

University of Pennsylvania Carey Law School

Penn Carey Law: Legal Scholarship Repository

Faculty Scholarship at Penn Carey Law

2010

Foreword: Procedure as Palimpsest

Catherine T. Struve

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#), [Courts Commons](#), [Jurisprudence Commons](#), and the [Litigation Commons](#)

Repository Citation

Struve, Catherine T., "Foreword: Procedure as Palimpsest" (2010). *Faculty Scholarship at Penn Carey Law*. 1186.

https://scholarship.law.upenn.edu/faculty_scholarship/1186

This Article is brought to you for free and open access by Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Carey Law by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

FOREWORD

PROCEDURE AS PALIMPSEST

CATHERINE T. STRUVE[†]

Ask an artist about the importance of “Twombly,” and he or she will likely think you are referring to Cy Twombly. Ask a lawyer about the importance of “Twombly,” and she will undoubtedly understand you to be asking about *Bell Atlantic Corp. v. Twombly*.¹ That the Supreme Court’s landmark pleading decision from the spring of 2007 bears the same name as the abstract painter is purely coincidental; but on consideration, the *Twombly* decision bears some similarity to Twombly’s work. Take any of a number of Twombly paintings from the late 1950s through the 1970s, and you will find indistinct forms that can be interpreted in numerous ways and erasures that are as significant as the marks scribbled atop them.² Twombly’s paintings have been characterized as palimpsests—images in which the most recent marks do not fully obscure the earlier patterns.³ Likewise, one of

[†] Professor, University of Pennsylvania Law School. I thank the members of the Executive Committee of the Civil Procedure Section of the Association of American Law Schools for selecting the three articles in this collection, and Thom Main for serving as the moderator of the meeting at which these papers were presented. I am indebted to Stephen Burbank and Kevin Clermont for very helpful comments on prior drafts of this Foreword.

¹ 550 U.S. 544 (2007).

² See generally KIRK VARNEDOE, *CY TWOMBLY: A RETROSPECTIVE* (1994) (accompanying and cataloging an exhibition of Twombly’s work at the Museum of Modern Art in New York).

³ See, e.g., ROLAND BARTHES, *Cy Twombly, ou ‘Non multa sed multum,’* in V ROLAND BARTHES: *OEUVRES COMPLÈTES* 703, 710 (Éric Marty ed., new rev. ed. 2002) (“[L]a main a tracé quelque chose comme une fleur et puis s’est mise à traîner sur cette trace; la fleur a été écrite, puis désécrite; mais les deux mouvements restent vaguement surimprimés; c’est un palimpseste pervers . . .”). The third edition of Webster’s defines a palimpsest as, *inter alia*, “a parchment, tablet, or other portion of writing material

Twombly's key feature is an erasure: *Twombly* "retire[s]"⁴ the Court's statement a half-century earlier in *Conley v. Gibson* "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵ The indeterminate new marks made by *Twombly* caused urgent debate: how should courts interpret—and how broadly should they apply—the *Twombly* Court's conclusion that the plaintiffs' antitrust complaint must be dismissed because their claim of conspiracy was not "plausible"?⁶ Just under two years later, the Court answered the question of scope: it made clear in *Ashcroft v. Iqbal* that *Twombly*'s new approach to pleading applies to all cases in federal court—not merely to complex antitrust class actions.⁷

To interpret *Twombly* and *Iqbal*, we must view those decisions in the light of the procedural law that forms their background. The three articles in this collection do so in distinct but complementary ways. And in so doing, they examine not only pleading standards but other interlocking aspects of contemporary civil procedure. Professor Edward Hartnett's close analysis of *Twombly* and *Iqbal* focuses our attention on underlying historical assumptions concerning the plausibility of inferences. Through this analysis, he suggests to advocates the importance of educating judges concerning such questions of plausibility in the context of the particular case. Professor Hartnett also examines the connection between motions to dismiss and discovery, and he finds that, even post-*Iqbal*, the district judge enjoys discretion to permit targeted discovery—pending the disposition of a motion to dismiss—in ways that may promote the survival of claims that might otherwise be dismissed. In considering Professor Elizabeth Schneider's article, we step several paces further back, so that our field of vision takes in not only pleading but also summary judgment and the evidentiary principles that govern expert testimony. Professor Schneider argues forcefully that these doctrines combine to tilt the balance against plaintiffs in civil rights and employment actions, and she considers the

that has been used twice or three times after the earlier writing has been erased." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1625 (3d ed. 1981).

⁴ *Twombly*, 550 U.S. at 563.

⁵ 355 U.S. 41, 45-46 (1957).

⁶ See *Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

⁷ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (citation omitted)).

implications of this insight for the role of federal judges in these important categories of litigation. Professor Scott Dodson broadens our field of inquiry further still, by suggesting that we evaluate the effects of *Twombly* and *Iqbal* in the light of pleading standards not only in the United States but also abroad. In combination, these articles have much to tell us, not just about *Twombly* and *Iqbal*, but about developments in U.S. federal civil procedure and the consequences of those developments for the enforcement of substantive rights.

