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# ARTICLE

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## COMPARATIVE CONVERGENCES IN PLEADING STANDARDS

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SCOTT DODSON<sup>†</sup>

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<sup>†</sup> Associate Professor of Law, William & Mary School of Law. This Article was selected for presentation at the 2009 Annual Meeting of the Association of American Law Schools Civil Procedure Section panel, *The Changing Shape of Federal Civil Pretrial Practice*, and I am grateful for the comments I received there. Two other selected articles, by Professors Edward Hartnett and Elizabeth Schneider, and a Foreword by Professor Catherine Struve, also appear in this issue. This Article also benefitted from comments during presentations to the faculty at the University of Alabama School of Law and at the University of Houston Law Center Colloquium. Special thanks to Aaron Bruhl, Ed Brunet, Kevin Clermont, Rick Marcus, Tom Rowe, and Suja Thomas for reviewing and commenting on previous drafts. I am indebted to Samantha Leflar for her diligent research assistance.

## INTRODUCTION

As transnationalism becomes more prominent, comparative law is burgeoning. In one area of American law, however, it has met a formidable challenge: civil procedure. Comparative civil procedure has been relatively slow to find its way into American law-school classrooms, legislation, and judicial opinions.<sup>1</sup>

There are many reasons why, but one reason is American exceptionalism. Though there is a vast difference between common law and civil law jurisdictions,<sup>2</sup> American procedure is very different even from its common law kin. As I and others have stated previously, American exceptionalism is a major obstacle to the benefits of comparative study and to potential reform in the field of civil procedure.<sup>3</sup>

This may be changing, however. Certain features of American procedure historically considered exceptionalist appear to be trending toward their foreign counterparts.<sup>4</sup> These trends, should they continue, may make comparative study, and perhaps even harmonization, easier.<sup>5</sup> They also, however, pose new challenges to the coherence of our own American system.

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<sup>1</sup> See Scott Dodson, Review Essay, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 134 (2008) (reviewing OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT (Oscar G. Chase & Helen Hershkoff eds., 2007)) (noting that the United States has failed to borrow from and harmonize with procedures from foreign legal systems).

<sup>2</sup> For a discussion of the differences between common law and civil law traditions, see generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* (3d ed. 2007).

<sup>3</sup> See Dodson, *supra* note 1, at 141-42 (pointing to a reverence for the civil jury trial and the “American Rule” for attorneys’ fees as examples); Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) (documenting how “idiosyncrasies of American culture are reflected in the procedural rules that govern civil litigation”); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1665 (1998) (explaining that differences in discovery procedures between the United States and foreign jurisdictions present difficulties for harmonizing the law of procedure among jurisdictions); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709 (2005) (“Not only does America conceive itself, often ruefully, as the litigation superpower, but it also has a set of procedural characteristics that seem to set it off from almost all of the rest of the world.” (footnote omitted)).

<sup>4</sup> See Dodson, *supra* note 1, at 144-50 (citing liberal pleading rules, verdict constraints, and the involved role of the judiciary as areas in American law trending towards harmonization).

<sup>5</sup> See *id.* at 143-44 (noting areas in American civil procedure where “[h]armonization and alignment are particularly promising”).

Pleading is a particularly useful example. It is a prominent feature of American civil procedure that has long been exceptional. Unlike civil law countries, which require detailed fact pleading and often evidentiary support at the outset, and unlike even most common law traditions that also require some fact pleading, Rule 8 requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>6</sup> a formula that has traditionally focused on notice rather than facts.<sup>7</sup> This conception of pleading is unlike any other in the world.

But exceptionalism in American pleading may be waning, at least in discrete areas. Congress has begun to experiment with imposing heightened pleading requirements in, for example, the Private Securities Litigation Reform Act of 1995.<sup>8</sup> Similarly, but perhaps more dramatically, the Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>9</sup> and *Ashcroft v. Iqbal*<sup>10</sup> recently imposed a transsubstantive “plausibility” standard that depends upon factual sufficiency, eliminating the more liberal notice-pleading standard that the Court had endorsed since 1957.

It may be that these discrete changes do not reflect a deeper and broader change to American pleading. Even if they did, the potential change to American pleading would still leave it significantly different from foreign models. But the mere fact of these changes, even in their narrowest form, suggests that American procedure is neither static nor irrevocably exceptionalist. If these trends do reflect a broader willingness to experiment with pleading and civil procedure generally, then they may allow for even more important gains, such as meaningful transnational dialogue between the U.S. and foreign systems, more valuable comparative analyses in the United States, and the potential to harmonize civil procedure across national boundaries. Of course, such trends also would present substantial challenges to the coherence, workability, and fairness of an American system built upon the premise of liberal pleading.

Part I frames this discussion by analyzing the normative benefits of, and practical obstacles to, comparative civil procedure generally. Part II locates American pleading in its exceptionalist state by contrasting it with civil law and other common law systems. Part III throws recent changes like *Twombly* and *Iqbal* into the mix and argues

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<sup>6</sup> FED. R. CIV. P. 8(a).

<sup>7</sup> See *infra* Section II.A (discussing the history of the drafting of Rule 8).

<sup>8</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

<sup>9</sup> 550 U.S. 544 (2007).

<sup>10</sup> 129 S. Ct. 1937 (2009).

that they are shifting—albeit gradually—the American approach closer to the pleading standards of the rest of the world. Part IV then discusses how this trend may affect the potential for comparative studies and transnational relations, both for pleading specifically and for civil procedure generally.

## I. COMPARATIVE CIVIL PROCEDURE GENERALLY

### A. *Benefits*

Comparative civil procedure offers many of the same benefits as comparative study generally. Comparative studies have academic, practical, reformative, and social benefits.

Academically, studying the procedure and procedural traditions of other countries can deepen one's understanding of U.S. procedural norms and the underlying policy balances they strike.<sup>11</sup> Practically, the increasing prevalence of transnational litigation and transactions concomitantly requires broader exposure to foreign laws and procedures. Advocates, advisers, and judges must have at least a working knowledge of foreign procedures to be able to frame, anticipate, or decide legal issues that cross national boundaries.<sup>12</sup>

Reformatively, knowledge and understanding of other systems provide an opportunity for individual systems to devise, either via importation or exportation, a different model for solving common problems. On a multinational scale, such reforms can harmonize various independent legal systems into a more coherent and accessible global system.<sup>13</sup>

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<sup>11</sup> See CHASE ET AL., *supra* note 1, at 1-2 (describing the importance of a global approach to the study of civil procedure); THOMAS O. MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 2 (2006) (discussing how a comparative approach to learning procedural rules provides “meaningful context,” allowing students to more easily internalize the material); Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524, 535 (2006) (highlighting how comparative procedural study helps to overcome misconceptions and deepen understanding of one's own legal system); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545 (1995) (“The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law.”).

<sup>12</sup> See CHASE ET AL., *supra* note 1, at 2 (explaining the pragmatic advantages of comparative legal study, including international legal practice); MAIN, *supra* note 11, at 1 (“In this era of increasing globalization, provincialism can be not only an embarrassment, but a professional liability.”); Clermont, *supra* note 11, at 525 (emphasizing that a familiarity with foreign systems is a necessity in our increasingly global society).

<sup>13</sup> See Dodson, *supra* note 1, at 139 (defining harmonization as “a coming together of various independent legal systems”). There are downsides to harmonization, of course. See, e.g., Jeffrey S. Parker, *Comparative Civil Procedure and Transnational “Harmonization”*, *supra* note 1, at 139.

Socially, a comparative civil procedure study may help bring nations and cultures closer together in a global community by broadening perspectives, reducing isolationism, and increasing tolerance,<sup>14</sup> perhaps thereby improving international relations.<sup>15</sup>

### B. *Obstacles*

Despite these potential benefits, several significant obstacles have stymied comparative civil procedure in the United States. First, civil procedure is extensively rooted in its home legal system.<sup>16</sup> Various procedures are built upon each other—notice pleading, for example, is tied to liberal discovery<sup>17</sup>—and, as a result, alteration of one rule may disrupt others.<sup>18</sup> Civil procedure also derives from and reflects deep-seated, often peculiarly held, values of the society it regulates.<sup>19</sup> This interconnectivity makes comparative procedure particularly resistant to the benefits normally attendant to comparative studies.<sup>20</sup>

*nization*”: *A Law-and-Economics Perspective* 3-4 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 09-03, 2008), available at [http://ssrn.com/abstract\\_id=1325013](http://ssrn.com/abstract_id=1325013) (arguing that legal diversity among nations, like diversity in product markets, can be welfare enhancing).

