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Putting the Notice Back into Pleading

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PUTTING THE “NOTICE” BACK INTO PLEADING

Robin J. Effron[†]

In the wake of Twombly and Iqbal, courts and commentators have questioned whether notice pleading died with those cases. But what exactly was notice pleading? In this Essay, I argue that the question of whether the Court had “really” abandoned notice pleading in Twombly and Iqbal was a distraction from the fact that a full-bodied doctrine of notice pleading had never really existed in the first place. It had little separate existence from general theories of openness and liberalism, yet the name provided some rhetorical cover by insinuating that the standard was doing some sort of work aside from screening out all but the most outrageous cases. At the margins, notice pleading helped explain why some plaintiffs had adequately stated a cause of action even if the complaint omitted the formal niceties of reciting with precision the law under which those plaintiffs sought relief or the exact elements of the cause of action. But beyond that, courts only engaged in superficial examinations of why notice is important to pleading and what actual notice might look like. The steady association of notice with minimalism in this era had profound consequences for pleading doctrine, but also for notice doctrines wholly unconnected with pleading regimes.

This Essay explores the real origins of notice pleading and documents the failure of courts to fully realize that doctrine in the Conley era. At the heart of this failure is a mistaken belief that the minimization of the concept of notice is necessary to bolster the court-access interests of vulnerable plaintiffs. I suggest that a true notice pleading regime might have staved off

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the advent of plausibility pleading in Twombly and Iqbal and conclude with suggestions for how to reincorporate the lost virtues of notice pleading into our modern pleading regime.

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INTRODUCTION

*Bell Atlantic v. Twombly*¹ and *Ashcroft v. Iqbal*² ushered in some of the most momentous changes in civil procedure of the twenty-first century. The Supreme Court supplanted the “notice pleading” regime of *Conley v. Gibson*³ with the “plausibility pleading” under *Twombly* and *Iqbal*.⁴ These decisions were lauded by some as a long-overdue remedy

1 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

2 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

3 *Conley v. Gibson*, 355 U.S. 41 (1957).

4 A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) (“Notice pleading is dead. Say hello to plausibility pleading.” (footnote omitted)).

for an “explosion” of expensive litigation,⁵ and panned by others as an unnecessarily harsh restriction on court access for plaintiffs, particularly plaintiffs in employment discrimination cases, civil rights cases, and antitrust actions.⁶

In this short Essay, I want to explore a somewhat different and (perhaps) counterintuitive side of the “*Twiqbal*” story. Although the journey from *Conley* to *Iqbal* is typically told as a story of court access gained and then lost, this period also contained a parallel and more complicated access-to-justice story. During this period, the Court routinely reinforced a liberal and open pleading standard, but it did little to define or elaborate on the “notice” part of notice pleading. In fact, the rhetoric that courts and scholars used to maintain a liberal pleading regime contributed to a larger assault on the concept notice itself—that it was “mere” or “only” or “simple.” In other words, fifty years of notice pleading rhetoric communicated the subliminal yet powerful message that “notice” could be synonymous with “minimal.” Efforts to integrate

⁵ See, e.g., Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1110 (2010) (“[B]road, bare-bones notice pleading has rightfully ‘earned its retirement,’ and that lower courts could benefit from a framework for determining the plausibility of a complaint.” (footnote omitted) (quoting *Twombly*, 550 U.S. at 563)); Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 631 (2009) (praising *Twombly*’s emphasis on “a desire for more efficient, cost-effective pleading”); Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645 (2011) (defending *Twombly* and *Iqbal* as decisions properly enabling legal pluralism); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064 (2009) (arguing that “the angst” over *Twombly* “is largely unwarranted”).

⁶ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331–47 (2013) (criticizing *Twombly* and *Iqbal*); Spencer, *supra* note 4, at 433 (discussing the “plausibility pleading standard and conclud[ing] that it is an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court”); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64–68 (2010) (describing problems with *Twombly*, *Iqbal*, and the screening of so-called meritless claims); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (criticizing the decisions as an inappropriate conversion of the motion to dismiss into an effect motion for summary judgment); 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); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011). But see Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1314 (2010) (criticizing aspects of *Twombly* and *Iqbal* but suggesting a closer reading in which “*Iqbal*’s framework is not in fundamental conflict with notice pleading”).

the substantive concepts of notice into pleading doctrine were spare and mostly superficial.

The minimization of notice is problematic because, just like pleading, notice is *also* about court access. Constitutionally,⁷ notice is important because of its logical connection to a party's "opportunity to be heard." While it is tempting to think of court access as primarily a plaintiff-side problem, defendants too have court access issues. Consider, for example, the debtor who has signed a cognovit clause, or the victims of so-called "sewer service," a phenomenon in which constructive notice has overtaken a meaningful examination of whether some vulnerable defendants have actually received a summons and complaint. Notice presents a court-access conundrum because the procedural protections that typically bolster notice to defendants often are themselves procedural and financial court-access barriers for plaintiffs. The rhetorical and doctrinal minimization of notice as a due process right distracts from the extent to which robust notice doctrines and practices buoy defendants' access to justice.

The use of the label "notice pleading," alongside the half-century characterization of that term as "mere" and "minimal," had important consequences for the broader concept of notice and for pleading doctrine itself. Part I introduces the broader concept of notice as a due process right that raises thorny court-access issues. Part II traces the more specific history of notice pleading from its introduction in the early twentieth century through its adoption as a part of Federal Rule of Civil Procedure 8 and the *Conley* decision. Following *Conley*, notice pleading was never fully realized as its own independent concept of pleading with a strong tie to a deep meaning of notice. I then track its decline after *Twombly* and *Iqbal*. In Part III, I consider what a more fully-realized notice pleading doctrine might have been, and how returning to the concept of notice might inform or change the plausibility pleading standard going forward.

⁷ While the "notice" in notice pleading does not refer to the due process right of notice, the larger connections between the many uses of "notice" in procedural law are inescapable. Thus, a genealogy and exploration of the term is in order.

I. SITUATING NOTICE IN THE NARRATIVES OF COURT ACCESS

The story of pleading in the twentieth century is traditionally cast as a court-access drama. The question of specificity in pleading “involves balancing two conflicting goals: screening frivolous suits (which favors stricter pleading) versus facilitating meritorious suits (which favors more liberal notice pleading).”⁸ According to the standard court-access narrative, prior to *Twombly* and *Iqbal*, the prevailing pleading regime was “notice pleading” as defined by the standard in *Conley v. Gibson*.⁹ The complaint did not need to be especially elaborate, detailed, or conform to arcane formalities that served as traps for the unwary. It simply needed to state enough information such that the defendant had adequate notice of the plaintiff’s claims such that the defendant could appear and begin to mount a defense. *Twombly* and *Iqbal* “moved the system from a notice pleading structure . . . to a fact pleading structure, which is exactly what the Federal Rules were drafted to reject.”¹⁰

If notice pleading was open and liberal, then plausibility pleading is narrow and exclusive. “Notice” was pro-plaintiff; a court-access buzzword synonymous with the lower bar that a plaintiff had to clear in the pre-*Twombly* and *Iqbal* world. To further this narrative, minimalist notice acted in service of the underdog plaintiff who lacked sufficient access to information to make the specific factual allegations that might be required under a heightened pleading standard. But taken seriously, the rights surrounding notice (and its mechanical manifestation, service of process) are not necessarily “bare” or “minimal.”

⁸ Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2005 (2007).

⁹ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“[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.”).

¹⁰ Miller, *supra* note 6, at 346.

A. *The Constitutional Context and History of Notice*

The right of notice and opportunity to be heard predates the founding and the Constitution.¹¹ The “principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result,”¹² was seen as a “natural right” and part of the general law which also once grounded other important procedural protections such as personal jurisdiction. The Supreme Court cemented notice and opportunity to be heard as a constitutional procedural due process right in *Pennoyer v. Neff*.¹³ Throughout the nineteenth and early twentieth centuries, the Supreme Court and lower courts would nod approvingly, often with lofty rhetoric, at the concept of notice. Until the mid-twentieth century, however, very few cases pushed the boundaries of constitutionally acceptable service of process practices because of *Pennoyer*’s personal in-hand service requirement.¹⁴ In situations where substituted service was permissible,¹⁵ the Court had the opportunity to reinforce the importance of notice as a “principle of natural justice,”¹⁶ and as a necessary means to the opportunity to be heard which is a “fundamental requisite of due process of law.”¹⁷

The modern due process standard for notice is flexible and relatively low. As the Supreme Court announced in *Mullane v. Central Hanover Bank*, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”¹⁸ Such a standard was meant to ensure that courts would stay attentive to the core

¹¹ See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 30–32 (2018) (summarizing the early American history of notice and opportunity to be heard).

¹² *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855).

¹³ Effron, *supra* note 11, at 33–35.