In *Taming Twombly, Even After Iqbal*, Professor Hartnett begins by examining the reasoning behind the *Twombly* Court's holding that a complaint alleging a "contract, combination . . . , or conspiracy, in restraint of trade or commerce" in violation of section 1 of the Sherman Act⁸ cannot "survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action."⁹ He summarizes the scholarly criticism of *Twombly* and notes in particular the concern that "the Court imposed a heightened specificity standard of pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery."¹⁰ Professor Hartnett observes that though *Twombly* could have been read as a decision concerning the substantive requirements for an antitrust conspiracy claim—rather than as a decision that bears on pleading standards generally—there was ample support in the *Twombly* opinion for the contrary reading.¹¹ And, as Professor Hartnett explains, lower federal courts promptly applied *Twombly* in a range of substantive areas outside antitrust.¹² Professor Hartnett also considers the possibility that *Twombly* could have been viewed as focusing on "complex cases involving the likelihood of extremely expensive discovery."¹³ Again, he notes that passages of broad language in *Twombly* cut against such a limiting interpretation. Moreover, he suggests, reading *Twombly* to alter the pleading standard in complex cases with expensive discovery "would put the

⁸ Sherman Act § 1, 15 U.S.C. § 1 (2006).

⁹ *Twombly*, 550 U.S. at 548-49.

¹⁰ Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010).

¹¹ *Id.* at 475-79.

¹² *Id.* at 479-80.

¹³ *Id.* at 478.

decision in serious tension with the transsubstantive approach of the Federal Rules of Civil Procedure.”¹⁴

Here Professor Hartnett identifies one of the major current challenges for federal civil procedure. Should the Civil Rules continue to take a rigorously transsubstantive approach that applies the same provisions to the most complex and the simplest of cases?¹⁵ If so, do we run the risk that the Rules will be adapted to the needs of the complex cases in a way that distorts their application to smaller, simpler disputes? In one respect, the Civil Rules explicitly depart from a transsubstantive approach by exempting specified types of cases from Rule 26(a)’s initial-disclosure requirement,¹⁶ Rule 26(d)’s discovery moratorium,¹⁷ and Rule 26(f)’s conference procedure.¹⁸ More recently—and without crafting a special rule for particular types of cases—the rulemakers altered Rule 26 to take special account of actions in which electronic discovery is particularly burdensome.¹⁹ And, of course, the Civil Rules’ pleading standards have never been entirely transsubs-

¹⁴ *Id.* at 480.

¹⁵ See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 542 (“[T]he normative question whether we are well served today by a rule-making enterprise that continues to frame rules and amendments for all cases filed in federal district court, no matter what the source or content of the substantive law, has been a subject of vigorous discussion and debate in the literature.”).

¹⁶ See FED. R. CIV. P. 26(a)(1)(B) (exempting from the initial-disclosure requirement actions for review on an administrative record, in rem forfeiture actions arising from a federal statute, habeas petitions and other challenges to a criminal conviction, pro se actions by federal or state prisoners, actions concerning administrative summonses or subpoenas, federal government actions to recover benefit payments, federal government actions to collect on student loans, proceedings ancillary to proceedings in other courts, and arbitration-award enforcement proceedings).

¹⁷ See FED. R. CIV. P. 26(d)(1) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.”).

¹⁸ See FED. R. CIV. P. 26(f)(1) (“Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).”).

¹⁹ See FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”).

tantive; Civil Rule 9(b)'s particularity requirement for pleading fraud or mistake dates back to 1938.²⁰ But these are exceptions; in the main, the Civil Rules couple a transsubstantive approach with numerous grants of discretion that, in practice, allow the district court to tailor its practice to the needs of the particular case. Whether that largely transsubstantive approach will continue to hold is a key question.

In any event, as Professor Hartnett notes, the reach of *Twombly* has now been settled.²¹ *Iqbal* involved very different facts and claims than *Twombly*. Javaid Iqbal, a Muslim citizen of Pakistan, brought constitutional claims against a number of federal officials stemming from his detention on federal charges after September 11, 2001.²² At issue in the appeal that reached the Supreme Court were Iqbal's claims against Robert Mueller (the Director of the FBI) and John Ashcroft (the former United States Attorney General). Iqbal alleged that Mueller and Ashcroft were responsible for his subjection to abusive conditions of confinement based on his race, religion, or national origin.²³ A closely divided Supreme Court held that Iqbal's allegations failed to state a claim against those two defendants.²⁴ The Court first addressed the substantive law governing Iqbal's claims, and concluded that those claims required discriminatory purpose on the part of Mueller and Ashcroft.²⁵ Though Iqbal did allege such a purpose, the Court found those allegations conclusory and disregarded them; and the Court held that the complaint's remaining allegations failed to render Iqbal's claims against Mueller and Ashcroft plausible because, in the

²⁰ See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Stephen Burbank has noted that Rule 9(b) is not substance specific in the way that a rule targeting only particular types of claims would be substance specific. See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1732 n.248 (2004) ("A Federal Rule requiring heightened pleading in 'all averments of fraud or mistake' is one thing. A proposed Federal Rule attempting to impose heightened pleading requirements as to a particular substantive claim would be quite another" (citation omitted)).