<sup>14</sup> See MAIN, *supra* note 11, at 2 (proposing that procedure be studied from international, transnational, and comparative perspectives); Clermont, *supra* note 11, at 535 (noting a common misconception that the procedure in one’s home jurisdiction provides the only set of rules that works).

<sup>15</sup> See Dodson, *supra* note 1, at 139-40 (proposing that “a willingness to appreciate other solutions can represent a step towards better international relations”).

<sup>16</sup> See *id.* at 140 (acknowledging that because procedure is tied to the fundamental principles of one’s home system, it is resistant to change).

<sup>17</sup> See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 68, at 470 (6th ed. 2002) (“The keystone of the system of procedure embodied in the rules is Rule 8 . . . . The other procedural devices of the rules—broad joinder, discovery, free amendment, and summary judgment—rest on these provisions about pleadings.”).

<sup>18</sup> See Marcus, *supra* note 3, at 710 (discussing the interdependence of procedural elements).

<sup>19</sup> See Chase, *supra* note 3, at 278 (“[T]he formal procedures of dispute resolution found in any culture reflect and express its metaphysics and its values . . . .”); see also Kevin M. Clermont, *Why Comparative Civil Procedure?*, *Foreword* to KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW*, at ix, xii (2003) (arguing that procedure is “surprisingly culture-bound”); Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 *DUKE J. COMP. & INT’L L.* 61, 71 (2003) (presenting the view that rules are rooted in a “country’s peculiar features of history, social structure, and political consensus”). In addition, the values underlying civil procedure choices are more subtle and latent than substantive norms. I am indebted to Kevin Clermont for this point.

<sup>20</sup> See Clermont, *supra* note 19, at ix, xi (noting that comparative scholarship is delicate and that actual transplanting is uncommon); Marcus, *supra* note 3, at 710 (arguing that the hesitance of American proceduralists to consider comparative insights is a result of the parochial view that comparative insights are “of relatively little utility and

Second, American proceduralists are infamously provincial<sup>21</sup> (though my own assessment is that this is changing<sup>22</sup>). Many students in U.S. law schools will never learn a thing about the civil procedure rules or systems of other countries.<sup>23</sup> Judges and legislators interpreting procedural rules or implementing procedural reforms are far more likely to look inward than outward.<sup>24</sup> Unilingualism and geographical isolation perpetuate U.S. self-centeredness.

Finally, and of particular relevance here, American procedure's entrenched exceptionalism creates barriers to comparativism.<sup>25</sup> The list of exceptionalist features is extensive: liberal pleading, liberal (and costly) discovery, class actions, a disengaged judge, civil juries, largely unfettered damage assessments, and the "American rule" of cost allocation.<sup>26</sup> It is much harder to understand, appreciate, and

perhaps even dangerous"); cf. John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 988 (1990) (arguing that adopting certain German civil procedure features could not be done "without radically changing other important aspects of our legal culture").

<sup>21</sup> See Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. LEGAL EDUC. 502, 502 (2006) ("American proceduralists are among the most parochial in the world.").

<sup>22</sup> Cf. Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 355 (2008) ("[T]he current crop of American scholars in civil procedure and conflict of laws is perhaps as well versed in the comparative and international dimensions of their field as any group of American legal scholars and any generation of American proceduralists."); Parker, *supra* note 13, at 1-2 ("[R]ecent trends show increasing attention to comparative procedural law, and in particular to civil procedure.").

<sup>23</sup> See Gidi, *supra* note 21, at 502 (stating that comparative civil procedure's "pervasive absence" from American law schools is "well documented"); Langbein, *supra* note 11, at 545 ("The study of comparative procedure in the United States has little following in academia, and virtually no audience in the courts or in legal policy circles."); Marcus, *supra* note 3, at 740 (lamenting that, in the United States, "comparative procedure is barely on the map"). That is not to say that U.S. civil procedure courses do not have a transnational flair at times. See, e.g., 28 U.S.C. § 1332 (2006) (creating alienage jurisdiction); FED. R. CIV. P. 4(f), 4(h) (governing international service of process); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (discussing personal jurisdiction over a foreign defendant); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (describing *forum non conveniens*). But these are simply international flavorings to American procedural law. They are not comparisons of foreign rules and systems.

<sup>24</sup> See Dubinsky, *supra* note 22, at 308 (highlighting a "tendency of the American bench to approach transnational scenarios from the perspective of interstate frameworks, precedents, and policy concerns").

<sup>25</sup> See Chase, *supra* note 3, at 287-301 (examining features of American exceptionalism); Dodson, *supra* note 1, at 141 (noting that American exceptionalism is "deeply entrenched").

<sup>26</sup> I have discussed these exceptionalist features previously in Dodson, *supra* note 1, at 141-42.

model a contrary perspective when one's home perspective is both so rooted and so different.

These barriers all but foreclose large-scale, rapid changes in U.S. procedure absent, perhaps, some urgent crisis.<sup>27</sup> The question posed here is whether components of American exceptionalism, such as pleading, are impervious to gradual changes and, if not, what that might mean for the future of comparative civil procedure.

## II. AMERICAN EXCEPTIONALISM IN FEDERAL CIVIL PLEADING

America has the most lax pleading system in the world.<sup>28</sup> That has not always been the case. America inherited its common law procedural rules from Great Britain, and its pleading system evolved in analogous ways until the twentieth century. Since the adoption of the Federal Rules, however, American pleading has taken a very different path.

### A. *Traditional Rule 8 Pleading in the United States*

The Federal Rules were a result of dissatisfaction with the Field Code, which dominated court practice from 1848 to 1938.<sup>29</sup> Code pleading required the complaint to contain "[a] statement of the facts constituting the cause of action."<sup>30</sup> Correlatively, the Codes severely limited discovery.<sup>31</sup>

Later dissatisfaction with the Codes in general (and their requirement that plaintiffs plead "ultimate" facts, as opposed to evidence or "evidentiary" facts<sup>32</sup>) then led to the consideration and adop-

<sup>27</sup> See Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 186-87 (2008) (arguing that major American procedural reform generally happens only in response to a crisis).

<sup>28</sup> See CHASE ET AL., *supra* note 1, at 8 (comparing the American system of notice pleading to the heightened requirements of fact pleading used in most civil law countries).

<sup>29</sup> See Stephen N. Subrin, *How Equity Conquered Common Law*, 135 U. PA. L. REV. 909, 933-74 (1987) (documenting the history and motivation of the adoption of the Federal Rules).

<sup>30</sup> Act of Apr. 12, 1848, ch. 379, § 120(2), 1848 N.Y. Laws 521; see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004) (comparing Rule 8 with the fact pleading required by the old code precedents).

<sup>31</sup> The Codes disallowed interrogatories and strictly limited document requests and oral depositions. See Subrin, *supra* note 29, at 936-37 (listing additional limitations of discovery in code pleading).

<sup>32</sup> See Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 533 (1925) (calling the system of pleading facts one of the "most important" characteristics of the Codes).

tion of the Federal Rules of Civil Procedure. Charles E. Clark, the principal drafter of the Rules<sup>33</sup> and a passionate advocate of relaxed pleading,<sup>34</sup> designed Rule 8 to eliminate the problems of fact pleading under the Codes.<sup>35</sup> The drafters “wanted something simple, uniform, and transsubstantive.”<sup>36</sup>

Changes to pleading corresponded with broader changes throughout the procedural system. The Federal Rules were designed to install, in Professor Marcus’s words, a “‘liberal ethos,’ in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.”<sup>37</sup> The drafters wanted to reduce the importance of pleadings,<sup>38</sup> particularly as a vehicle for merits determinations, and instead placed the burden of weeding out meritless lawsuits on liberal discovery and summary judgment.<sup>39</sup> Thus, the primary goal of Rule 8 moved from isolation of issues, factual development, and merits determination to notice.<sup>40</sup>

<sup>33</sup> See Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965) (calling Clark the “prime instigator and architect of the rules of federal civil procedure”).