¹⁴ See RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 130 (2004) (“During the nineteenth and early twentieth centuries, the Supreme Court rarely had occasion to discuss the form that notice had to take in *in personam* actions . . . because its personal jurisdiction jurisprudence . . . ensured, as a practical matter, that defendants in such actions received notice through personal service of process.”).

¹⁵ Prior to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), substituted service was constitutionally permissible for a smattering of cases including proceedings *in rem*, or lawsuits that utilized nonresident motor vehicle statutes. See Effron, *supra* note 11, at 36–39.

¹⁶ *Lafayette Ins. Co.*, 59 U.S. at 406.

¹⁷ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

¹⁸ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

values of notice and opportunity to be heard while avoiding the problem of placing “impossible or impractical obstacles”¹⁹ in the way of plaintiffs who want to move forward with a lawsuit.

In the decades since *Mullane*, the Supreme Court has added little to constitutional notice,²⁰ particularly the constitutional dimension of notice that is required in ordinary adversarial litigation.²¹ Notice is largely governed by the state, federal, and international law rules that dictate the procedures for service of process. Compared to other procedural issues, notice has garnered relatively little scholarly and judicial attention. One should not conclude, however, that modern notice and service practices are satisfactory or unproblematic. Rather, one might wonder why the injustices—potential and actual—of poor notice receive so little attention in comparison to other access to justice problems such as the growth of arbitration clauses, the restriction of class actions, and the diminishing scope of personal jurisdiction.

B. *Notice and the Court Access Conundrum*

From the beginning, the problem of court access has lurked in the background of notice doctrine. Notice pits the court-access rights and privileges of plaintiffs against those of defendants. For plaintiffs, notice is a barrier to court access. It adds time and expense to a lawsuit before the plaintiff can proceed on the merits. This is why many jurisdictions (including the federal courts) have procedures for procuring and encouraging waiver of formal service of process.²² But even the process of obtaining waiver is another stumbling block on the way to the plaintiff's

¹⁹ *Id.* at 313–14.

²⁰ There has, however, been more development of the “opportunity to be heard” prong of notice. In these cases, the Court has narrowed and refined the situations in which a party must be given an “opportunity to be heard” before the deprivation of a constitutionally protected due process right, and defined the sort of hearing or proceeding that suffices as an “opportunity to be heard.”

²¹ *Jones v. Flowers*, 547 U.S. 220 (2006); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

²² See, e.g., FED. R. CIV. P. 4(d) (procedure for waiver of service of process in federal court); FLA. R. CIV. P. 1.070(i) (Florida state procedure for waiving formal service of process); GA. CODE ANN. § 9-11-4(d) (2010) (Georgia state procedure for waiving formal service of process).

“day in court.” For defendants, on the other hand, it is a *lack* of notice that creates the court-access barrier. To state the obvious, there is no meaningful court access for a defendant if he does not know of a lawsuit or other pending action that might result in a binding judgment that permanently alters his rights and obligations.

The barriers go beyond mere receipt of service of process. A defendant might be personally served, but if the notice is vague, or dense, or filled with technical jargon, it is questionable whether that party has been meaningfully notified. In the same way that a pro se plaintiff does not have the same meaningful court access as a represented plaintiff,²³ an unrepresented defendant might need counsel to help make sense of a summons and complaint. And sometimes, a defendant might have consented to a waiver of notice altogether before a cause of action even accrues; thus the only notice she ever receives is notice that she won’t get notice at all.²⁴

A legal system that would demand the highest degree of notice—notice that actually (rather than constructively) reaches the defendant and communicates the relevant information to the defendant in a clear, complete, and easily comprehensible manner, would be expensive and burdensome for plaintiffs, thus worsening court access. But in a legal system that has a relatively low threshold for notice requirements, the court-access burdens are borne by defendants who might be ill-notified of their legal predicament or fail to learn about it at all until after the entry of a default judgment. This is the court-access conundrum of notice in a nutshell. Removing barriers for plaintiffs creates stumbling blocks for defendants, while easing the notice barriers for defendants ramps up court-access costs for plaintiffs.

The fact that the Supreme Court has structured the due process standard for notice as a balancing test does not suggest in any direct way that the *plaintiff’s* court access should be favored over the defendant’s.

²³ See Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227 (2014) (documenting the access to justice difficulties for pro se litigants).

²⁴ This is accomplished via a cognovit or “confession of judgment” clause, used primarily in lending contracts, in which the debtor agrees in writing that upon a certain event of non-payment, the creditor may obtain a judgment for the unpaid debt without serving the debtor with process or any other sort of notice. The U.S. Supreme Court has upheld the use of such clauses in a contract between two sophisticated commercial parties. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 176, 187–88 (1972).

But prior to *International Shoe*²⁵ and *Mullane*, notice had, for the most part, been a defendant (or recipient) centered inquiry. By shifting the inquiry to encompass the plaintiff’s court-access interest, the Court began to shift the discourse around notice to one in which “too much” notice could be problematic.

To be clear, none of this is to suggest that there is something wrong or nefarious about centering plaintiff’s court access interests when considering notice. Notice could easily have followed a similar path as personal jurisdiction post-*International Shoe*: a doctrine that once promised generous court access to plaintiffs, but that was warped and winnowed by decades of Supreme Court pruning. Plaintiffs should not have to face arcane and expensive procedures just to get a foot in the courthouse door. That being said, the tacit assumption seems to have become that notice is a court-access problem for *plaintiffs* and not for defendants. As we shall see, this mid-century shift collided with the 1940s revolution in federal pleading. And the chosen nomenclature—“notice pleading”—would have effects on both notice and pleading for the decades to come.

Notice did not follow a stereotypical trajectory of a due process right that grows stronger, or at least accrues a dense doctrinal discourse, over time. For several decades, notice was bolstered by *Pennoyer*’s strict jurisdictional requirements, and thus never developed the real doctrinal muscle to back the lofty rhetoric upon which the right was once based. And once the Court introduced the court-access interests of plaintiffs, meaningful development of notice doctrine stagnated.

II. THE MINIMIZATION OF NOTICE IN THE NAME OF LIBERAL PLEADING

Notice pleading figures prominently in the pre-*Twombly* and *Iqbal* court-access story. By the time that those cases called it into question, the term “notice pleading” seemed like a natural and inevitable part of the procedural landscape. But the relationship between notice and pleading should not be taken for granted. The repeated use of the label had consequences for pleading doctrine and notice doctrine alike. This Part provides a brief history of how “notice pleading,” used first by scholars

²⁵ 326 U.S. 310 (1945).

and then by judges, exerted subtle yet powerful effects on the trajectory of both doctrines.

A. *The Early History of Notice Pleading*

A major innovation of the 1938 revolution in civil procedure was to simplify and liberalize the pleading rules in federal court.²⁶ The requirement in Rule 8(a)(2) that the plaintiff need only give “a short and plain statement of the claim showing that the pleader is entitled to relief” was drafted by jurists who “were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and American procedural systems.”²⁷ The post-*Conley* practice of contrasting notice pleading with fact pleading does not map onto the early debate or formulation of the term. In the pre-*Conley* era,

[c]ommentators on both sides of the continuing debate drew a distinction between “notice” pleading and pleading issues. . . . [T]he underlying disagreement concerned the degree to which adjudication should conform to positive law. Today, notice pleading is more often contrasted with “fact” pleading . . . which entails a more specific statement of facts.²⁸

But courts and commentators in the first part of the twentieth century were slow to adopt “notice pleading” as a ubiquitous moniker with a settled meaning.

The term “notice pleading” first appears in the early twentieth century. Roscoe Pound first introduced the idea in his 1910 article, *Some Principles of Procedural Reform*. Although he did not use the phrase “notice pleading” itself, he wrote that the purpose of procedural rules such as those governing pleadings should be to provide “a fair opportunity of meeting the case against him and of making his own case” and ensuring that “no other advantage could be had than securing a fair

²⁶ For a complete and concise history of the introduction and rise of notice pleading, see Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109–14 (2009).

²⁷ Miller, *supra* note 6, at 288–89.