²¹ Hartnett, *supra* note 10, at 481.

²² See First Amended Complaint and Jury Demand ¶¶ 1, 9, at 2-4, *Elmaghraby v. Ashcroft*, No. 04-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) [hereinafter *Iqbal* Complaint].

²³ *Id.* ¶¶ 1-3, 10, 11, at 2-5.

²⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

²⁵ See *id.* at 1948 (2009) ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendment . . . the plaintiff must plead and prove that the defendant acted with discriminatory purpose.").

Court's view, it was more likely that Mueller and Ashcroft's actions were motivated by legitimate law-enforcement purposes than by a discriminatory purpose.²⁶ In the process, the Court roundly rejected any attempt to cabin *Twombly* as an antitrust decision: *Twombly*, the *Iqbal* Court stated, "expounded the pleading standard for 'all civil actions.'"²⁷

What, then, is the content of that universally applicable pleading standard? In Part II of his article, Professor Hartnett offers an important and helpful interpretation of *Twombly*'s plausibility requirement. Professor Hartnett rejects the view that *Twombly* permits dismissal of a complaint because the district judge finds the facts alleged or the legal theory advanced in the complaint to be implausible.²⁸ Rather, he suggests, the plausibility analysis that *Twombly* invites concerns the plausibility of the *inferences* to be drawn from the facts.²⁹ Thus, he argues, "*Twombly*'s insistence that the inference of conspiracy be 'plausible' is equivalent to the traditional insistence that an inference be 'reasonable.'"³⁰ And the plausibility of the inference, Professor Hartnett contends, can depend on the context of the claim.³¹ Turning to Form 11 (formerly Form 9), which famously pleads negligence liability merely by stating that "[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff,"³² Professor Hartnett suggests that the Form's stark simplicity can be viewed as a reflection of the familiarity of car-accident negligence claims—and he supports this insight by citing Charles Clark for the proposition that even in the nineteenth century equally simple allegations would have sufficed to ground a negligence claim.³³

²⁶ See *id.* at 1951 (rejecting as "bare assertions" *Iqbal*'s allegations that "petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" (alterations in original)); *id.* ("On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.").

²⁷ *Id.* at 1953.

²⁸ Hartnett, *supra* note 10, at 481-83.

²⁹ *Id.* at 483-84.

³⁰ *Id.* at 484-85.

³¹ See *id.* at 492-93 ("[W]hat is 'conclusory' depends on the right of action on which the claimant seeks relief and the conclusions that are necessary to relief under that right of action.").

³² FED. R. CIV. P. Form 11.

³³ Hartnett, *supra* note 10, at 493-94.

By contrast, in other contexts, the inferences that the plaintiff wishes to draw from the facts in the complaint may not strike the judge as plausible. The judge's willingness to regard a particular inference as plausible, Professor Hartnett observes, may depend in part on the judge's own range of experience.³⁴ And this has implications for the advocate: "*Twombly* can be understood as inviting lawyers to present information and argument designed to convince a judge that what the judge thinks is 'natural' is not."³⁵ Professor Hartnett's insight is of central importance to lawyers who must now operate under a post-*Twombly* regime. Given *Twombly*'s invitation to judges to police the plausibility of inferences at the stage of the motion to dismiss,³⁶ advocates must do their best to explain their case in a way that, where necessary, broadens the judge's perspective.

But this insight also helps to explain why many commentators are uncomfortable with both *Twombly* and *Iqbal*. Instead of broadening the judge's perspective, there is an alternative way to ensure that a breadth of perspective is brought to bear on the inferences in the case: namely, to send the case to the jury. Here it is helpful to recall Justice Hunt's discussion of the jury's role in *Sioux City & Pacific Railroad Co. v. Stout*.³⁷ Justice Hunt, writing for the Court, conceded that in "extreme" cases "the necessary inference from the proof is so certain that it may be ruled as a question of law."³⁸ For example,

if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability.³⁹

But between such extreme cases lies a spectrum of other factual scenarios—"almost infinite in variety and extent"⁴⁰—in which the inferences to be drawn are properly for the jury.

³⁴ *Id.* at 498-503.

³⁵ *Id.* at 500.

³⁶ See Burbank, *supra* note 15, at 540 (noting "the threat that legal indeterminacy about the freedom of judges to police inferences presents to policies underlying both the substantive law and the Seventh Amendment").

³⁷ 84 U.S. (17 Wall.) 657 (1874).

³⁸ *Id.* at 663.