<sup>34</sup> Clark initially favored abolishing pleading motions altogether so that all merits dispositions would occur via trial or summary judgment. See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 927-28 (1976) (describing Clark’s preference for Rule 56 summary judgment over the devices of Rule 12).

<sup>35</sup> See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 (1998) [hereinafter Marcus, *Puzzling*] (asserting that the drafters of Rule 8 wished to “curtail reliance on the pleadings”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986) [hereinafter Marcus, *Revival*] (stating that Rule 8 “was designed to escape the complexities of fact pleading”).

<sup>36</sup> Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002).

<sup>37</sup> Marcus, *Revival*, *supra* note 35, at 439; see also Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318-19 (1938) (denouncing dismissals based on the pleadings).

<sup>38</sup> See WRIGHT & KANE, *supra* note 17, at 458 (“The draftsmen of the Civil Rules proceeded on the conviction, based on experience at common law and under the codes, that pleadings are not of great importance in a lawsuit.”).

<sup>39</sup> See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (“[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims . . . .”); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (“[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function.”); Marcus, *Revival*, *supra* note 35, at 440 (describing features of the Federal Rules, such as expanded discovery, which provided courts a heightened ability to decide the merits of a case on summary judgment).

<sup>40</sup> See Fairman, *supra* note 36, at 556 (“Instead of requiring pleadings to serve the multiple functions of notice, fact development, winnowing, and early disposition, un-

The resulting Rule 8 requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>41</sup> Rule 8 thus moved away from fact pleading<sup>42</sup> and instituted something much closer to notice pleading.<sup>43</sup> As Judge Posner has put it, “The federal rules replaced fact pleading with notice pleading.”<sup>44</sup>

Rule 8 conspicuously lacks any mention of facts.<sup>45</sup> Of course, it would be difficult to provide proper notice without recitation of at least *some facts*.<sup>46</sup> But, as Clark later wrote,

The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.<sup>47</sup>

Of course, what is needed to provide notice may vary depending upon the claim and the circumstances.<sup>48</sup> But the point of Rule 8 is that notice—not factual detail—is the ultimate touchstone.<sup>49</sup>

der the Federal Rules pleadings serve but a single function: providing notice.”).

<sup>41</sup> FED. R. CIV. P. 8(a)(2).

<sup>42</sup> See Edward D. Cavanagh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 877 (2008) (explaining how the drafters declined to require a plaintiff to allege facts sufficient to establish a cause of action); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1007 (2003) (stating that Rule 8 was specifically designed to inter the old code pleading requirement of pleading facts constituting a cause of action).

<sup>43</sup> See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460-61 (1943) (remarking that notice was the principal goal of pleading when the rules were developed); Fairman, *supra* note 42, at 990 (“A procedural system with notice pleading at its core is no accident.”). *But see* Marcus, *Puzzling*, *supra* note 35, at 1749-51 (arguing that pleadings should be dismissed only when the allegations themselves demonstrate a bar to relief).

<sup>44</sup> Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004); *see also* Fairman, *supra* note 42, at 988 (“If any rule in federal civil procedure deserves the label ‘blackletter,’ it is notice pleading.”).

<sup>45</sup> See WRIGHT & MILLER, *supra* note 30, § 1216 (“Conspicuously absent from Federal Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the ‘facts’ constituting a ‘cause of action.’”).

<sup>46</sup> See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, 1955 REPORT OF THE ADVISORY COMMITTEE PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (stating that Rule 8’s contemplation of facts is only to distinguish the claim from a bare averment that the plaintiff wants and is entitled to relief), *reprinted in* WRIGHT & MILLER, *supra* note 30, app. F, at 644-45.

<sup>47</sup> Clark, *supra* note 43, at 460-61.

<sup>48</sup> See Fairman, *supra* note 42, at 1001 (“To provide notice, some complaints certainly go beyond . . . skeletal illustrations . . . . What simplified notice pleading calls for is a general description of the case. To do so, more or less description may be inherent.” (footnote omitted)).

Most heralded the 1938 Federal Rules as a great success, and more than half of the states adopted rules modeled after them.<sup>50</sup> Nevertheless, federal courts interpreting pleading standards in their immediate aftermath tended to ignore them.<sup>51</sup> Lower courts, still enamored with fact pleading, interpreted Rule 8 to require “a detailed narrative . . . setting forth all elements of a claim,”<sup>52</sup> something indistinguishable from pre-Rules pleading.

In 1957, the Supreme Court purported to put that resistance to Rule 8 to rest in *Conley v. Gibson*.<sup>53</sup> According to the Court, “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>54</sup> Instead, Rule 8 required only “simplified ‘notice pleading,’”<sup>55</sup> which meant providing “fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>56</sup> That language suggests that *Conley* meant to put the questioning of liberal notice pleading to rest.<sup>57</sup>

*Conley* also admonished, however, 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.”<sup>58</sup> This language literally precluded dismissal if the plaintiff asserted a valid legal theory, and it allowed dismissal only if discovery would be futile.<sup>59</sup>

<sup>49</sup> But see Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 605 (2007) (“Assertions that the rule does not require the pleading of facts . . . are both oft stated and . . . demonstrably false.”).

<sup>50</sup> See Subrin, *supra* note 29, at 910 (“Approximately half of the states adopted almost identical rules [to the Federal Rules], and procedural rules in the remainder of the states bear their influence.”).

<sup>51</sup> See Marcus, *Revival*, *supra* note 35, at 433 (“There were pockets of resistance against the new pleading rules in the years after 1938 . . .”); Subrin, *supra* note 29, at 983 (“Soon after the Federal Rules went into effect there were signs that both lawyers and judges felt a need to limit the system that the drafters had created.”).

<sup>52</sup> Hazard, *supra* note 3, at 1685; see also Marcus, *Puzzling*, *supra* note 35, at 1750 (noting the resistance to Rule 8’s liberal pleading standard).

<sup>53</sup> See Marcus, *Revival*, *supra* note 35, at 445 (“*Conley v. Gibson* seemed to scotch the effort to revert to code practice.”).

<sup>54</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Marcus, *Revival*, *supra* note 35, at 434 (opining that the thrust of *Conley* seems to be that pleadings need only give general notice but nothing more); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 20 (2009) (“*Conley v. Gibson* sealed the deal [on the issue of notice pleading].”).

<sup>58</sup> *Conley*, 355 U.S. at 45-46.

<sup>59</sup> See Marcus, *Revival*, *supra* note 35, at 434 (“Taken literally, [*Conley*] might have

Despite *Conley*'s endorsement of notice pleading, defendants continued to move to dismiss pleadings, and courts continued to grant their motions.<sup>60</sup> Lower courts reimposed restrictive pleading in a number of substantive areas.<sup>61</sup> A litigation boom in the 1960s and 1970s spurred courts to dismiss complaints regularly for factual deficiencies.<sup>62</sup> Pleading became a mechanism to "test[] doubtful claims."<sup>63</sup> Even antitrust cases fell victim to heightened pleading standards,<sup>64</sup> despite the Supreme Court's admonition that antitrust cases should be dismissed sparingly.<sup>65</sup>

Despite these lower court attempts to impose heightened pleading standards after *Conley*, the Supreme Court consistently rebuffed

precluded dismissal in any case where the plaintiff invoked a valid legal theory."). Professor Hazard has argued that *Conley*'s interpretation is contrary to Rule 8. See Hazard, *supra* note 3, at 1685 (arguing that *Conley* "turned Rule 8 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself."). Others disagree. See, e.g., Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 315-16 (Kevin M. Clermont ed., 2d ed. 2008) (arguing that the "no set of facts" language in *Conley* should be interpreted literally).