²⁸ Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 85–86 (2008).

opportunity to meet proof adduced without fair notice.”²⁹ The idea of notice pleading slowly permeated the scholarly and judicial discourse prior to the drafting and passage of the Federal Rules of Civil Procedure in the mid-1930s. Professor Clarke Whittier conducted the first sustained academic inquiry into “notice pleading”³⁰ in 1918. His writing sheds some light on how scholars were thinking about the “notice” part of notice pleading at its inception. He traced the idea of notice pleading to the procedure in English courts as governed by the Judicature Act of 1873,³¹ and early twentieth century innovations in the Chicago municipal courts and in Michigan courts.³² According to Whittier, pleadings should be drafted so that the opponent is not taken by surprise later in litigation because “[t]he cardinal principle of notice pleading is that enough shall be stated adequately to apprise the opponent of the cause of action or defense.”³³ The purpose of such minimalism was to slash the number of cases that were decided on the pleadings, rather than proceeding to trial, and he even engaged in some rudimentary empirical analysis to show that the few jurisdictions that had adopted notice pleading had far fewer dismissals at the pleadings stage.³⁴ That same year, Professor Austin Wakeman Scott portrayed notice pleading as “the other extreme” of specific fact pleading regimes; one that required “only such a description of the cause of action as will give to the opposite party notice of the nature of the claim against him.”³⁵

Scholars did not uniformly assume that the adoption of notice pleading would unquestionably lead courts away from fact pleading and its attendant problems. Writing in 1927, Professor Thomas Atkinson wrote that “there is often a failure to comprehend that pleading to a

²⁹ Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 401 (1910); see also Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 527 (2006).

³⁰ Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501 (1918).

³¹ *Id.* at 506–07.

³² *Id.* at 509–10. The author of a 1931 Comment in the *Texas Law Review* noted in passing that “[n]otice pleading is present in some inferior courts, and there is a substantial agitation for the adoption of this procedure for all courts in order to prevent delay.” Lee Jackson Freeman, *Pleading and Practice—Relation of the Petition to the Jurisdiction of the Court*, 9 TEX. L. REV. 254, 261–62 (1931).

³³ Whittier, *supra* note 30, at 516–17.

³⁴ *Id.* at 506–10.

³⁵ Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 679–80 (1918).

specific issue will give notice But it is not necessary or desirable to go to the extreme of stating what the testimony is expected to be.”³⁶ In other words, he was concerned that, if taken seriously, the concept of *notice* might lead courts right back to the days of demanding factual specificity in complaints. He then cautioned that “[o]ften the disclosure of the legal theory upon which the pleader proceeds is sufficient to avoid surprise.”³⁷ On this reading, the concept of notice pleading had not yet calcified into the rote incantations of “bare,” “mere,” or “minimal” that would solidify in the decades to come. For Atkinson, “notice pleading” meant that judges sometimes might have to do some work to figure out what combination of legal theory and factual specificity really did put the defendant in the position of avoiding surprise. Professor Sidney Post Simpson echoed this sentiment in 1939, opining that “notice pleading . . . would be substantially as useful . . . in effectuating the purpose of notice to the parties. But, to insure the development of the real issues before trial, it would have to be supplemented.”³⁸

In 1935, Charles Clark and James William Moore published their monumental article in the *Yale Law Journal*, *A New Federal Civil Procedure*,³⁹ in which they voiced many of the ideas that would find a home in the Federal Rules of Civil Procedure in a single, comprehensive work.⁴⁰ This included an ethos of a liberal pleading standard with the “short and simple statement” formula that would eventually become Rule 8(a)(2).⁴¹ Clark and Moore did not use the term “notice pleading” at any point in the article, and as we shall see, it is unclear if Clark ever endorsed notice pleading at all. Their defense of the proposed pleading standard

³⁶ Thomas E. Atkinson, *Pleading the Statute of Limitations*, 36 YALE L.J. 914, 918 n.12 (1927).

³⁷ *Id.* (emphasis added).

³⁸ Sidney Post Simpson, *A Possible Solution of the Pleading Problem*, 53 HARV. L. REV. 169, 197 (1939).

³⁹ Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291 (1935).

⁴⁰ Clark is a drafter of the Federal Rules of Civil Procedure.

⁴¹ Clark & Moore, *supra* note 39, at 1302–03. During this time, the rules’ drafters also carefully considered the new rules for notice and service of process. For a detailed account of this history, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1165–67 (1982).

focused on simplicity and uniformity, and the explicit idea of "notice" did not figure prominently in this discussion.⁴²

In general, the term "notice pleading" was slow to catch fire as a category or idea unto itself. Many of the mentions of "notice pleading" prior to the drafting of the Federal Rules and its later formal introduction as standard in *Conley v. Gibson* were simply citations to the Whittier piece *Notice Pleading*.⁴³ Recall that Professor Simpson, writing shortly *after* the adoption of the new Federal Rules, still wrote about notice pleading in the conditional tense, contemplating what a notice pleading system *would* do rather than what current pleading standards *did* do.⁴⁴ Indeed, "[i]n the decades that immediately followed adoption of the Federal Rules, there was not universal acceptance of Rule 8's simplicity and brevity."⁴⁵

B. *From the Introduction of the Federal Rules to Conley*

Soon after the introduction of Rule 8(a)(2), federal courts began to evaluate pleadings with reference to the idea of notice.⁴⁶ But the term "notice pleading" did not enter the routine judicial lexicon until around 1946,⁴⁷ even though some scholars had been using the term intermittently for the past three decades. In the mid-1940s, courts began the now-familiar practice of labeling the new standard "notice pleading" and then connecting it to the idea of notice as well as the idea of minimalism.⁴⁸ The

⁴² Clark & Moore, *supra* note 39, at 1306 (for a brief mention of notice, only in connection with technical aspects of defendants' pleadings).

⁴³ See, e.g., Comment, *The Effect of Pleading on Jurisdiction*, 36 YALE L.J. 549, 556 (1927) (noting "the development of notice pleading, since adopted in some of our states").

⁴⁴ Simpson, *supra* note 38, at 197.

⁴⁵ Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 558 (2002).

⁴⁶ See *Cont'l Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942) ("Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim . . ."); *Sierocinski v. E.I. Du Pont de Nemours & Co.*, 103 F.2d 843, 843-44 (3d Cir. 1939) (rejecting defendant's argument that the plaintiff's complaint did not give sufficient notice of the nature of his claim).

⁴⁷ *Bowles v. Pure Oil Co.*, 5 F.R.D. 300, 302 (E.D. Pa. 1946); *Wagner Mfg. Co. v. Underwood*, No. 6235, 1946 WL 3278, at *1 (E.D. Pa. Oct. 4, 1946); *United States v. Standard Oil Co. of Cal.*, 7 F.R.D. 338, 340 (S.D. Cal. 1947); *Metropolis Bending Co. v. Brandwen*, 8 F.R.D. 296, 297 (M.D. Pa. 1948) ("To the pleadings is assigned the task of general notice giving . . .").

⁴⁸ *Porter v. Shoemaker*, 6 F.R.D. 438, 439-40 (M.D. Pa. 1947) (identifying the new pleading standard as "notice pleading" and stating that "[u]nder the new rules, the purpose of the

new nomenclature made its way into state courts around this time as well, although usually as a means of distinguishing the continued fact-pleading state regimes from the new federal standard.⁴⁹ The term was by no means ubiquitous or even common, appearing in only a smattering of cases between the mid-1940s and the 1957 *Conley* decision, almost all emanating from courts in the Third Circuit. Interestingly, these few decisions refer breezily to “a system”⁵⁰ or “our system”⁵¹ or “the theory”⁵² of notice pleading, as if that nomenclature had already been widely adopted. In fact, only one court outside of the Third Circuit used the term, and did so by way of responding to a *party’s* use of that term in its brief.⁵³

Doctrinally, *Dioguardi v. Durning*⁵⁴ is thought to have kicked off the notice pleading era. Judge Charles Clark, the lead drafter of the Federal Rules, penned the Second Circuit opinion. The plaintiff, a pro se litigant, filed an “obviously home drawn” complaint regarding the disposition of two cases of medical tonics by a customs collector. The plaintiff did not formally identify a cause of action in his complaint, but Judge Clark held that Dioguardi had, “however inartistically . . . stated,” asserted a claim for relief, because under the new Rule 8(a)(2), “there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action.’”⁵⁵

pleadings is to give notice of what an adverse party may expect to meet” and that “[t]he modern philosophy concerning pleadings is that they *do little more* than indicate generally the type of litigation that is involved.” (emphasis added)).

⁴⁹ See, e.g., *Langenberg v. City of St. Louis*, 197 S.W.2d 621, 625 (Mo. 1946) (“The legislature in enacting the new Code has not sanctioned ‘notice pleading’ which, it has been asserted by some, is contemplated by the Federal Rules of Civil Procedure . . .”); *Livingston v. Stewart & Co.*, 69 A.2d 900, 903 (Md. 1949).

⁵⁰ *Stevenson v. Isaacs*, 126 F. Supp. 411, 413 (D. Del. 1954) (“The present rules adopt a system of notice pleading . . .”).

⁵¹ *Auto. Serv. of Reading, Inc. v. Reading Tr. Co.*, 93 F. Supp. 907, 909 (E.D. Pa. 1950) (“[U]nder our system of notice pleading the complaint need only put the defendant on notice of what it will be called upon to meet.”); *Ryan v. Jones*, 92 F. Supp. 308, 310 (E.D. Pa. 1950) (“[N]o more is required under our system of notice pleading.”).