³⁹ *Id.*

⁴⁰ *Id.*

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.⁴¹

To the extent that *Twombly* encourages judges to dismiss cases at the pleading stage on the ground that the plaintiff's desired inferences are implausible, the judgments that might otherwise be made by a jury will instead be made by the judge. The concerns raised by such dismissals at the pleading stage are even starker than the similar concerns raised by the possible overuse of summary judgment, because summary judgment ordinarily will not be granted without an opportunity for discovery.⁴²

Here, though, Professor Hartnett provides another central insight: he points out that the pendency of a Rule 12(b)(6) motion to dismiss for failure to state a claim does not ordinarily operate to delay discovery.⁴³ A plaintiff can plead the facts for which he or she already has evidentiary support, and can also plead factual allegations that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."⁴⁴ By specifically identifying the latter type of allegation (as required by Rule 11(b)(3)), the plaintiff "thereby focus[es] on the key issue of discovery to substantiate such allegations."⁴⁵ Once attention is focused on the key areas where discovery is needed in order to support those allegations, "[t]he court could allow limited discovery, targeted at the identified allegation, and establish a briefing schedule for any motion to dismiss that follows the completion of that limited discovery."⁴⁶ The rigors of such an approach

⁴¹ *Id.* at 664.

⁴² *See* FED. R. CIV. P. 56(f) ("If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.")

⁴³ Hartnett, *supra* note 10, at 507.

⁴⁴ FED. R. CIV. P. 11(b)(3).

⁴⁵ Hartnett, *supra* note 10, at 505.

⁴⁶ *Id.* at 509-10.

might challenge plaintiffs who (prior to discovery) lack a deep knowledge of information that is uniquely within the defendant's possession; but it could nonetheless give the skilled plaintiff's lawyer an opportunity to pursue the information needed to flesh out key points in the complaint. This might be particularly true if the plaintiff's existing information comes from informants who are reluctant to be identified in the complaint⁴⁷ but whose information could help the plaintiff's lawyer to shape the course of targeted discovery.

Professor Hartnett thus identifies two ways in which, under *Twombly* and *Iqbal*, district judges retain discretion to permit claims to survive a motion to dismiss for failure to state a claim, even where some judges might view the plaintiff's desired inferences with a skeptical eye. First, the judge might take the plausibility standard as an invitation to consider a range of perspectives—some perhaps outside the judge's own experience—when evaluating the inferences that can be drawn from the facts alleged in the complaint.⁴⁸ Second, even if the judge might not consider such inferences to be plausible on the facts as alleged in the original complaint, the judge can provide an opportunity for discovery that may enable the plaintiff, by amendment, to fill in gaps in the original complaint.⁴⁹ But Professor Hartnett acknowledges frankly that these avenues for taming *Twombly* depend on the discretion of the district judge.⁵⁰ The district judges may cabin *Twombly*, but who will cabin the district judges?

In *The Disparate Impact on Civil Rights and Employment Discrimination Cases*, Professor Schneider expands our consideration of trial-judge discretion by examining three related contexts: pleading, summary judgment, and expert testimony.⁵¹ She argues that in each of these areas, developments over the past thirty years have augmented the district judge's authority to reject claims of civil rights violations and employment discrimination. Part I of her article commences by reviewing empirical studies that indicate the challenges faced by federal-court plaintiffs in such cases.⁵² Professor Schneider notes preliminary

⁴⁷ See generally *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711-12 (7th Cir. 2008) (assessing a complaint's use of information from confidential sources).

⁴⁸ Hartnett, *supra* note 10, at 499-503.

⁴⁹ *Id.* at 509-12.

⁵⁰ *Id.* at 513-15.

⁵¹ Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010).

⁵² *Id.* at 524-26.

findings showing that, even pre-*Iqbal*, courts were applying *Twombly* in employment and civil rights cases and suggesting that *Twombly*'s application in such cases was adversely affecting such claims.⁵³ Professor Schneider then highlights a number of decisions applying *Iqbal* in the context of civil rights cases; her review of those decisions demonstrates the broad discretion that *Iqbal* vests in district judges.⁵⁴ Some judges, she suggests, are taking *Iqbal* as a license to bring their own preconceptions concerning civil rights and employment discrimination claims to bear on motions to dismiss such claims.⁵⁵

Turning to summary judgment, Professor Schneider describes a similar dynamic. Here the question of judicial perspective—which Professor Hartnett, too, has addressed in connection with pleading decisions—recurs in connection with summary judgment.

[I]n civil rights or employment discrimination cases . . . where subtle issues of credibility, inferences, and close legal questions may be involved, where issues concerning the “genuineness” or “materiality” of facts are frequently intertwined with law, a single district judge may be a less preferable decision maker than a jury. Juries are likely to be far more diverse and to bring a broader range of perspectives to bear on the problem.⁵⁶

Moreover, Professor Schneider suggests, some judges take a mechanistic approach to evaluating summary judgment motions, analyzing pieces of evidence in isolation from each other and failing to consider the whole of the evidence in context.⁵⁷ Such an approach differs from that which jurors are likely to employ when deciding a case. Not only will the jurors bring to the case a variety of life experiences (and thus a range of perspectives) but it seems likely that jurors will tend to evaluate the case by fitting each piece of evidence into a narrative that makes sense of the case as a whole.⁵⁸

⁵³ *Id.* at 532.