<sup>60</sup> See Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1071 (1986) ("Nonetheless, a close look at Burger Court antitrust decisions reveals thinking at odds with the notice pleading tradition."); Marcus, *Puzzling*, *supra* note 35, at 1750 (documenting that, after *Conley*, "pleading practice persisted. In some areas . . . the courts appeared to disinter fact pleading."); Marcus, *Revival*, *supra* note 35, at 434 (remarking that applying *Conley* in subsequent cases was "problematic"); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 899 (2008) ("District courts routinely grant motions to dismiss for failure to state a claim . . .").

<sup>61</sup> See Fairman, *supra* note 36, at 551 ("Despite [the] clarity [of Rule 8] and the Supreme Court's endorsement of notice pleading in *Conley v. Gibson*, federal courts have embraced heightened pleading burdens in a variety of situations." (footnote omitted)); Fairman, *supra* note 42, at 1011-59 (discussing judicially imposed heightened pleading in antitrust, civil rights, RICO, conspiracy, and defamation claims).

<sup>62</sup> Marcus, *Revival*, *supra* note 35, at 435-36 (recounting the revival of fact pleading).

<sup>63</sup> Marcus, *Puzzling*, *supra* note 35, at 1776; see also Fairman, *supra* note 36, at 567 (arguing that, despite Rule 8 and *Conley*, lower federal courts imposed heightened pleading in civil rights cases out of concern for increasing caseloads and a perception of rampant frivolousness).

<sup>64</sup> See Harvey Kurzweil et al., *Twombly: Another Swing of the Pleading Pendulum*, 9 SEDONA CONF. J. 115, 118-19 (2008) (recounting the shift in circuit courts away from bare-bones notice pleading in antitrust cases).

<sup>65</sup> See *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."); *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.").

them.<sup>66</sup> Until very recently, the Court never wavered in reaffirming *Conley's* liberal notice pleading standard and its “no set of facts” language, even in antitrust cases.<sup>67</sup> Thus, at least until recently, notice pleading, not fact pleading, has been the traditional touchstone of American pleading under Rule 8.<sup>68</sup>

### B. *Foreign Approaches*

This American federal pleading standard is quite exceptionalist; no other country's pleading requirements are so relaxed. Civil law countries, as typified by Germany and France,<sup>69</sup> require substantially more than the American system's focus on notice pleading. In Germany, the initial complaint occupies a place of central importance.<sup>70</sup> Consequently, the German system requires “specific fact pleading and does not permit mere notice pleading.”<sup>71</sup> German procedure also re-

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<sup>66</sup> See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509-10 (2002) (rejecting the Second Circuit's heightened pleading standard); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting the Fifth Circuit's heightened pleading standard); see also Fairman, *supra* note 42, at 997 (“[W]hen called upon to address pleading issues square on, the Court continually—and unambiguously—embraces simplified notice pleading.”).

<sup>67</sup> See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (affirming the denial of a motion to dismiss).

<sup>68</sup> See Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998) (describing notice pleading coupled with broad discovery and broad discretion as “embedded in the infrastructure of American civil procedure”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008) (“Since . . . 1938, notice pleading has been the watchword for the system of pleading in federal civil courts.”).

<sup>69</sup> Germany and France are particularly appropriate for comparison because “[e]ach . . . has made a major contribution to the civil law tradition, and each still occupies a position of intellectual leadership in the civil law world.” MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at ix; see also Marcus, *supra* note 3, at 717-18 (noting the historical prevalence of the German civil procedure system as a model for comparisons with the American system); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002) (noting that, in comparing American civil procedure to other countries, it is typical to look at England, France, Germany, Italy, and Japan). Of course, civil law systems are dynamic and differ widely. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 143-47 (describing the diversity of legal systems of different countries, and attributing it in part to cultural and historical circumstances). Thus, I must rely on some generalities and extrapolations in this Section.

<sup>70</sup> ANDREW J. MCCLURG ET AL., *PRACTICAL GLOBAL TORT LITIGATION: UNITED STATES, GERMANY AND ARGENTINA* 65 (2007) (calling the initial complaint “the crucial blueprint on which the entire lawsuit will depend”).

<sup>71</sup> PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 198 (2004); see also CHASE ET AL., *supra* note 1, at 171 (noting that the statement of a claim should also “provide details of factual circumstances supporting the petition as well as the designation of the evidence by which the party will prove its factual allegations.” (citation

quires a party to designate the means of proof (for example, by identifying documents and witnesses) for each factual assertion in the pleadings.<sup>72</sup> Other civil law countries have slightly different pleading standards but uniformly require some level of fact pleading beyond the American system's notice regime.<sup>73</sup>

Asian procedural systems, such as Japan's,<sup>74</sup> also require fact pleading (and submission of evidence at the pleading stage).<sup>75</sup> Japan's 1996

omitted)); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 (1985) (stating that the complaint should contain the "key facts" and "propose[] means of proof for its main factual contentions"). German law professor Peter Schlosser has described the factual requirements of the complaint:

In Germany, litigation starts with the submission of a written statement to the court . . . [that] is a very extensive, detailed and, if it comes from a qualified attorney, very carefully drafted paper. . . . If documentary evidence is available, it will usually be enclosed. Should circumstantial evidence exist, it is also explained to the judge in the statement of claim and may be emphasized by copies of relevant documents and other materials.

Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 12 (1996) (footnote omitted).

<sup>72</sup> MURRAY & STÜRNER, *supra* note 71, at 197-98; *see also* Langbein, *supra* note 71, at 827 (stating that the complaint should contain a proposed means of proof for the key facts as well as a list of both the supporting documents in the plaintiff's possession and the other documents and witnesses that will support his position); James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541, 575 (2007) (asserting that the plaintiff must include all facts upon which the claim is based, as well as proof for the stated facts).

<sup>73</sup> *See* MAIN, *supra* note 11, at 28-29 (stating that a complaint in Spain must provide a complete narrative of the factual background and reference all documents that are to be attached to the complaint); *id.* at 29 (stating that, in Austria, the plaintiff must include a statement of the facts upon which the claim is based in the complaint); Schlosser, *supra* note 71, at 13 (stating that while French pleading is more notice based than German pleading, the plaintiff must still provide a statement of the facts to justify the claim); Michele Taruffo, *Civil Procedure and the Path of a Civil Case* (reporting similar standards in Italy), in INTRODUCTION TO ITALIAN LAW 159, 166 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

<sup>74</sup> Japan is a common comparison country because it adopted the Germanic civil law system virtually verbatim but has been heavily influenced by U.S. procedure and public law in ways that make it a relatively unique hybrid system. *See* CHASE ET AL., *supra* note 1, at 4 (noting that Japan's system combines elements of civil law and common law procedure); MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 4 (discussing the influence of both civil and common law notions on the development of Japanese legal traditions).

<sup>75</sup> Japanese law

requires that "the operative fact-basis of the claim" be specified as well as relevant important indirect facts that relate to the cause of action [in the complaint]. Evidence should be itemized and written out according to each point to be proved. . . . The role of the complaint is to disclose all of the important facts and evidence at an early stage as well as to identify the nature of the claim.

Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L.

Revised Code requires the complaint to “specif[y] and particularize[e]” the claim, include the facts on which it is based, delineate “relevant indirect facts” related to the claim, and itemize the evidence corresponding to each point the plaintiff will prove.<sup>76</sup> If the plaintiff does not include the required facts, the complaint may be dismissed before it is ever served on the defendant.<sup>77</sup> Other Asian pleading systems have similar fact-pleading requirements.<sup>78</sup>

Prevailing common law systems have more in common with these civil law pleading requirements than with the American system. In England<sup>79</sup> the pleadings must contain a “statement . . . of the material facts on which the party pleading relies”;<sup>80</sup> a statement of “the necessary particulars,” designed to give notice;<sup>81</sup> and a summary of the evidence the claimant has against the defendant.<sup>82</sup> If the claimant files a formal petition, he must provide additional details, possibly including relevant documents.<sup>83</sup> This “statement of the case” allows the parties to define the nature of the dispute and to facilitate orderly process,

REV. 687, 697 (1998) (footnote omitted) (quoting MINSOHŌ KISOKU [Rules of Civil Procedure], Sup. Ct. Rule No. 5 of 1996).