⁵² *Pritchard v. Liggett & Myers Tobacco Co.*, 134 F. Supp. 829, 832 (W.D. Pa. 1955) (“[T]he Federal Rules of Civil Procedure rejected the theory of fact pleading and adopted the theory of notice pleading.”); *MacDonald v. Winfield Corp.*, 82 F. Supp. 929, 930 (E.D. Pa. 1948) (referring to “the theory of notice pleading, introduced by the Federal Rules”).

⁵³ *Putnam v. Air Transp. Ass’n of America*, 112 F. Supp. 885, 886 (S.D.N.Y. 1953) (citing defendant’s use of the term “notice pleading” in its argument).

⁵⁴ 139 F.2d 774 (2d Cir. 1944).

⁵⁵ *Id.* at 775.

Although it is frequently cited as solidifying notice pleading as the standard for Rule 8(a)(2),⁵⁶ Judge Clark does not actually use the term "notice pleading" in the opinion, and in fact, Judge Clark himself remarked a decade later in both academic writings and judicial opinions that "'notice' is not a concept of the Rules."⁵⁷

Despite Judge Clark's uneasiness with notice pleading, *Dioguardi* is still seen as the seed from which full-fledged notice pleading would sprout a decade later in *Conley*. As Professor Emily Sherwin has observed, "[t]he difference between notice pleading and issue-oriented pleading is easy to see in *Dioguardi v. Durning*" because "the complaint was adequate for purposes of notice, although it did not come close to pleading a framework of legal issues for trial."⁵⁸

The Supreme Court's first explicit recognition of notice pleading came not in a pleadings case, but in *Hickman v. Taylor*,⁵⁹ a case about attorney work product. Justice Murphy explained that

[u]nder the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. . . . The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.⁶⁰

⁵⁶ See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1815 n.224 (2015); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1879 (2002) (*Dioguardi*'s "confused complaint was deemed sufficient to satisfy the low threshold of notice pleading."); Fairman, *supra* note 45, at 558 n.63 (recounting Supreme Court oral argument in which the "Court directed the petitioner to begin discussion of notice pleading, not with *Conley v. Gibson*, but with the 'classic' *Dioguardi* decision"); Sherwin, *supra* note 28, at 86 n.66 (citing *Dioguardi* as "discussing the distinction between notice pleading and the substance of the pleading").

⁵⁷ Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 49 (1957); *United States v. Lamont*, 236 F.2d 312, 317 (2d Cir. 1956) (Clark, C.J.); see also Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 476 n.19 (2010).

⁵⁸ See Sherwin, *supra* note 28, at 86.

⁵⁹ *Hickman v. Taylor*, 329 U.S. 495 (1947); see Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 451 (1986) ("*Conley v. Gibson* itself appeared to endorse the notice pleading idea, which the Supreme Court had previously suggested was the sole purpose of pleadings").

⁶⁰ *Hickman*, 329 U.S. at 500-01.

It is thus in *Hickman* that we observe the genesis of associating the “notice-giving” function with an ethos that is not just liberal but is minimalist. Notice is a non-specific “general” task; something to which pleadings are “restricted” and for which not much is needed. By deemphasizing pleadings, the Court could accentuate the importance of information to be obtained and disclosed later in the process.

C. *From Conley to Twombly and Iqbal*

It was another decade before the Supreme Court announced notice pleading as a standard in an actual pleadings case. *Conley v. Gibson*⁶¹ “permanently introduced the term ‘notice pleading’ into the judicial lexicon”⁶² a good seven years after *Mullane* ushered in the era of constitutional notice minimalism. Professor Stancil has commented on this choice of words as a deliberate choice to contrast the new, liberalized pleading rules with “their arcane, demanding, and complex predecessors,”⁶³ but as Professor Reinert has observed, “*Conley* was a strange poster child for notice pleading” because “the plaintiffs had provided extensive factual detail [and] had specified their legal claims.”⁶⁴ Notice was chosen for its minimalism,⁶⁵ having been associated with a “fundamental philosophical change . . . that cast away formal and fact-intensive pleadings in favor of merely providing a party ‘notice.’”⁶⁶

Following *Conley*, courts began a five-decade project of modifying the term “notice pleading” with diminutive adjectives and adverbs. At first, many judges defaulted to *Conley*’s phrase “simplified ‘notice pleading,’”⁶⁷ conveying the *action* of the rules drafters who chose to

⁶¹ 355 U.S. 41 (1957).

⁶² Stancil, *supra* note 26, at 111.

⁶³ *Id.*

⁶⁴ Reinert, *supra* note 6, at 128.

⁶⁵ See, e.g., Spencer, *supra* note 4, at 434 (“[T]he complaint simply would initiate the action and notify the parties and the court of its nature while subsequent stages of the litigation process would enable the litigants to narrow the issues and test the validity and strength of the asserted claims.”).

⁶⁶ Schwartz & Appel, *supra* note 5, at 1117–18.

⁶⁷ *Conley v. Gibson*, 355 U.S. 41, 47 (1957); see also *Porter v. St. Louis-San Francisco Ry. Co.*, 354 F.2d 840, 843 (5th Cir. 1966); *Great Atl. & Pac. Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., Local Union No. 88*, 410 F.2d 650, 652 (8th Cir. 1969); *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 398 (2d Cir. 1967).

simplify the entire pleading system from its complex fact-pleading structure to the streamlined standard under Rule 8. But slowly, courts shifted from using language that emphasized the act of simplification to language that characterized notice *itself* as simple. The term "notice pleading" rarely appeared in isolation. Rather, it was almost always accompanied by a word such as "mere,"⁶⁸ "bare,"⁶⁹ "simple,"⁷⁰ "minimal,"⁷¹ or "low."⁷² State courts used such language as well, either to

⁶⁸ See, e.g., *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1216 n.3 (10th Cir. 1986) ("[M]ere notice pleading."); *Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distribs., Inc.*, 839 F. Supp. 376, 379 n.4 (D.S.C. 1993) (same); *Bos. & Me. Corp. v. Town of Hampton*, 987 F.2d 855, 862 (1st Cir. 1993) (same).

⁶⁹ See, e.g., *United States v. Tex. Educ. Agency (Lubbock Indep. Sch. Dist.)*, 138 F.R.D. 503, 511 (N.D. Tex. 1991) (associating "notice pleading" with the "bare bones of the notice"); *Tamura, Inc. v. Sanyo Elec., Inc.*, 636 F. Supp. 1065, 1067 (N.D. Ill. 1986) (describing a standard of "the barest notice pleading"); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1192 (5th Cir. 1986) (comparing what is needed to survive summary judgment with "the bare allegations of notice pleading"); *Equal Emp't Opportunity Comm'n v. State of Wyo.*, 514 F. Supp. 595, 596 (D. Wyo. 1981) ("[T]he barest notice pleading."); *Evers v. Evers Marine Serv., Inc.*, 487 F. Supp. 1283, 1287 (D.N.J. 1980) ("[T]he complaint is a bare skeleton of 'notice' pleading . . ."); *S. Side Drive-In Co. v. Warner Bros. Pictures Distrib. Corp.*, 30 F.R.D. 32, 34 (E.D. Pa. 1962) ("[T]he bare requirements of notice pleading . . .").

⁷⁰ See, e.g., *Gen. Motors Corp. v. Burns*, 316 F. Supp. 803, 804–05 (D. Haw. 1970) ("[S]imple 'notice pleading.'"); *Simpson v. Gallant*, 231 F. Supp. 2d 341, 349 (D. Me. 2002) (same); *In re Szymanski*, 344 B.R. 891, 896 (Bankr. N.D. Ind. 2006) (same); *Sheldon v. Vermonty*, 53 F. Supp. 2d 1157, 1161 (D. Kan. 1999) ("Rule 8(a)'s simple 'notice' pleading directive."); *In re Sturdevant*, 415 F.2d 465, 467 (5th Cir. 1969) ("[T]he simple standard of notice pleading."); *Zimmermann v. Zimmermann*, 395 F. Supp. 719, 724 (E.D. Pa. 1975) ("[T]he simple notice pleading requirements of Fed. R. Civ. P. 8(a)."); *Breeland v. Bethlehem Steel Co.*, 179 F. Supp. 464, 466 (S.D.N.Y. 1959) ("[T]he simple notice pleading contemplated by the Federal Rules of Civil Procedure."); *Manicini Enters., Inc. v. Am. Express Co.*, 236 F.R.D. 695, 698 (S.D. Fla. 2006) ("Rule 8(a)'s simple notice pleading requirements.").