⁵⁴ *Id.* at 533-35.

⁵⁵ *Id.*

⁵⁶ *Id.* at 542-43.

⁵⁷ *Id.* at 544.

⁵⁸ See, e.g., Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192, 194 (Reid Hastie ed., 1993) (“The story model is based on the hypothesis that jurors *impose* a narrative story organization on trial information. According to the theory, the story will be constructed from three types of knowledge . . . : (A) case-specific information acquired during the trial . . . ; (B) knowledge about events similar in content to those that are the topic of dispute . . . ; and (C) generic expectations about what makes a complete story (e.g., knowledge that human actions are usually motivated by goals).”).

Professor Schneider aptly illustrates her argument by reference to *Scott v. Harris*.⁵⁹ In *Harris*, the Supreme Court reversed the lower courts' denial of summary judgment for the defendant in a case arising from a high-speed chase.⁶⁰ The Court's ruling depended on the view that "no reasonable jury" could fail to conclude from the evidence that "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others" and that the defendant's "attempt to terminate the chase by forcing respondent off the road was reasonable."⁶¹ Justice Stevens's lone dissent asserted that "jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19."⁶²

As Professor Schneider points out, a recent study by Dan Kahan, David Hoffman, and Don Braman can illuminate our understanding of the debate between Justice Stevens and the *Harris* majority.⁶³ Professors Kahan, Hoffman, and Braman showed the video of the *Harris* chase to 1350 people.⁶⁴ They found that

[a] very sizable majority of our diverse, nationally representative sample agreed with the *Scott* majority that Harris's driving exposed the public and the police to lethal risks, that Harris was more at fault than the police for putting the public in danger,⁶⁵ and that deadly force ultimately was reasonable to terminate the chase.

But they also discerned patterns among viewers in that majority and among viewers who took the contrary view: "Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions."⁶⁶ By contrast,

[i]ndividuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose

⁵⁹ 550 U.S. 372 (2007).

⁶⁰ *Id.* at 386.

⁶¹ *Id.*

⁶² *Id.* at 397 (Stevens, J., dissenting).

⁶³ Schneider, *supra* note 51, at 547-48 & n.147.

⁶⁴ Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

⁶⁵ *Id.* at 879.

⁶⁶ *Id.*

ranks include disproportionately more African Americans and women . . . were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase.⁶⁷

Kahan, Hoffman, and Braman criticize the grant of summary judgment in *Harris* on a number of grounds. One is that, even if we assume that in a given jury a majority of jurors might respond as a majority of the viewers did in the study, the jury's deliberations could provide an opportunity for those taking the minority view to persuade those in the majority to reconsider their perceptions.⁶⁸

Professor Schneider's analysis of summary judgment, then, suggests a conclusion similar to that which one might draw from Professor Hartnett's discussion of motions to dismiss for failure to state a claim. In both contexts, the judge's ability to perceive a range of perspectives other than her own may be vital in determining whether the judge permits a case to proceed further—and thus, potentially, to reach a jury that might embody that greater diversity of perspectives.⁶⁹ Likewise, Professor Hartnett's suggestion that plaintiffs might use social science data to broaden the judge's perspective at the Rule 12(b)(6) stage⁷⁰ resonates with Professor Schneider's observations concerning the vital role that social scientists can play as experts in discrimination cases.⁷¹ Professor Schneider's article thus underscores the importance of investigating the impact of the *Daubert* standard on rulings concerning social science experts in such cases.⁷² District court rulings concerning such testimony may be particularly pivotal,

⁶⁷ *Id.*

⁶⁸ *See id.* at 885 (“The experience of interacting with others whose understandings of social reality differ from theirs—and thus learning that their own understandings, and hence their views of the facts, are partial—might cause jurors of diverse identities to converge on a common view of the facts, particularly where one side's initial view is less intensely held than the other's.”). Kahan, Hoffman, and Braman also suggest a process value in denying summary judgment where an identifiable minority of potential jurors would disagree with the majority's view of the appropriate case outcome. *See id.* (“[J]ury deliberation can invest law with democratic legitimacy even when factual understandings born of diverse experiences and social influences persist.”).

⁶⁹ Obviously, most federal cases do not go to trial even if they survive the Rule 12(b)(6) and summary judgment stages.

⁷⁰ Hartnett, *supra* note 10, at 503.

⁷¹ Schneider, *supra* note 51, at 553-55.

⁷² *See id.* at 555 (noting that there is “less information on what is actually happening with *Daubert* in the pretrial context than other aspects of pretrial procedure,” but suggesting that “there is good reason to believe that the lethal combination of *Daubert* and summary judgment has affected” civil rights and employment discrimination cases).