<sup>76</sup> *Id.*; see also CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 257 (2004) (“It is not sufficient to allege ultimate facts but also underlying facts that need to be established to support the claim must be asserted.”).

<sup>77</sup> *Id.*

<sup>78</sup> In China, the bill of complaint must set forth the facts and reasons on which the request is based, as well as evidence and the source of the evidence. See Lindsey Kiang, *Intellectual Property Litigation in the People's Republic of China*, in CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 113 (1993), WL 369 PLI/Pat 113. In India, pleadings must state the material facts, defined as “[a]ll the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence.” See C.K. TAKWANI, CIVIL PROCEDURE 109 (3d ed. 1994) (quoting Udhav Singh v. Madhav Rao Scindia (1976) 2 S.C.R. 246, 257 (India)).

<sup>79</sup> England is a common comparison country because it is the parent to the U.S. legal system. See Subrin, *supra* note 29, at 914-18 (noting the influence of England's common law system on the development of U.S. procedure). Common law systems include the United States, Canada, Australia, New Zealand, South Africa, India, Israel, Singapore, and Bermuda. See Hazard, *supra* note 3, at 1672 (noting that all of these systems derive from the English system).

<sup>80</sup> RSC O.18 r. 7(1) (U.K.).

<sup>81</sup> *Id.* O.18 r. 12(1) (U.K.).

<sup>82</sup> See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE 254 (2003) (specifying that “[t]he claimant is not required to adduce at this early stage details of the evidence by which he intends to establish his claim” but must describe the facts and details relating to his allegations).

<sup>83</sup> See *id.* at 251-56 (recognizing that, while the rules permit the inclusion of any document necessary to support the claim, courts urge the filing of excerpts due to limited filing space); CHASE ET AL., *supra* note 1, at 166 (describing the other required elements of a claim form, most notably the duty to disclose funding arrangements such as the existence of a conditional fee agreement).

provides notice of relevant issues in order to prevent surprise and satisfy due notice requirements, prevents an inadvertent false admission, sets the scope of the litigation for purposes of efficiency and *res judicata*, and allows either party to get rid of the case as a matter of law if warranted.<sup>84</sup> Other common law systems have similar requirements.<sup>85</sup>

Finally, attempts to create an international pleading norm have disfavored the American system in favor of fact pleading. The ALI/UNIDROIT principles reject notice pleading, instead requiring a statement of facts that “must, so far as reasonably practicable, set forth detail as to time, place, participants, and events.”<sup>86</sup>

In sum, pleading standards are substantially identical in most legal systems, requiring that the facts supporting a claim be stated with reasonable particularity. This nearly universal standard is, as Professor Hazard has noted, essentially similar to the old code pleading requirement rejected by the Federal Rules of Civil Procedure.<sup>87</sup> As a result, no other country has (nor apparently, wants) the kind of liberalized pleading, focused on notice rather than facts, that America has chosen to reaffirm repeatedly and emphatically—at least until recently.

### III. CURRENT TRENDS IN AMERICAN FEDERAL CIVIL PLEADING

Recent trends in American pleading suggest that America may be moving toward the global norm by experimenting with more rigorous fact pleading and dispensing with mere notice pleading. Those trends manifest themselves both through congressional statutes that provide for heightened pleading and through court interpretations of the pleading rules.

#### A. *Statutes*

The Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>88</sup> imposes heightened pleading requirements for certain securities claims. It requires pleading with particularity for claims based on misleading statements or omissions.<sup>89</sup> It also imposes heightened plead-

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<sup>84</sup> ANDREWS, *supra* note 82, at 253.

<sup>85</sup> See MAIN, *supra* note 11, at 28-32 (noting that other countries similarly require factual specificity, pleading evidence, and legal precision).

<sup>86</sup> ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 12.3 (2006).

<sup>87</sup> Hazard, *supra* note 3, at 1671.

<sup>88</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

<sup>89</sup> 15 U.S.C. § 78u-4(b)(1) (2006) (“[T]he complaint shall specify each statement

ing requirements for claims containing an element of scienter.<sup>90</sup> As should be obvious, the PSLRA breaks with the notice pleading of Rule 8 and replaces it with fact pleading more akin to the global norm. As Professor Richard Marcus has put it, “[T]he PSLRA sought to substitute for the Federal Rules’ attitude toward initiating a lawsuit a view more symptomatic of the rest of the world.”<sup>91</sup>

Similarly, though perhaps less striking because of its comparatively narrow scope, the Y2K Act,<sup>92</sup> designed to control lawsuits based on computer failures on January 1, 2000, also imposed pleading requirements more onerous than the traditional notice regime. Indeed, the Y2K Act requirements seem borrowed from a typical civil law jurisdiction. They include requirements that a claim set out “a statement of the facts giving rise to a strong inference” of scienter,<sup>93</sup> that the complaint be accompanied by “a statement of specific information” regarding “the nature and amount of each element of damages and the factual basis for the damages calculation,”<sup>94</sup> and that the complainant disclose “the manifestations of the material defects and the facts supporting a conclusion that the defects are material.”<sup>95</sup>

The PSLRA and the Y2K Act demonstrate a newfound congressional willingness to experiment with rigorous pleading standards normally found only outside Rule 8. True, those experiments have been narrowly applied to specific subject-matter areas. Nevertheless, the rationales for heightened fact pleading in those areas apply well beyond them,<sup>96</sup> and there is evidence that Congress is interested in broadening the experiment.<sup>97</sup>

alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).

<sup>90</sup> *Id.* § 78u-4(b)(2) (“[T]he complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”).

<sup>91</sup> Marcus, *supra* note 27, at 178.

<sup>92</sup> Pub. L. No. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601–6617).

<sup>93</sup> 15 U.S.C. § 6607(d).

<sup>94</sup> *Id.* § 6607(b).

<sup>95</sup> *Id.* § 6607(c).

<sup>96</sup> Both the PSLRA and the Y2K Act were designed to curb frivolous claims. *See* S. REP. NO. 104-98, at 4 (1995) (describing the PSLRA’s goal of deterring frivolous strike suits), as reprinted in 1995 U.S.C.C.A.N. 679, 683; Fairman, *supra* note 36, at 613-15 (noting that President Clinton’s Y2K signing statement reiterated legislative concerns for deterring frivolous claims); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-Information Standard on ’33 and ’34 Act Claims*, 76 WASH. U. L.Q. 537, 552-57 (1998) (describing Congress’s motivation for reform as stemming from concern about the negative impact frivolous suits were having on market credibility and regulation). This justification has wide appeal. *See, e.g.,*

B. *Twombly* and *Iqbal*

Perhaps more dramatically, the Supreme Court has begun to curtail notice pleading in a way that it never before endorsed. That trend began just two years ago in *Bell Atlantic Corp. v. Twombly*,<sup>98</sup> a case that imposed a fact-pleading standard of “plausibility,”<sup>99</sup> eviscerated the liberal general notice-pleading standard set forth in *Conley*,<sup>100</sup> and, in contrast to previous pleading decisions, affirmed (rather than rejected) lower court attempts to impose something more than mere notice pleading.<sup>101</sup>

*Twombly* was a consumer class-action lawsuit against telecommunications providers for antitrust conspiracy claims under section 1 of the Sherman Antitrust Act.<sup>102</sup> The plaintiffs alleged an “agreement” and a “conspiracy,” relying on allegations of conscious parallel conduct.<sup>103</sup> The problem was that conscious parallel conduct itself is not unlawful; an actual agreement is necessary to find a section 1 violation.<sup>104</sup> That would not have posed great difficulties for the plaintiffs if conscious parallel conduct could raise a permissible inference of such an

Fairman, *supra* note 36, at 567 (noting that lower federal courts have imposed heightened pleading in civil rights cases based upon a perception of rampant frivolousness).

<sup>97</sup> For example, Congress considered heightened pleading for nationwide class actions in early versions of the Class Action Fairness Act. See Class Action Fairness Act of 2001, H.R. 2341, 107th Cong. § 1716(a)–(b) (2001) (requiring plaintiffs to specify relief, scienter, and alleged injury with “particularity” in their pleadings).