⁷¹ See, e.g., *Hollins v. U.S. Postal Serv.*, 645 F. Supp. 735, 739 n.3 (N.D. Ill. 1986) ("[T]he minimal requirements of notice pleading."); *In re Bessette*, 226 B.R. 103, 106 (Bankr. D. Idaho 1998) ("[M]inimal 'notice pleading.'"); *Moll v. Carter*, 179 F.R.D. 609, 610 (D. Kan. 1998) ("[M]inimal standards of notice pleading."); *Mason v. Cty. of Del. Sheriff's Dep't*, 150 F.R.D. 27, 28 (N.D.N.Y. 1993) ("[E]ven the minimal notice pleading requirements . . ."); *Pomeroy v. Ashburnham Westminster Reg'l Sch. Dist.*, 410 F. Supp. 2d 7, 16 (D. Mass. 2006) ("[E]ven the minimal requirements of notice pleading.").

⁷² *Response Oncology, Inc. v. MetraHealth Ins. Co.*, 978 F. Supp. 1052, 1064 (S.D. Fla. 1997) ("[T]he admittedly low requirements of notice pleading."). Some courts refer to a "low threshold." See *Pete Thoesen Tractor & Equip. Repair Co. v. City of Chicago*, 101 F.R.D. 734, 735 (N.D. Ill. 1984); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 990 (7th Cir. 2000). Or even an "exceedingly low threshold." *Hutton v. Priddy's Auction Galleries, Inc.*, 275 F. Supp. 2d 428, 434 (S.D.N.Y. 2003). Other refer to a "low bar." See *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d

describe their own notice pleading regimes or to contrast notice pleading with a different state standard.⁷³ These terms were sometimes used to contrast the low threshold of 8(a)(2) with the heightened standard under Rule 9 or other statutory schemes with special pleading requirements.⁷⁴ These modifiers appeared steadily in the 1960s and 1970s, were used with increasing frequency in the 1980s, and became nearly ubiquitous by the 1990s through the *Twombly* decision. It was neither obvious nor inevitable that courts would use minimizing language rather than language that suggested openness in connection with notice pleading. In fact, a less popular yet still visible modifier for notice pleading was to characterize the regime as “liberal.”⁷⁵

391, 396 (5th Cir. 2005). Or a “low hurdle.” *Bleau v. Greater Lynn Mental Health & Retardation Ass’n*, 371 F. Supp. 2d 1, 1 (D. Mass. 2005); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d 484, 493 (M.D. Penn. 2005).

⁷³ See, e.g., *Wiggins v. Bd. of Comm’rs of Dearborn Cty.*, 422 N.E.2d 448, 449 (Ind. Ct. App. 1981) (“[C]onsidering the ‘bare bones’ approach of notice pleading.”); *Herman v. State*, 330 Mont. 267, 278 (2006) (noting the “mere notice pleading requirements for an ordinary complaint”); *Ross v. City of Gatlinburg*, 327 F. Supp. 2d 834, 842 (E.D. Tenn. 2003); *La Salle Nat’l Tr. v. Vill. of Mettawa*, 249 Ill. App. 3d 550, 558 (1993) (“[M]ore than mere notice pleading is required in Illinois.”); *Daniels v. Daniels*, 885 A.2d 524, 531 (N.J. Super. Ct. App. Div. 2005) (“[T]he very low standard of notice pleading . . .”); *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wash.2d 342, 352 (2006) (“Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought.”); *Peeples v. State of Utah*, 100 P.3d 254, 259 n.1 (Utah Ct. App. 2004) (“[O]ur notice-pleading requirements are already minimal.”); *Peacock Constr. Co. v. Erickson’s, Inc.*, 121 Ga. App. 544, 544 (1970) (“[T]he very minimal requirements of notice pleadings.”).

⁷⁴ See, e.g., *United States ex rel. Bagley v. La Vallee*, 209 F. Supp. 529, 530 (N.D.N.Y. 1962) (“No matter how liberal the modern approach may be to federal habeas corpus proceedings,” the standard is not “in the form of a bare notice pleading.”); *Hunt v. Am. Bank & Tr. Co.*, 606 F. Supp. 1348, 1363 (N.D. Ala. 1985) (Rule 9(b) is an exception to “mere notice pleading.”); *United States v. 1625 S. Delaware Ave.*, 661 F. Supp. 161, 162 (E.D. Pa. 1987) (“[C]ivil forfeiture proceedings [must] be pleaded with greater specificity than the mere notice pleading . . .”); *Lloyd v. Vannatta*, 296 F.3d 630, 633 (7th Cir. 2002) (“[M]ere notice pleading is not sufficient in the habeas corpus context.”); *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978) (contrasting “simple notice pleading” with “the rule relating to relief from default judgments . . .”); *Lerma v. Univision Commc’ns, Inc.*, 52 F. Supp. 2d 1011, 1026 (E.D. Wis. 1999) (“Federal Rule of Civil Procedure 8 requires simple notice pleading.”).

⁷⁵ Sometimes, however, the characterization of notice pleading as “liberal” was still accompanied by one of the other terms such as “simple” or “low.” See, e.g., *PKG Grp., LLC v. Gamma Croma, S.p.A.*, 446 F. Supp. 2d 249, 251 (S.D.N.Y. 2006) (“[T]he liberal pleading standards of Rule 8, Fed. R. Civ. P., require nothing more than simple notice pleading.”); *Milk Drivers, Dairy & Ice Cream Emps., Laundry & Dry Cleaning Drivers, Clerical & Allied Workers Local Union No. 387 v. Roberts Dairy*, 294 F. Supp. 2d 1050, 1061 (S.D. Iowa 2003) (“[T]he liberal and simple standard required by the Rule 8(a) notice pleading standard.”).

At the same time that courts made a habit of associating pleading with minimizing language, very little was done to flesh out the "notice" side of notice pleading. When courts bothered to invoke the concept of notice at all (rather than just use the label "notice pleading"), it was most likely a rote invocation of the purpose of notice pleading,⁷⁶ or a conclusory observation that the complaint had adequately given notice to the defendant.⁷⁷ Occasionally, a court might invoke the simplicity of notice pleading to chastise a litigant for "produc[ing] a complaint so complicated and unwieldy that defendants will have great difficulty in framing a pleading that will be responsive."⁷⁸

Although this was a time of linguistic minimization of notice, it was not an era of minimizing the centrality of pleadings. Throughout the *Conley* era, courts did not unquestioningly endorse any and all pleadings. On the contrary, they did grant motions to dismiss for complaints deemed insufficient under Rule 8(a)(2),⁷⁹ and sometimes the word "bare" was paired with "legal conclusions" instead of "notice pleading" to illustrate what was not acceptable.⁸⁰ This pattern of lower court demands for "heightened pleading" in the years between *Conley* and *Twombly* has

⁷⁶ See, e.g., *Bautista v. Los Angeles Cty.*, 216 F.3d 837, 843 (9th Cir. 2000) ("[T]hat is the point of notice pleading: a plaintiff need only provide the bare outlines of his claim."); *Alexander v. City of S. Bend*, 256 F. Supp. 2d 865, 881 (N.D. Ind. 2003) ("Simple notice pleading is adequate to bring a § 1983 action against governmental entities so long as a plaintiff's complaint provides the defendant entities 'fair notice' of the claim and 'the grounds upon which it rests.'"); *FTC v. Consol. Foods Corp.*, 396 F. Supp. 1344, 1348 (S.D.N.Y. 1974) ("These minimal requirements have been characterized as 'notice' pleading. Under notice pleading, courts have consistently held that it is no longer necessary to state 'facts' as long as fair notice of the claim is given." (internal citation omitted)).

⁷⁷ *Frieri v. City of Chicago*, 127 F. Supp. 2d 992, 995 (N.D. Ill. 2001) ("[F]ederal pleading is 'notice' pleading, so the question on a motion to dismiss is whether [plaintiffs'] allegations, even if bare and boilerplate, give notice of her claims against the City.").

⁷⁸ *Cooper v. N. Jersey Tr. Co.*, 250 F. Supp. 237, 241 (S.D.N.Y. 1965).

⁷⁹ See sources cited in Fairman, *supra* note 45; see also *Luthy v. Proulx*, 464 F. Supp. 2d 69, 79 (D. Mass. 2006) ("It can be difficult to discern a bald assertion from proper notice pleading. Some precedent indicates that simple notice of a custom or policy is not enough . . .").

⁸⁰ This emerged from an oft-cited quote from the Wright, Miller, & Cooper treatise at the time. See, e.g., *Barrett v. Wallace*, 107 F. Supp. 2d 949, 952 (S.D. Ohio 2000) (the standard "does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions"); *In re SCB Computer Tech., Inc.* 149 F. Supp. 2d 334, 343 (W.D. Tenn. 2001) ("[M]ore than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements." (quoting *Schneid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988))).

been well-documented.⁸¹ The problem for notice pleading is that very few, if any, of these cases appear to have involved a serious engagement with the actual concept of notice writ large or notice pleading in particular.⁸² Instead, these cases centered around a concern about the deficiencies in what a plaintiff could *say* or *prove*, rather than a concern about what plaintiff had communicated *to the defendant* and whether this communication furthered the cause of notice.