Professor Schneider notes, because such rulings are reviewed only for abuse of discretion (in contrast to summary judgment grants, which are reviewed *de novo*).⁷³ Professor Schneider also impresses upon us the need to consider procedural devices as an interlocking set, and to scrutinize proposed changes in those devices for signs that the changes might disproportionately impact particular types of litigation (such as employment discrimination or other civil rights cases).⁷⁴ But in the end, Professor Schneider, like Professor Hartnett, returns to the importance of good judging—including the importance of a judge’s openness to the perspectives of others whose experiences differ from her own.⁷⁵

If Professors Schneider and Hartnett invite us to study *Twombly*’s pleading standard as part of an interconnected web of federal court procedures, Professor Dodson calls on us to enlarge our focus by comparing the United States’ approach to pleading with that employed in other countries. In *Comparative Convergences in Pleading Standards*, Professor Dodson situates this invitation within the larger project of the comparative study of civil procedure, and he thus begins by summarizing the benefits and challenges of that larger project.⁷⁶ Comparing the United States’ approach to those taken in other common law jurisdictions and in civil law jurisdictions serves a number of purposes. The comparison reveals the many ways in which U.S. procedure is exceptional, and thus invites U.S. scholars to reconsider the range of procedural possibilities. Moreover, an examination

⁷³ See *id.* at 551-52 (“*Daubert* rulings may be the preferred method of district court resolution because they provide greater discretion for district court judges and less chance of reversal on appeal.”). This insight also helps to address one question that might arise concerning Professor Schneider’s earlier point about district court grants of summary judgment. In one way, there might be a structural incentive not to grant summary judgment: grants of summary judgment that end the entire case produce an appealable judgment and thus raise the prospect of immediate appellate review, whereas denials ordinarily will not be immediately appealable. (An exception exists in certain contexts, such as some denials of motions based on qualified immunity.) The prospect of immediate *de novo* appellate review might lessen the incentives for a district judge to grant summary judgment dismissing a case (though, admittedly, there are contrary incentives, given that dismissing a case helps to clear the judge’s docket); but if the grant of summary judgment is based upon the exclusion of the plaintiff’s expert witness’s testimony, then the operative reasoning that underpins the dismissal will receive more deferential review.

⁷⁴ *Id.* at 556-57.

⁷⁵ *Id.* at 569.

⁷⁶ See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 444-47 (2010).

of the processes a society chooses for dispute resolution may reveal broader and deeper differences concerning the presuppositions on which the society is founded.⁷⁷

Having thus framed the pleading question within this broader context, Professor Dodson notes the intriguing contrast between U.S. pleading practices and those of other countries. The United States' system of notice pleading contrasts sharply, he observes, with the pleading requirements imposed in Germany, France, Japan, England, and other countries.⁷⁸ But, he notes, the comparative project must also recognize that a country's procedure is likely to be dynamic rather than static, and thus the project should entail not only a review of different countries' current practices but also the study of changes in each country's practices.⁷⁹ Accordingly, Professor Dodson insightfully considers the development of the United States' pleading practices over time, noting the effects of the Supreme Court's 1957 decision in *Conley v. Gibson*⁸⁰ as well as the Supreme Court's more recent (pre-*Twombly*) decisions rejecting judicial efforts to impose heightened pleading standards.⁸¹

Professor Dodson comments that the comparative study of pleading practices is particularly apposite now, because the United States has shown signs of shifting closer to the pleading approach adopted by other countries. Here Professor Dodson draws together both legislative and case law developments. With respect to case law, Professor Dodson recounts the debate over *Twombly*'s scope and merits, and he discusses the *Iqbal* Court's response to that debate.⁸² He observes that *Iqbal* directs the application of *Twombly* across the board. He also asserts that *Iqbal* and *Twombly* "shift [the] focus from notice to facts," thus rendering federal pleading "more akin to foreign pleading re-

⁷⁷ See, e.g., William B. Ewald, What's So Special About American Law?, Keynote Speech of the Annual Quinlan Lecture at the Oklahoma City University School of Law (Mar. 29, 2001) (suggesting that "the deepest differences between the American and the European legal systems are all linked, in one way or another, to . . . two different ways of thinking about the state and popular democracy"), in 26 OKLA. CITY U. L. REV. 1083, 1100 (2001).

⁷⁸ See Dodson, *supra* note 76, at 452 (stating that "no other country's pleading requirements are so relaxed" as those of the United States).

⁷⁹ *Id.* at 452 n.69.

⁸⁰ 355 U.S. 41 (1957); see Dodson, *supra* note 76, at 450-52.