<sup>98</sup> 550 U.S. 544 (2007).

<sup>99</sup> See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138 (2007), <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/07/09/dodson> (“[A]t least for the kinds of costly class action antitrust cases like the one initiated by *Twombly*, *Bell Atlantic* erects an additional ‘plausibility’ requirement of fact pleading in its place, what I have called ‘notice-plus.’”).

<sup>100</sup> See *id.* at 135 (arguing that the Court “gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart: 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’” (quoting 355 U.S. 41, 45-46 (1957))).

<sup>101</sup> See Dodson, *supra* note 1, at 145 (arguing that “discrete changes” in pleading, such as *Twombly*, may represent an emerging trend toward transnational harmonization in pleading standards).

<sup>102</sup> *Twombly*, 550 U.S. at 548-50.

<sup>103</sup> *Id.* at 550-52.

<sup>104</sup> See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“Tacit collusion . . . describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”).

agreement, but, unfortunately for them, prevailing antitrust case law holds that it does not.<sup>105</sup>

The Supreme Court applied the evidentiary inference standard to pleadings and held that Rule 8 requires that antitrust conspiracy allegations show “plausible grounds” for inferring an agreement, which allegations of conscious parallel conduct alone—by staying in “neutral” territory<sup>106</sup>—could not.<sup>107</sup>

*Twombly* raised a stir after it was decided, resulting in mass confusion about its scope and meaning.<sup>108</sup> Some wondered whether the Court was imposing a heightened pleading standard<sup>109</sup> despite the Court’s own protestations to the contrary.<sup>110</sup> Others debated whether the Court’s new “plausibility” standard applied transsubstantively or was restricted either to antitrust conspiracy claims (because of the

<sup>105</sup> *Twombly*, 550 U.S. at 553-54. One commentator has argued that, in fact, the antitrust case law previously allowed conscious parallel conduct to permit an inference of conspiracy and that the shift in *Twombly* created a substantive change in antitrust law. See Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) (commenting that those who believe that *Twombly* changed pleading standards but not substantive antitrust law “ha[ve] it backwards”).

<sup>106</sup> *Twombly*, 550 U.S. at 557 & n.5.

<sup>107</sup> *Id.* at 556-57. The Court acknowledged Judge Charles E. Clark’s opinion in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), which held that conscious parallelism is sufficient to state a claim under section 1, but concluded that intervening Supreme Court cases questioning that inference in other phases of litigation suggest that “it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.” *Twombly*, 550 U.S. at 561 n.7.

<sup>108</sup> See Dodson, *supra* note 99, at 137-39 (discussing various interpretations of the breadth of *Twombly*); Posting of Scott Dodson to PrawfsBlawg, *The Mystery of Twombly Continues*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/the-mystery-of.html> (Feb. 5, 2008) [hereinafter Dodson, Prawfsblawg] (describing the confusion among the circuit courts). As one judge put it, “We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.” Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 853 (2008). For a bibliography of commentary in the immediate *Twombly* aftermath, see Dodson, Prawfsblawg, *supra*.

<sup>109</sup> See, e.g., Spencer, *supra* note 68, at 475 (arguing that *Twombly* imposes “a pleading obligation that approaches the particularity requirement of Rule 9(b)"); Posting of Michael Dorf to Dorf on Law, *The End of Notice Pleading?*, <http://www.dorfonlaw.org/2007/05/end-of-notice-pleading.html> (May 24, 2007) (asserting that *Twombly* imposes a heightened pleading standard). But see Dodson, *supra* note 99, at 140 (“What Rule 8 requires after both *Erickson* and *Bell Atlantic* are not specific facts, but *sufficient* facts such that the complaint as a whole makes a ‘showing’ of entitlement to relief.”).

<sup>110</sup> See *Twombly*, 550 U.S. at 569 n.14 (“[W]e do not apply any ‘heightened’ pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . . .”); *id.* at 570 (“Here, . . . we do not require heightened fact pleading of specifics . . . .”).

unique substantive law on permissible inferences) or perhaps just to certain high-cost and potentially abusive litigation.<sup>111</sup> Still others worried that “plausibility” was imposing a merits determination at the pleading stage,<sup>112</sup> again despite the Court’s protestations to the contrary.<sup>113</sup> Commentators debated whether *Twombly* was significant as a pleadings case,<sup>114</sup> particularly after the Court issued the routine Rule 8

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<sup>111</sup> Compare *id.* at 556 (reciting “general standards” of pleading), and Dodson, *supra* note 99, at 140 (“[T]he best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases . . .”), and Spencer, *supra* note 68, at 458-59 nn.150-52 (citing courts applying *Twombly* beyond the antitrust context), and Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814-15 (2008) (reporting that courts “have applied the decision in every substantive area of law governed by Rule 8”), with *Twombly*, 550 U.S. at 559 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given . . . that the success of judicial supervision in checking discovery abuse has been on the modest side.” (citation omitted)), and *id.* (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . .”), and Ides, *supra* note 49, at 635-36 (“[T]he ‘better’ reading of *Bell Atlantic* is that it did not change the law of pleading, but that it simply applied long-accepted pleading standards to a unique body of law under which the plaintiffs’ complaint failed to include any facts or plausible inferences supportive of a material element of the claim specifically asserted by the plaintiffs.”).

<sup>112</sup> See Dodson, *supra* note 99, at 142 (predicting that motions to dismiss will “change from challenges to the legal sufficiency of a complaint to those challenging the factual sufficiency”); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1882 (2008) (arguing that the “plausibility” requirement imposes an evidentiary standard incompatible with the Seventh Amendment). For more on the doctrinal and normative implications of incorporating merits determinations at the pleading stage, see Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1221-22 (2008).

<sup>113</sup> See *Twombly*, 550 U.S. at 556 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

<sup>114</sup> Compare Bradley, *supra* note 105, at 122 (arguing that *Twombly* does not change pleading standards), and Ides, *supra* note 49, at 634-36 (same), and J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN’S L. REV. 849, 851 (2008) (same), and Posting of Einer Elhauge to The Volokh Conspiracy, *Twombly*—The New Supreme Court Antitrust Conspiracy Case, <http://www.volokh.com/posts/1179785703.shtml> (May 21, 2007) (calling the decision “quite insignificant”), with Spencer, *supra* note 68, at 431 (“Notice pleading is dead.”), and Posting of Scott Dodson to Civil Procedure Prof Blog, Dodson on *Erickson*, [http://lawprofessors.typepad.com/civpro/2007/06/dodson\\_on\\_erick.html](http://lawprofessors.typepad.com/civpro/2007/06/dodson_on_erick.html) (June 12, 2007) (“*Bell Atlantic* sets a ‘notice-plus’ pleading standard. Mere notice is no longer sufficient.” (italics added)), and Dorf, *supra* note 109 (asserting that *Twombly* imposes a heightened pleading standard). The lower courts clearly thought *Twombly* was significant. See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1021-22 (report-

case of *Erickson v. Pardus*.<sup>115</sup> Meanwhile, the lower courts nearly uniformly took *Twombly* as an invitation to dismiss claims more often.<sup>116</sup>

What seemed most clear, however, was that *Twombly* was beginning to shift the pleading focus from notice to facts—i.e., from “legal sufficiency” to “factual sufficiency”—resulting in a burden on plaintiffs to plead a level of factual detail that the Court had not required before.<sup>117</sup>

The Court confirmed this in no uncertain terms two years later in *Ashcroft v. Iqbal*.<sup>118</sup> There, a detainee sued John Ashcroft, the former U.S. Attorney General, and Robert Mueller, the FBI Director, alleging

ing that *Twombly* was cited over 13,000 times in U.S. courts in the twelve months after it was decided); Hannon, *supra* note 111, at 1814-15 (reporting that courts “have applied the decision in every substantive area of law governed by Rule 8”).