In response to the lower court drift toward “heightened pleading,” the Supreme Court twice rebuked the lower courts for straying from a liberal pleading standard. In both *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*⁸³ and *Swierkiewicz v. Sorema N.A.*,⁸⁴ the Court reiterated the centrality of notice pleading to Rule 8(a)(2) which it described as “liberal,” and thus “impossible to square with the ‘heightened pleading standard’ applied” by the lower court in *Leatherman*,⁸⁵ and “simple,” “simplified,” and “liberal” in *Swierkiewicz*.⁸⁶ The *Swierkiewicz* opinion mirrored the lower court opinions of that era that endorsed notice pleading—it contained the rote incantation that a pleading “must simply ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests,’”⁸⁷ but did nothing to flesh out what notice might be.

Thus, as the *Conley* period drew to a close, “notice pleading” was firmly associated with minimalism. Any apparent diversions from “liberal” pleading standards did not do so in the name of notice, but instead in the name of skeptical intuitions about the merits of the lawsuit

⁸¹ See Fairman, *supra* note 45, at 574–90; Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 12 (2010) (“[A] number of lower court federal judges . . . frequently applied more demanding pleading standards in many types of cases . . .”).

⁸² But see, e.g., *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 921–22 (N.D. Iowa 2003) (“The only function left to be performed by the pleadings alone is that of notice. For these reasons, pleadings under the rules may properly be a generalized summary of the party’s position, sufficient to advise the party for which incident he is being sued, sufficient to show what was decided for purposes of res judicata, and sufficient to indicate whether the case should be tried to the court or to a jury.”).

⁸³ 507 U.S. 163 (1993).

⁸⁴ 534 U.S. 506 (2002).

⁸⁵ *Leatherman*, 507 U.S. at 168.

⁸⁶ *Swierkiewicz*, 534 U.S. at 512–14.

⁸⁷ *Id.* at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

in question and concerns about litigation costs and the promotion of so-called “fishing expeditions.”⁸⁸

D. *Notice Pleading in the Age of Twombly and Iqbal*

By the time the Supreme Court issued its landmark *Twombly* decision, two patterns in pleading jurisprudence had become evident. First, a non-trivial number of lawyers, commentators, and lower court judges exhibited varying levels of discomfort with the *Conley* standard as it was generally interpreted. Although the criticisms were not completely uniform, there was some consensus among the *Conley* critics that the current pleading standard was *too* open and liberal, and that judges were not deploying motions to dismiss aggressively enough to screen out particularly speculative or meritless cases. On the other side, proponents of liberal pleading tightened their grip around the most open and liberal formulation of the pleading standard, pointing repeatedly to the *Leatherman* and *Swierkiewicz* rebuke of lower court rebellions against liberal pleading.

For *Conley*’s supporters, any engagement with limiting language in a pleading standard ran the risk of opening the door to a standard that would shut the courthouse door to worthy plaintiffs. Thus, the “notice” in notice pleading had ossified into a verbal placeholder. *Conley* critics dutifully recited the “notice pleading” standard, perhaps out of habit, and perhaps because the term “notice” did not appear to be the true barrier to a heightened pleading standard. *Conley* defenders clung to “notice pleading” because it had simply become a synonym for a “low” or “liberal” standard. Since very few courts had truly engaged with the “notice” aspect of notice pleading, supporters could continue to invoke the phrase without worrying that a meaningful examination of the phrase might result in anything but the most generous of pleading standards.

The benign neglect of the “notice” in notice pleading left a void. An opportunistic Supreme Court was in a position to fill it by using the phrase to redefine the standard in a heightened manner. Or it could quietly dispose of the term altogether. As this Part shows, *Twombly* did the former whereas *Iqbal* did the latter, although it is not clear that the

⁸⁸ See Elizabeth G. Thornburg, *Just Say “No Fishing”: The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1 (2006).

lower courts have similarly abandoned the “notice” in notice pleading. What follows is an account of what happened to notice pleading in *Twombly* and *Iqbal* and a reflection of how the whole notice pleading story itself has affected both notice and pleading.

E. *The Impact of Twombly and Iqbal*

What happened to notice pleading in *Twombly*? After the Supreme Court handed down its opinion, Professor Spencer declared that “[n]otice pleading is dead.”⁸⁹ As Part II of this Essay has shown, however, the problem is not that the court abandoned notice pleading in *Twombly*. Rather, the problem is that “notice pleading” never really existed as a meaningful idea outside of the concepts of pleading as “minimal,” “bare,” or “simplistic.” Given the vague status of “notice” in notice pleading, however, it is not entirely clear exactly what (if anything) about *notice* pleading died with *Twombly*.

In his opinion, Justice Souter severed the “notice pleading” language of *Conley* from the “no set of facts” language, writing that

Justice Black’s opinion for the Court in *Conley v. Gibson* spoke *not only* of the need for fair notice of the grounds for entitlement to relief *but of* “the accepted rule 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.”⁹⁰

Justice Souter then proceeded to the now-famous retirement of the “no set of facts” language. But it is plausible⁹¹ to read this passage as an attempt to preserve notice pleading, or at least present the illusion that the Court intended for some semblance of liberal and open pleading to survive *Twombly*. Justice Souter could assure the reader that the Court had not abandoned notice pleading. Rather, the Court could simply retain the moniker “notice pleading” and pry it away from the decades of association between notice and minimalism.

⁸⁹ Spencer, *supra* note 4, at 431.

⁹⁰ Bell Atl. Corp. v. *Twombly*, 550 U.S. 544, 561 (2007) (emphasis added) (quoting *Conley*, 355 U.S. at 45–46).

⁹¹ Pun intended.

Notice pleading, then, was an empty vessel that allowed for continuity with the past. The Court could abandon the specific offending *Conley* language without “really” overturning *Conley* itself because, after all, notice pleading still remained. The question of whether the Court had “really” abandoned notice pleading in *Twombly* was a distraction from the fact that a full-bodied doctrine of notice pleading had never really existed in the first place. It had little separate existence from general theories of openness and liberalism, yet the name provided some rhetorical cover by insinuating that the standard was doing some sort of work aside from screening out all but the most outrageous cases. At the margins, notice pleading helped explain why some plaintiffs had adequately stated a cause of action even if the complaint omitted the formal niceties of reciting with precision the law under which those plaintiffs sought relief or the exact elements of the cause of action.⁹² But beyond that, courts only engaged in superficial examinations of why notice is important to pleading and what actual notice might look like.

Iqbal then confirmed the emptiness, if not the irrelevance, of notice pleading. Justice Kennedy did not explicitly reject notice pleading or retire the term with any fanfare. It was simply absent from the entirety of the majority opinion. The Court’s new project was to refine and elaborate on the plausibility standard. Notice pleading added little to this endeavor. Justice Souter, in his *Iqbal* dissent, clung to the idea that notice pleading was a meaningfully distinct doctrine that could exist apart from and alongside the plausibility standard that he announced in *Twombly*. He tried to reconcile his own opinion in *Twombly* with the earlier *Conley* regime and the expanded plausibility standard in *Iqbal*. On his reading, the *Iqbal* complaint gave the defendants “fair notice of what the . . . claim is and the grounds upon which it rests.”⁹³

⁹² Sherwin, *supra* note 28, at 75 (“Today, the notion of issue pleading has been relegated to history: no one maintains that plaintiffs must specify the elements of a legal cause of action in their complaints.”); see also *Acosta v. Byrum*, 180 N.C. App. 562, 568 (2006) (“To require plaintiff to describe particular provisions of the rules and regulations would defeat the purpose of simple notice pleadings, i.e., to place the opposing party on notice of all claims and defenses.”); *Lekas v. Briley*, 405 F.3d 602, 614 (7th Cir. 2005) (“[N]oting that even though a complaint may comply with the simple notice pleading requirements of Rule 8(a)(2), it may nonetheless be dismissed under Rule 12(b)(6) if the plaintiff does not present legal arguments supporting the ‘substantive adequacy’ or ‘legal merit’ of that complaint.”).

⁹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 698–99 (2009) (citing *Twombly*, 550 U.S. at 545 (quoting *Conley*, 355 U.S. at 47)).

There is some disagreement among the lower courts about whether notice pleading survived the *Twilight* revolution. Many judges did not immediately abandon notice pleading after *Iqbal*. For the most part the decisions that continue to use the term notice pleading do so in a manner consistent with pre-*Twilight* opinions. That is, a court will use the label “notice pleading” without much elaboration.⁹⁴ Some deployments of the label suggest that “notice pleading” is practically interchangeable with “plausibility pleading;” for example, the Fifth Circuit’s casual observation that “notice pleading . . . requires ‘enough facts [taken as true] to state a claim to relief that is plausible on its face.’”⁹⁵ Most of the disagreement, then, mirrors the older battles between tighter and looser pleading standards with “notice pleading” deployed as a synonym for open or liberal pleading.