⁸¹ See Dodson, *supra* note 76, at 451-52 & n.66 (discussing, inter alia, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

⁸² *Id.* at 457-62.

gimes.”⁸³ Here we find another synergy among the articles in this collection: Professor Hartnett’s reading of *Twombly* as directing a plausibility analysis that varies with the context of the case yields an important nuance for the comparative project. Professor Hartnett’s observations that “[p]lausibility of inference is not the same as specificity of factual allegation” and that the plausibility test’s application “will depend on what facts the substantive law makes material and on the appropriate inferential connections between facts”⁸⁴ give us reason to think that we now have fact pleading for some things in some federal cases—not for all things in all federal cases. Professor Dodson aptly picks up this thread when he notes that the *Twombly/Iqbal* plausibility standard “has a different focus than the pleading regimes in other countries.”⁸⁵

The *Twombly/Iqbal* pleading standard has not only a different focus but also, I suspect, a different set of justifications. Neither *Twombly* nor *Iqbal* makes any attempt to justify the plausibility approach by reference to the existence of tougher pleading standards elsewhere in the world. Perhaps ironically, a number of the Justices who favor the new pleading test deplore reliance on foreign law, and vice versa. Justices Scalia and Thomas—who voted with the majority in both *Twombly* and *Iqbal*—have asserted (albeit in a different context) that the notion “that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.”⁸⁶ Conversely, Justice Ginsburg—who dissented in both cases—has argued with respect to constitutional adjudication that “[w]e are the losers if we do not both share our experience with, and learn from others.”⁸⁷ The Justices have not taken their dispute over foreign sources into the pleading field; rather, they have couched the pleading debate—at least so far—in domestic terms. But perhaps future cases will give them an occasion to heed Professor Dodson’s suggestion that “[p]leadings convergence, particularly if justified by comparative sources, may go a long way to-

⁸³ *Id.* at 462-63.

⁸⁴ Hartnett, *supra* note 10, at 495-96.

⁸⁵ Dodson, *supra* note 76, at 463.

⁸⁶ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

⁸⁷ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective In Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1 (2003).

ward making a good-faith showing of willingness to join the international conversation on civil procedure.”⁸⁸

As Professor Dodson points out, the shift in *Twombly* and *Iqbal* toward a more rigorous pleading standard parallels similar statutory developments. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress imposed a heightened pleading standard for fraud claims under the Securities Exchange Act of 1934.⁸⁹ And in the Y2K Act, Congress set heightened pleading requirements for certain claims of harm arising from computer failures in connection with the start of the year 2000.⁹⁰

Professor Dodson’s juxtaposition of these three pleading developments is illuminating in several ways. First, it directs our attention to the source of the pleading requirement. When a heightened pleading requirement is confined to a particular subject area and is imposed by the body that also creates the substantive rules of law for that subject area—as was true in the case of the PSLRA—that might be thought to raise fewer concerns than would the judicial creation of a heightened pleading requirement that may apply to many types of claims and that may affect the vindication of rights created by the Constitution or by statute.⁹¹

Second, viewing *Twombly*, *Iqbal*, the PSLRA, and the Y2K Act together prompts us to heed Professor Dodson’s call for a comparison not only of federal with foreign procedure but also of federal with state procedure.⁹² In the case of the PSLRA, it becomes clear that we cannot understand or predict the effects of procedural change in the federal courts without also considering the procedures available in state courts. Plaintiffs frustrated by the PSLRA’s procedural hurdles—such as its imposition of a stay of discovery pending the disposition of a motion for summary judgment—found their way into state courts.⁹³ Congress responded in 1998 by enacting the Securities Litigation Uniform Standards Act, which preempts “covered class actions” under state

⁸⁸ Dodson, *supra* note 76, at 469-70.

⁸⁹ 15 U.S.C. § 78u-4(b) (2006).

⁹⁰ *Id.* §§ 6602, 6607.

⁹¹ See generally Burbank, *supra* note 20, at 1731-32 (discussing the PSLRA as an example of substance-specific procedural lawmaking by Congress).

⁹² Dodson, *supra* note 76, at 471.

⁹³ See generally Richard H. Walker et al., *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 677-80 (1997) (explaining that “[t]he strictures of the [PSLRA] have led some plaintiffs’ attorneys to seek a detour around the obstacles in federal court by turning to state forums”).

law⁹⁴ and authorizes federal courts hearing claims under the Securities Act of 1933 or the Securities Act of 1934 to stay state-court discovery under some circumstances.⁹⁵ And when enacting the Y2K Act in 1999, Congress imposed its heightened pleading requirements not only on federal court actions but also on state court actions.⁹⁶ Congress's legislative forays into state-court procedure raise constitutional questions,⁹⁷ but they also show an awareness that procedural reform in the federal courts requires consideration not only of federal court procedures but also of the procedures offered in competing state court fora.

Third, experience under the PSLRA may help to illustrate the connections between private litigation and other forms of regulation. Professor Dodson makes this connection clear, noting that the optimal degree of court access for private litigants may sometimes depend in part on the extent to which government regulators stand ready to enforce the substantive law.⁹⁸ This insight suggests that one interesting avenue for research might explore the extent to which the PSLRA's barriers to private securities litigation roughly coincided with a decrease in government regulation of the securities markets, and might also explore the extent to which both of these trends, in conjunction, may have contributed to recent economic developments.