<sup>115</sup> See 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly* while simultaneously stating that “[s]pecific facts are not necessary”). Compare Posting of Amy Howe to SCOTUSblog, More on Yesterday’s Decision in No. 06-7317, *Erickson v. Pardus*, <http://www.scotusblog.com/wp/more-on-yesterdays-decision-in-no-06-7317-erickson-v-pardus> (June 5, 2007) (“It seems likely that the Court . . . decided to summarily reverse in *Erickson*, likely in order to counteract any impression that could arise that *Twombly* was intended to set a particularly high pleading standard.”), with Dodson, *supra* note 99, at 139-40 (arguing that *Erickson* does not mitigate the import of *Twombly*), and Dodson, *supra* note 114 (same), and Posting of Michael O’Shea to Concurring Opinions, How Cautionary is *Erickson v. Pardus*? (With an Excursus on Commerce Clause Disillusionment), [http://www.concurringopinions.com/archives/2007/06/how\\_cautionary\\_1.html](http://www.concurringopinions.com/archives/2007/06/how_cautionary_1.html) (June 6, 2007) (detailing arguments on both sides of this debate).

<sup>116</sup> Studies seem to show that *Twombly* had a disproportionate impact on discrimination and civil rights claims. See Seiner, *supra* note 114, at 1014 (“[T]he lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims.”); Hannon, *supra* note 111, at 1815 (concluding that dismissal rates rose in civil rights cases after *Twombly*). For more on the implications of such disparate impact, see 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.

<sup>117</sup> See Dodson, *supra* note 99, at 140 (arguing that *Twombly* may have signaled a shift from notice to fact pleading); Spencer, *supra* note 57, at 19 (“[T]he value of notice is largely irrelevant to understanding contemporary standards of substantive sufficiency in pleading.”); Ward, *supra* note 60, at 896 (calling notice the “old narrative”). The Court implied as much numerous times in its opinion. *Twombly*, 550 U.S. at 556 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough *fact* to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” (emphasis added)); *id.* (identifying “*facts* that are suggestive enough to render a § 1 conspiracy plausible” (emphasis added)); *id.* at 569 n.14 (“Here, our concern is not that the allegations in the complaint were insufficiently ‘particular[ized],’ rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.” (citation omitted) (quoting FED. R. CIV. P. 9(b)–(c))); *id.* at 570 (“Here, . . . we do not require heightened fact pleading of specifics, but only enough *facts* to state a claim to relief that is plausible on its face.” (emphasis added)).

<sup>118</sup> 129 S. Ct. 1937 (2009).

that they adopted an unconstitutional policy that subjected him to harsh conditions of confinement on account of his race, religion, and national origin.<sup>119</sup> The defendants raised the defense of qualified immunity and moved to dismiss the complaint under the auspices of *Twombly*, arguing that the allegations did not amount to a “plausible” showing of entitlement to relief.<sup>120</sup>

Relying exclusively on *Twombly*, the Supreme Court agreed. Citing *Twombly*’s admonition that labels, conclusions, naked assertions, and “formulaic recitation[s]” of the elements will not do,<sup>121</sup> the Court confirmed that *Twombly* required “sufficient factual matter” to state a claim that is “plausible.”<sup>122</sup> In addition, the Court held that “conclusory” factual allegations may not be credited;<sup>123</sup> rather, the complaint must contain nonconclusory, “well-pleaded factual allegations” that meet the “plausibility” test.<sup>124</sup> Taking Iqbal’s well-pleaded factual allegations as true, but ignoring his conclusory factual allegations, the Court held that he did not make a showing of “plausible” entitlement to relief.<sup>125</sup>

*Iqbal* thus clarifies several ambiguities in *Twombly*. First, the “plausibility” standard is a factual-sufficiency standard that operates independently of notice<sup>126</sup> and is more restrictive than the previously pre-

<sup>119</sup> *Id.* at 1942.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

<sup>122</sup> *Id.* (quoting *Twombly*, 550 U.S. at 570).

<sup>123</sup> *See id.* at 1949-50 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

<sup>124</sup> *Id.* at 1940-41.

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 1948-49 (“[R]espondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue . . . .”); *id.* at 1949 (“Nor does a complaint suffice if it tenders ‘naked assertion[s] devoid of further factual enhancement.’” (alteration in original) (quoting *Twombly*, 550 U.S. at 557)); *id.* (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Twombly*, 550 U.S. at 557)); *id.* at 1950 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”); *id.* (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” (second alteration in original) (quoting FED. R. CIV. P. 8(a)(2))); *id.* (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”); *id.* at 1951 (“[T]he complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-

vailing factual standard.<sup>127</sup> Second, the standard is transsubstantive, applying to all Rule 8 claims.<sup>128</sup>

Thus, *Iqbal* and *Twombly* together complete a major shift in pleading focus from notice to facts. Combined with the recent congressional experiments in the PSLRA and Y2K Act, as well as the Solicitor General's brief in support of the ultimate outcome in *Iqbal*,<sup>129</sup> the shift appears to have the support of all three branches of government.<sup>130</sup>

September-11 detainees as 'of high interest' because of their race, religion, or national origin."); *id.* (asserting that *Iqbal* "would need to allege more by way of factual content"); *id.* ("Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."); *id.* at 1952 ("We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief."); *id.* at 1954 ("But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."); *id.* ("[R]espondent's complaint fails to plead sufficient facts to state a claim . . ."). The Court did not even mention a notice requirement.

<sup>127</sup> Compare *id.* at 1949 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" (quoting *Twombly*, 550 U.S. at 557)), with *Christopher v. Harbury*, 536 U.S. 403, 406 (2002) ("Since we are reviewing a ruling on motion to dismiss, we accept [the plaintiff's] factual allegations and take them in the light most favorable to her."), and *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("[I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."), and *WRIGHT & MILLER*, *supra* note 30, § 1357 ("For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true. . . . Basically, the court will accept the pleader's description of what happened to him along with any conclusions that can reasonably be drawn therefrom."). Compare *Iqbal*, 129 S. Ct. at 1954 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."), with *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) ("The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."). Conspicuously, the *Iqbal* Court made no mention of *Erickson*.

<sup>128</sup> See *Iqbal*, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike." (citation omitted) (internal quotation marks omitted)); *id.* at 1953-54 ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.").

<sup>129</sup> See Brief for the Petitioners at 51-52, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015) (arguing that respondent failed to make factual allegations and asking for dismissal of the complaint).

<sup>130</sup> That is not to say that support is uniform. Senator Arlen Specter recently introduced a bill in the Senate to restore the notice pleading standard of *Conley v. Gibson*. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2.

There are still significant differences between even *Iqbal* and, say, the German pleading system. “Plausibility,” for example, is somewhat unique and arguably has a different focus than the pleading regimes in other countries. Not even the U.S. Supreme Court has gone so far as to require the submission of evidence at the pleading stage. In these respects, then, the U.S. pleading trend is not moving in a straight line directly toward foreign pleading regimes. The details are still very different.

But my point is more general. Before *Twombly* and the PSLRA, federal pleading under Rule 8 was based uniformly on notice. Now, it is based on facts. That is a momentous shift in kind—one that takes the U.S. system to a fact-based system fundamentally more akin to foreign pleading regimes. After *Iqbal*, U.S. federal pleading looks a lot more foreign.

#### IV. POTENTIAL EFFECTS OF AMERICAN FEDERAL PLEADING TRENDS

So what might this trend in American pleading from notice to facts mean for comparative civil procedure? It is entirely possible that the answer is “not much.” This is, admittedly, only one small change in a very small part of American civil procedure. It remains to be seen whether the trend accelerates, widens, remains static, or, perhaps, even retreats. And it remains to be seen whether the trend branches into comparative or international analyses. In short, it would not be an understatement to say that the recent pleading trends may mean very little for comparative civil procedure.

Nevertheless, enough uncertainty exists to merit exploration of what further meaningful effects the trend might have. So let me hazard a series of thoughts—not entirely distinct from each other—that reflect both the promises and the perils of comparative civil procedure in light of the pleading trend observed above.