Some courts maintain that notice pleading is still a viable concept. The Fourth Circuit, for example, opined that “[t]he Federal Rules of Civil Procedure remain committed to a notice-pleading standard that was adopted when the Rules were first promulgated in 1938.”⁹⁶ In a decision issued shortly after *Iqbal*, the Seventh Circuit declared that

Twombly and *Erickson* together . . . mean that “at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” This continues to be the case after *Iqbal*.⁹⁷

The Ninth Circuit, on the other hand, describes plausibility pleading as a distinct standard that “represents a balance between Rule 8’s roots in relatively liberal notice pleading and the need to prevent . . . ‘largely groundless claim[s]’” from proceeding past a motion to dismiss.⁹⁸ In light

⁹⁴ See, e.g., *FindWhat Inv’r Grp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011); *ABB Turbo Sys. AG v. TurboUSA, Inc.*, 774 F.3d 979, 984 (Fed. Cir. 2014); *Rogers v. Capital One Bank (USA)*, 190 F. Supp. 3d 1144, 1146–47 (N.D. Ga. 2016); *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 147 (3d Cir. 2014).

⁹⁵ *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 466 n.5 (5th Cir. 2015).

⁹⁶ *Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)).

⁹⁷ *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (quoting *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007)).

⁹⁸ *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014).

of the uncertainty about the current status of notice pleading, both as a label and as a substantive concept, the next Part examines the possible future of notice pleading in the post *Twiqbal* era. While this might look like a circuit split, the reality is that the disagreement concerns whether and how the term can be repurposed. As we shall see in the following Part, even the Seventh Circuit’s formulation calls into question whether a true notice pleading regime really survives into the *Twiqbal* era.⁹⁹

III. THE FUTURE OF NOTICE AND THE FUTURE OF PLEADING

A. *The Future of Notice*

This Essay primarily concerns pleading, and thus is not the forum for an extended discussion of the due process dimensions of notice in its own right. However, it is worth reiterating the rhetorical battering that the term “notice” took during the notice pleading era. The minimization of notice in the name of jealously guarding court access occurred alongside a general practice of subordinating notice to other procedural rights and interests. Concerns about the scope of personal jurisdiction, the enforcement of arbitration clauses, and a host of other procedural issues have dominated the discourse. Meanwhile, questions about how suboptimal notice practices might prejudice the rights and interests of defendants—many of whom might actually belong to vulnerable populations—have been subordinated to other procedural concerns, either out of passive disregard, or out of an active fear that paying too much attention to notice will jeopardize the ability of most litigants to vindicate their rights in public tribunals. I have written elsewhere that we need not accept this court-access conundrum as a settled state of affairs. For purposes of this Essay, it is enough to hold pleading up as an unlikely but very real example of how a procedural doctrine—somewhat distant from the mechanics of service of process—can impact the Fourteenth Amendment discourse about notice.

⁹⁹ See *infra* notes 105–107 and accompanying text.

B. *The Future of Pleading*

What would happen if we were to put the “notice” back into notice pleading? As this Essay has shown, the concept of notice pleading was a relatively late-breaking phenomenon in the long history of pleading doctrines and practice, and it did not even garner the full-throated support of rules-drafter Charles Clark himself. Even in its heyday, notice pleading was more of a moniker or label than a fully realized legal concept. So, to suggest a “restoration” or “return to” notice pleading might be a bit much, as it is not entirely clear to what sort of concept or standard jurists would be returning.

We can begin by imagining what might have become of *Conley* had courts paid as much attention to notice as they did to the “no set of facts” language. The “no set of facts” standard drove courts, litigants, and commentators into two opposing camps. The staunch defenders of “no set of facts” saw it as a key ingredient of maximal courthouse access for plaintiffs, worrying that any movement away from the low bar would slam the courthouse doors shut to deserving plaintiffs in the name of screening frivolous lawsuits. Critics of that standard saw it as such a low bar that it effectively permitted all but the most outrageously implausible complaints to make it past a motion to dismiss.¹⁰⁰ And once it became the case that total implausibility was the only way *out* of the *Conley* standard, then it is no surprise that the Supreme Court turned to plausibility as the way *in* to pleading. As we saw, it only took two years after the introduction of plausibility pleading for the Supreme Court to quietly drop notice pleading from its pleading discourse.¹⁰¹

Given that plausibility pleading has now been with us for over a decade, it is unlikely that the Court would turn back the clock to try notice pleading, but this time, take it seriously as a pleading standard. It would be doctrinally awkward (although not impossible) to retract the test announced in *Twombly* and clarified in *Iqbal*. Still, one might wonder what might have happened if courts had invested more in developing the scope and definition of notice pleading. One possibility is that a meatier

¹⁰⁰ This does not account for successful motions based on *legal* rather than *factual* insufficiency, but that never seemed to be the chief complaint of *Conley* critics.

¹⁰¹ The Court mentioned the notice pleading standard in *Erickson v. Pardus*, 551 U.S. 89 (2007), in the context of a quote from *Twombly*. The Supreme Court has not used the phrase since.

(although still presumably liberal and open) standard might have staved off the strawman construction of *Conley* as an intolerably low standard. Another is that the *Twiqbal* revolution was inevitable, but it might have consisted of an insistence on refining or tightening the scope of notice pleading, rather than turning to the entirely new paradigm of plausibility pleading. We will never know what might have resulted from this counterfactual world. But, imagining what a more robust "notice pleading" regime might have looked like enables us to envision how courts could slip notice back into pleading just as quietly as it disappeared.

Recall that notice pleading emerged as a response to two distinct pleading problems from the pre-1938 era of civil procedure. The first was difficulty that resulted from the hypertechnicalities of earlier pleading regimes which had the effect of barring a number of otherwise completely meritorious actions simply because the parties had failed to conform to any number of the byzantine niceties required by a complex set of rules. The second problem was the difficulty of sorting so-called "meritorious" actions from the unworthy "bogus" lawsuits that ought not clog the courts' dockets.

Notice pleading was meant to cure the first problem by introducing a simple and (mostly) transsubstantive standard to replace the arcane rules of pleading regimes past. And it was meant to solve the second problem by assuming that pleading need only take care of the most basic sorting. The "real" work of disaggregating worthy from unworthy lawsuits was to come later in litigation, especially through careful judicial supervision of discovery. What, then, does notice have to do with either of these problems? Notice does little work with regard to the first problem. It simplified pleading regimes in virtue of its potential for universal application and relatively uniform nature, but this could be true of any number of other standards besides notice. "Plausibility," for example, serves precisely the same function of superficial transsubstantivity.

But notice might actually really matter to the sorting problem. By shifting the meritoriousness problem away from pleading and into discovery and later stages of litigation, notice pleading transformed pleadings from a mostly technical and bureaucratic affair to an adversarial affair. Notice pleading did not assume that courts would no longer sort meritorious from nonmeritorious claims (to the extent that

this had even been a reality in the prior regimes). The pleading (and concomitant motion to dismiss) itself was not intended to be the primary site of sorting. Instead, pleading should be designed to *facilitate* sorting. And notice, if taken seriously, might facilitate the sorting of meritorious actions.

What follows is a brief sketch of what might have been the tenets of a fortified notice pleading regime; that is, a regime in which notice pleading would be a liberal standard that enables court access, but is also tied to the belief that sorting would occur at some early post-complaint stage of a lawsuit. The three central tenets of a notice pleading regime are: (1) specification of the pleading audience, (2) recognizing the centrality of legal sufficiency, and (3) the subjectivity of factual sufficiency and accounting for informational asymmetries.

Specification of the Pleading Audience. The idea of notice is inherently dialogic; that is, it contemplates that the pleading is a document that communicates something to an intended audience. Prior to notice pleading, the court (or judge or chancellor) had been the assumed audience for a pleading, standing in for the public or world at large. It was not that the defendant was unimportant, it was simply the case that a pleading was meant to communicate certain information regardless of the particular identity of the recipient. The emphasis was on *conformity* with a given set of procedures rather than *communication* of information. Notice pleading seemed poised to replace the generality of conformity with formal requirements with the specificity of communication to a designated audience.

As Part II demonstrates, the early rhetoric around notice pleading stressed that the *defendant* was the intended audience of a pleading.¹⁰² This does not mean that defendants were the *only* audience for a pleading. The notice feature of pleading was presumably additive to the earlier assumptions about the centrality of courts and judges. Thus, pleadings are meant to communicate relevant information both to the defendant in particular and to the public in general, as embodied by the court. The question of audience is important because, as we shall see, a notice regime that has a specific audience is one that allows for variation in what might be “sufficient” based on the identity of the defendant-audience. This

¹⁰² See *infra* Section II.A.

variation, in turn, would be smoothed out later on in litigation via factual development and merits determinations.