So far I have only sketched the vistas that Professor Dodson's article opens for research concerning procedure within the United States. But of course his article is equally thought provoking with respect to the pleading practices in other countries. His survey of those countries' pleading practices prompts us to ask what, in the U.S. experience, produces our anomalous practice of notice pleading, and what

⁹⁴ See 15 U.S.C. § 78bb(f)(1) ("No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.").

⁹⁵ See *id.* § 77z-1(b)(4) (1933 Act) ("Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection."); *id.* § 78u-4(b)(3)(D) (1934 Act) (setting forth a similar provision).

⁹⁶ See *id.* § 6602(1)(A) (defining Y2K actions to include certain civil actions "commenced in any Federal or State court"); *id.* § 6607 (setting heightened pleading requirements for Y2K actions).

⁹⁷ See, e.g., Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 953-55 (2001) (discussing, inter alia, constitutional issues raised by the Y2K Act).

⁹⁸ Dodson, *supra* note 76, at 468.

the result would be if we were to abandon it. Here Professor Dodson aptly notes that procedural mechanisms operate as a system, and that it is difficult to analyze any one component of the system in isolation from the others.⁹⁹

Professor Dodson's article thus calls on us to consider the ways in which a country allocates the enforcement of its substantive law. For example, a country in which public enforcement of certain types of legal obligations is relatively strong may rely less on private enforcement of such obligations and that balance may help to explain features that restrict private litigants' access to the courts to litigate such claims. Here Professor Dodson's observations about overseas developments in aggregate litigation are particularly intriguing because they suggest that in some foreign countries this balance may be shifting, in the sense that some countries outside the United States are in fact experimenting with an expansion of their use of private suits to supplement governmental regulation.¹⁰⁰

Likewise, Professor Dodson prompts us to consider the ways in which pleading standards link to other mechanisms within the litigation system, such as discovery, summary judgment, and evidentiary standards. Reading Professor Dodson's article in conjunction with those by Professor Hartnett and Professor Schneider is illuminating in that respect, given that Professors Hartnett and Schneider underscore the connections among those devices. In addition, Professors Schneider and Hartnett have focused us on the ways in which the choice and application of a pleading standard affects the division of tasks between judge and jury. In systems that do not have (or have only recently acquired) a jury system, we might expect that a heightened pleading standard would have a different valence. Professor Dodson's comparative analysis also raises questions about the relevance of judicial and lawyerly culture. Do differences in the ways that judges are trained, selected, and retained affect the workings of a country's pleading standard? Might the nature of the local bar influence the way in which a pleading standard is applied in practice?¹⁰¹

⁹⁹ *Id.* at 463-64.

¹⁰⁰ *Id.* at 470 ("Other countries are experimenting with aggregate litigation, another quintessentially American phenomenon.").

¹⁰¹ Professor Jolowicz, for instance, notes that

in England the main responsibility for pleadings and for the conduct of litigation rested, and still rests to a large extent, with the relatively small number of lawyers who practise as barristers, while the judges and the Masters, a small

Professor Dodson thus challenges procedure scholars to embark upon a research program that is as important as it is ambitious. The comparison of U.S. and foreign procedure will enrich the domestic debate over matters such as pleading standards. In some instances, such a comparison may prompt U.S. policymakers to adopt a mechanism employed by other countries, such as a heightened pleading requirement. As Professor Dodson's thoughtful discussion suggests, the transplanted mechanism may well function differently in its new environment. We might think of the transplant as the top layer of a Twombly painting, which receives some of its meaning from the erased or partially obscured layers beneath it.

This brief Foreword has not done justice to any of the articles in this collection. But I hope that it has indicated the importance of each author's contribution as well as the synergies among their three projects. Professor Hartnett provides litigators with key strategic insights through his close reading of *Twombly's* plausibility requirement and through his exploration of the uses of targeted discovery pending the disposition of a motion to dismiss for failure to state a claim, but he also concludes that the success of such strategies will rest largely within the discretion of the district judge. Professor Schneider takes up the theme of judicial discretion and considers how that discretion manifests itself through the interconnections among Rule 12(b)(6) motions, summary judgment motions, and evidentiary rulings concerning expert testimony. Her exploration underscores the importance of examining how the exercise of that discretion may affect employment discrimination and other civil rights cases. Professor Dodson's comparative analysis of pleading standards urges scholars to deepen and broaden their analysis of U.S. procedure by measuring it against the practices in other countries. Not only is his thoughtful investigation of this question an important step in advancing this project, but that investigation fits naturally with the other two articles in this collection by inviting us to enrich our comparative analysis through a consideration of the ways in which each discrete procedural element connects to other parts of the relevant country's procedural system.

and homogeneous group of people, were, and to a large extent still are, former members of the Bar. However strong the adversary idea may be, within such a context there are social and professional pressures whose tendency is to discourage excessive and unreasonable attempts to take advantage of an opponent's technical or formal mistakes.