery can be structured and cases managed to protect government officials from unwarranted litigation, as described by the Second Circuit.[74]

Others have recognized the utility of plausibility discovery[75] and proposed similar ways discovery can address the informational inequality issue.[76] Indeed, it was the topic of discussion

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[68] *See* Bone, *supra* note 63, at 933 n.251.
[69] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1986–87 (2007) (Stevens, J., dissenting).
[70] Brief for Respondents at 25, *Twombly*, 127 S. Ct. 1955 (No. 05-1126).
[71] *Twombly*, 127 S. Ct. at 1987 (Stevens, J., dissenting).
[72] *See* Iqbal v. Hasty, 490 F.3d 143, 158, 178 (2d Cir. 2007).
[73] *Id.* at 158.
[74] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1961–62 (2009) (Breyer, J., dissenting).
[75] Miller, *supra* note 28, at 107 ("There is considerable support for this."); s*ee* Memorandum from Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 15 (May 17, 2010) [hereinafter Memorandum], *available at* http://ftp.documation.com/references/ABA10a/PDfs/4_1.pdf ("[S]taged discovery to support pleading may become a useful means of addressing the problems of a plaintiff who needs access to information controlled by the defendant in order to frame a complaint."); Bone, *supra* note 63, at 932–35, 934 n.256 (describing pleading-stage discovery as "promising"); Spencer, *supra* note 63, at 161 (arguing for limited initial discovery on specific issues at the pleading stage for civil rights cases); Steinman, *supra* note 63, at 1351-56.
[76] *See, e.g.*, SPECIAL COMM., AM. BAR ASS'N SECTION OF LITIG., CIVIL PROCEDURE IN THE 21ST CENTURY: SOME PROPOSALS 8 (2010), *available at* http://www.abanet.org/litigation/docs/civil-procedure-proposals.pdf; Letter from Albert A. Foer, President, Am. Antitrust Inst., to the Standing Comm. on Rules of Practice & Procedure of the U.S. 2 (May 27, 2010), *available at* http://www.antitrustinstitute.org/sites/default/files/Iqbal%20letter%205%2027%2010_052720101301.pdf (encouraging "limited, non-burdensome discovery prior to consideration of the motion to dismiss"); Inst. for the Advancement of the Am. Legal Sys., *Fact-Based Pleading; A Solution Hidden in Plain Sight*, UNIV. OF DENVER, http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf. *See also* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010) (discussing potential role of state presuit discovery in addressing informational asymmetry); Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The*

among several scholars, practitioners, and judges at the Judicial Conference of the United States's Civil Rules Advisory Committee meeting held on May 10 and 11, 2010, at Duke University School of Law.[77]

While plausibility discovery may offer a lifeline to civil rights plaintiffs struggling to get federal court access post-*Iqbal*, it is not a panacea. It clearly does not address all of the problems the more rigorous pleading standard poses. It does nothing to address the overly subjective nature of how judges go about determining if a claim is plausible by using their "judicial experience and common sense." If anything, this approach may rely more heavily on a judge's discretion by conditioning the availability of plausibility discovery on individual judges' case-by-case determinations. While recognizing the value of plausibility discovery, Professor Miller notes this limitation:

> A matter of this magnitude should not be left to the inclinations of individual judges, however. Whether or not the Supreme Court's prescription is taken literally, a significant revision of the pleading and motion rules appears to be necessary to create a more textured and balanced solution to the information-access problem.[78]

Others have made similar observations but concluded that a legislative fix is the answer.[79] Nor does plausibility discovery address the fact that a judge may still conclude that plaintiff's theory is implausible because it pales in comparison to a more benign explanation, given the facts set out early in the case.

VII. Conclusion

Plausibility discovery admittedly functions as a stop gap measure; it offers a temporary lifeline for civil rights plaintiffs to get access to the federal courts until a more institutional solution comes along. Given the very real possibility that a Rules change or act of Congress may be months, if not years, away, plausibility discovery creates an opportunity for potentially meritorious cases to survive rather than die on the vine. This reason alone justifies creative lawyering and judicial decisions that consider all of the tools in a judge's toolbox. Indeed, some lawyers and judges are catching on.[80]

Role of Presuit Investigatory Discovery, 40 U. MICH. J.L. REFORM 217, 222–23 (2007) (describing pre-suit discovery as an option).

[77] *See* Memorandum, *supra* note 75, at 4 ("Various proposals were explored to ensure an opportunity for targeted discovery before dismissal for failure to state a claim, particularly in 'asymmetrical information' cases.").

[78] Miller, *supra* note 28, at 110.

[79] *See* Joshua Civin & Debo P. Adegbile, *Restoring Access to Justice: The Impact of* Iqbal *and* Twombly *on Federal Civil Rights Litigation*, AM. CONSTITUTION SOC'Y ISSUE BRIEF, Aug. 2010, at 18.

[80] *See* Memorandum, *supra* note 75, at 3:

> At least some trial judges achieve a tacit accommodation [to the information asymmetry problem] by allowing discovery to proceed while considering a motion to dismiss. It may be that the most effective response for plaintiffs who lack equal access to essential information will be to focus on some new means of controlled discovery in aid of pleading, not on the 1938 language of Rule 8(a)(2) that construed in the *Twombly* and *Iqbal* opinions.

While plausibility discovery may not address every problem posed by the more rigorous pleading standard, it addresses one of most pernicious ones. According to Professor Miller "inequality of information access" is "a significant—if not the most significant—problem for many people seeking affirmative relief."[81]

The courts are in unchartered territory post-*Iqbal*. The challenge of preserving court access for those civil rights plaintiffs struggling with informational inequality is great. This is an important moment in the history of modern civil procedure. The new plausibility pleading standard may threaten the viability of claims that protect fundamental American values, such as civil rights. Given their charge to administer and interpret the rules to promote efficiency and justice, judges are empowered and encouraged to consider how plausibility discovery can help ameliorate this threat.

Id.; *see, e.g.*, *Kregler I*, 608 F. Supp. 2d 465 (S.D.N.Y. 2009); *see also Kregler II*, 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009).

[81] Miller, *supra* note 28, at 105.