The Centrality of Legal Sufficiency. A notice pleading regime would center legal sufficiency.¹⁰³ From a civil procedure perspective, legal sufficiency is sometimes overlooked because most of the disputes over legal sufficiency concern the areas of substantive law for which the plaintiff may or may not have stated a claim. But the question of whether a given set of facts amount to a cognizable claim is key. It is hardly novel to recognize the procedural benefits of an early determination of whether there is law under which a plaintiff may be entitled to relief. Perhaps it is because this feature of pleading is so obvious and undisputed that it is simply taken for granted. Legal sufficiency is connected to both audiences of notice pleading. Notice pleading recognizes that a pleading should communicate to the court what sort of lawsuit to expect and communicate to the defendant how it should prepare. This is why the ability to add and refine causes of action later in the lawsuit is intimately connected with the adverse party's expectations from the outset of the pleadings.¹⁰⁴ Notice pleading sets up the architecture for later legal as well as factual developments in litigation.

Defining the legal parameters of a lawsuit is not identical to screening cases with some sort of goal of prognostication as to its merits. To downplay the centrality of legal sufficiency is to paint a picture of pleading in which a permissive fact pleading threshold looks like it's not "doing" enough work. But a reminder of the centrality of legal sufficiency illustrates that notice pleading is always "doing" important work, and we need not always expect more from a complaint or the motions that test its sufficiency.

The Subjectivity of Factual Sufficiency and Accounting for Informational Assymetries. Although notice pleading centers legal sufficiency, it does not exclude the dimension of fact pleading. In addition to communicating the plaintiff's anticipated legal arguments, the complaint contains the plaintiff's account of the factual background of the case. But because notice pleading centers adverse parties as a distinct audience, rather than limiting the audience to a disconnected public, notice pleading will not treat all facts equally. The plaintiff need not be

¹⁰³ See *supra* notes 37–38 and accompanying text.

¹⁰⁴ See FED. R. CIV. P. 15.

charged with notifying the defendant in detail about facts already within its possession, or facts to which the defendant has cheaper or easier access than the plaintiff.

This feature of notice pleading was that which best protected plaintiffs' court-access interests in lawsuits alleging discriminatory or conspiratorial conduct among defendants such as employment discrimination and antitrust cases. If the plaintiff alleged facts within the defendants' putative knowledge or control, it did not allow defendants to hide behind the fact that plaintiffs did not have access to the information. The key feature of notice pleading, then, is that it accounts for information asymmetries, but does not reify them in a way that disadvantages *either* plaintiffs or defendants. A stronger notice pleading regime would have protected vulnerable plaintiffs who could not reasonably be expected to notify a defendant of its own hidden conduct. But it also would have engaged more with the question of whether the inferences alleged from the stated facts really *notified* the defendants of the factual and legal situations from which the plaintiffs had good reason to expect to find. In other words, a strong notice pleading regime might have allowed a fishing expedition in a well-identified lake but not an ocean. To stretch the analogy further, notice pleading would have demanded that the plaintiff identify what sort of fish she might catch, but not verify the existence of any individual fish in advance of the trawling expedition.

While this approach might not always immediately cull the supposedly "nonmeritorious" lawsuits from the federal docket at the motion to dismiss, a subjective approach to factual sufficiency under a stronger notice pleading regime might have facilitated a more searching look at the plaintiff's factual allegations at the outset. Even the optics of investigating the knowledge gaps between plaintiff and defendant might have kept at bay the nagging feeling harbored by *Conley* skeptics that the "no set of facts" language unfairly favored plaintiffs. A stronger notice pleading regime would have forced plaintiffs and courts to account for the defendant and *communicate* the legal and factual parameters of the lawsuit to come.

In one of the few extended discussions of notice pleading after *Twombly* and *Iqbal*, the Seventh Circuit linked notice pleading with plausibility. Judge Wood framed the pleading question presented as "whether [the] factual allegations provide sufficient notice to defendants

of [the plaintiff’s] claims.”¹⁰⁵ She then explained that the main “take away from *Twombly*, *Erickson*, and *Iqbal*” was that “[f]irst, a plaintiff must provide *notice* to defendants of her claims. Second, courts must accept a plaintiff’s factual allegations as true, but some factual allegations will be so sketchy or implausible that they *fail to provide sufficient notice* to defendants of the plaintiff’s claim.”¹⁰⁶ But in the end, the notice issue collapsed back into plausibility. Judge Wood agreed with the district court’s assessment that a set of facts were just too implausible to meaningfully inform the defendant of the case against him. This was a curious formulation; it is unclear how the *plausibility* of facts fail to inform a defendant. A set of facts might be perfectly clear (and thus informative), yet still implausible. If implausibility is the standard under *Twiqbal*, there might not be much that a judge can do beyond adjust her own expectations of plausibility.¹⁰⁷ But to say that to be implausible is to be non-informative does not ring true. This odd equivalence between notice and plausibility has gone unremarked upon, save for the Seventh Circuit district and appellate judges who have included the *Brooks* formulation in a standard citation. Perhaps no one paused to consider whether this definition of “notice” pleading made much sense, because we had all been conditioned to think of notice pleading as the empty vessel into which judges would pour their expectations or understandings of the Rule 8 pleading standard.

This hypothetical notice pleading regime is far from a perfect answer to that perpetual “pleading problem.”¹⁰⁸ Its late-breaking appearance in modern jurisprudence and the relative paucity of early academic discourse surrounding the term might have doomed it to its life primarily as a synonym for liberal pleading rather than a deeper concept that enabled and justified a particular form of liberal pleading. Even if courts had engaged more meaningfully with the concept, it is likely that it would have been just as difficult to define with precision the meaning of “notice” as it has been to articulate the meaning of “plausible.”

¹⁰⁵ *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009).

¹⁰⁶ *Id.* at 581 (emphasis added).

¹⁰⁷ And, as other scholars have shown, there is *ample* room for such discretion and adjustment.

¹⁰⁸ Recall that in 1939, Professor Simpson optimistically titled his article, *A Possible Solution to the Pleading Problem*. See Simpson, *supra* note 38. By 2010, Professor Steinman was among the many, many professors trying to solve the intractable “pleading problem.” See Steinman, *supra* note 6.

There is an advantage, though, in notice pleading. However indeterminate the words might be, it might have better accounted for the relative needs of *both* plaintiffs and defendants, rather than *Conley* and *Twiqbal*, in which the pendulum seems to have swung from overemphasizing the relative position of plaintiffs to that of defendants. Regardless of how true that might have been, the current doctrinal reality is plausibility pleading. There might still be room for some of the old promise of notice pleading to reenter pleading discourse. Putting the “notice” back in pleading would allow courts to shift from the passive voice (“the plaintiff’s complaint *is* plausible”) to the active voice (“the plaintiff’s complaint *notifies* the defendant of the legal basis for relief and *communicates* the facts that support several possible inferences”). A court might conclude that a plaintiff has not cast a wide net in a vast ocean without any support or feedback in sight. Rather, she plans to cast several discrete lines into a lake with the expectation that other recognizable vessels that have trawled these waters can and will guide her toward meaningful finds.

Notice pleading is the opening of a dialogue. Plausibility might be measured against how *this* defendant could respond, rather than how a neutral third-party observer might understand various legal and factual allegations. While much of this is contrary to some of the language from *Twombly* and *Iqbal*, it might, as a descriptive matter, explain the difficulty that courts have had in determining whether a statement is “conclusory” and thus must be disregarded for purposes of evaluating the pleading.¹⁰⁹

CONCLUSION

The era of notice pleading is gone, and it is a shame that it slipped away before courts and commentators had really given it its due. I have suggested some small ways in which the concepts behind notice pleading might still live on in the world of plausibility pleading, namely, by centering the importance of legal sufficiency determinations and by shifting the plausibility inquiry into a subjective, audience-centered perspective. I do not expect these to result in any monumental shifts in plausibility pleading.

¹⁰⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); see also Howard M. Erichson, *What Is the Difference Between a Conclusion and a Fact?*, 41 CARDOZO L. REV. 899 (2020).

Perhaps, then, the contribution of this Essay, beyond heaving a historical sigh, is to provide a partial blueprint for pleading reformers. Those who wish to reform the federal pleading standard through an explicit change to Rule 8 or through congressional legislation would do well to be deliberate in their choice of words for a pleading standard. A "return" to notice pleading might be a far more successful enterprise if it is resurrected as a fully realized concept and doctrine, and not just as the superficial label it once was.

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