First, a comparative approach might enrich the debate over the American pleading system. The trend toward fact pleading has generated both outcries and defenses.<sup>131</sup> Few defenders, however, have

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<sup>131</sup> Compare, e.g., Sale, *supra* note 96, at 562-65, 578-79 (criticizing the PSLRA’s heightened pleading requirement for making it more difficult to bring difficult-to-prove but potentially meritorious claims), and Spencer, *supra* note 68, at 433 (arguing that *Twombly* is an unwarranted and ill-advised departure from notice pleading), with Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 68-72 (2007) (noting that the prevention of discovery abuse is another rationale for plausibility pleading), and Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment*

relied on the fact that most other countries have some form of fact pleading, and that such prevalence suggests that fact pleading may be an appropriate way to solve certain pleading problems. True, the argument is not so facile—foreign systems based on fact pleading look very different from the American system in other facets of civil procedure, namely discovery<sup>132</sup> and the presence of a jury—but the incorporation of comparative civil procedure seems particularly relevant to the current debate in America regarding pleading standards. Indeed, critics of the *Conley v. Gibson* notice-pleading regime have used comparative analyses to attack the American system of liberal pleading in the past.<sup>133</sup> The time seems particularly ripe for *Conley* critics to now defend the current trends with the same comparative views. At the same time, opponents of the trend may find comparative arguments effective in rebuttal by, for example, contrasting the nonconclusory, plausibility-pleading regime adopted by *Bell Atlantic* and *Iqbal* with the strict fact-pleading model of foreign systems. My point is not that comparative civil procedure ought to support one position or the other, but rather that it seems like an appropriate way to enliven the debate.

Second, the resulting enrichment of that debate through foreign comparisons may lead to a reexamination and better understanding of America's own procedural policy balances (or even litigation culture). Pleading balances the underlying policies of access to courts and justice with efficiency and economy. Virtually all pleading regimes balance these policies, yet most foreign regimes have adopted a pleading mechanism that achieves a balance different from that of the United States. Given the size and complexity of modern commercial litigation, the wide variation in levels of discovery across cases,<sup>134</sup> and the paucity of trial adjudication,<sup>135</sup> perhaps it is time to reevaluate the

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*Standards*, 16 SUP. CT. ECON. REV. 39, 41-42 (2008) (providing an economic justification for supporting plausibility pleading in certain cases).

<sup>132</sup> See Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 6 (2001) (“[N]o other country in the world has any system of discovery approaching that provided for in the Federal Rules of Civil Procedure.”).

<sup>133</sup> See, e.g., Hazard, *supra* note 3, at 1671-72 (comparing the American notice pleading to other common law systems and highlighting the advantages of fact pleading); Maxeiner, *supra* note 72, at 601 (criticizing American legal indeterminacy and favoring the certainty offered by a fact-based European system of law).

<sup>134</sup> Compare Epstein, *supra* note 131, at 69-71 (noting substantial discovery burdens in certain commercial litigation cases), with James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621 (1998) (reporting minimal or no discovery in a significant portion (about fifty percent in 1975) of civil cases in six federal district courts).

<sup>135</sup> See Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Dis-*

American balance by taking into consideration the fact-pleading solution adopted by most other jurisdictions.

Third, foreign solutions might provide illustrations of potential models for U.S. reform. Say a reevaluation occurs, taking foreign models into account, and leads to a recognition that the American policy balance has shifted from an emphasis on court access to an emphasis on efficiency.<sup>136</sup> One might conclude, at least in certain cases, that the current pleading regime needs reform.<sup>137</sup> Moving toward the fact pleading exemplified by foreign systems, then, might be an appropriate way to accommodate an underlying shift toward efficiency.<sup>138</sup> Alternatively, changes to other procedural mechanisms aside from pleading, such as fee-shifting, discovery, or more attentive judicial case management,<sup>139</sup> also might accommodate the policy shift and

*contents*, 61 OKLA. L. REV. 275, 279 (2008) (reporting that only 1.3% of federal civil cases reached trial in 2006). Other studies have similarly shown that trial dispositions make up less than 2% of all federal adjudications. See Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7-8 (finding that trials comprised 1.7% of federal cases in 2004); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting the rapid disappearance of the trial in American civil cases).

<sup>136</sup> See, e.g., Hylton, *supra* note 131, at 41 (“[E]arly dismissals, by eliminating low-merit claims before they become costly, offer benefits to society in comparison to late dismissals.”); Perschbacher & Bassett, *supra* note 135, at 286-87 (observing a shifting emphasis toward efficiency in litigation and away from full and fair adjudication on the merits); Spencer, *supra* note 68, at 433 (observing a transition from a liberal and open-access ethos to a “restrictive” and “efficiency-oriented” ethos); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 312 (2007) (“[T]he Court seemed motivated by a desire to increase efficiency by allowing judges to dismiss the cases in which discovery seems least likely to be fruitful.”).

<sup>137</sup> See Epstein, *supra* note 131, at 67-69 (arguing that Rule 8 provides too lax a pleading standard for antitrust litigation); Sale, *supra* note 96, at 552-57 (reporting that the PSLRA’s heightened pleading requirement was designed to curb frivolous securities claims); see also *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (“[I]n a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

<sup>138</sup> See, e.g., Epstein, *supra* note 131, at 68-69 (arguing that fact pleading is more appropriate for modern, complex litigation); Hylton, *supra* note 131, at 41 (“In general, pleading standards should vary with the . . . social costs of litigation.”).

<sup>139</sup> See, e.g., Marcus, *Revival*, *supra* note 35, at 493-94 (arguing that judicial case management offers better tools for weeding out frivolous claims than heightened pleading standards); Randal C. Picker, Twombly, Leegin, and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161, 177 (preferring discovery reform to pleading reform); Sale, *supra* note 96, at 579-83 (arguing that limiting discovery would have been more effective than the PSLRA’s heightened pleading standard at curbing frivolous claims); Spencer, *supra* note 57, at 30-31 (suggesting that changes to the American Rule, such as ordering each side to bear her own attorney’s fees regardless of outcome, might better curb frivolous claims).

could be informed by foreign models.<sup>140</sup> The point is that comparative analyses may inform any conversation about procedural reform.

Fourth, and related to the third point, comparative perspectives can illuminate the resurging debate over the transsubstantivity of the Federal Rules. Whether the Federal Rules (and the pleading rules in particular) should vary by claim is a debate with a long pedigree,<sup>141</sup> but *Twombly's* arguable focus on the uniqueness of antitrust conspiracy claims and the threat of coercive litigation costs has reenergized it,<sup>142</sup> and *Iqbal's* purported reaffirmation of the transsubstantivity of the "plausibility" standard was not substantially justified (and undoubtedly will create problems).<sup>143</sup> Foreign procedural systems may have insights

<sup>140</sup> See Langbein, *supra* note 71, at 825 (praising the German system of active judicial case management); Mullenix, *supra* note 132, at 4-12 (listing the differences between the American procedural system and other civil law systems); *id.* at 12-31 (noting the ways in which American and foreign systems have begun to converge in complex civil litigation).

<sup>141</sup> Compare, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713-14 (1988) (criticizing transsubstantivity), and Subrin, *supra* note 29, at 985 (same), with EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:1 (3d ed. 2006) (presenting arguments for and the historical background of the transsubstantive nature of the Federal Rules), and Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081-84 (1988) (noting, in favor of transsubstantive rules, that "procedural complexity defeats substantive rights"), and Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-39 (1975) (arguing for transsubstantivity), and Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989) (responding to criticism of the Federal Rules' transsubstantivity), and Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993) (reviewing the merits and drawbacks of transsubstantivity), and Subrin, *supra* note 29, at 977 (reporting that Charles Clark, the principal draftsman of Rule 8, supported its transsubstantive application for the purposes of "uniformity and simplicity").

<sup>142</sup> Compare, e.g., *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803-04 (7th Cir. 2008) (stating that pleading standards vary depending upon the likely discovery burdens), and Spencer, *supra* note 57, at 30 n.129 (citing cases suggesting that plausibility-pleading standards depend upon the type of claim alleged), with Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 537 ("The argument (made by some lower courts and scholars) that the standards emerging from *Twombly* should, and can, be confined to antitrust conspiracy cases confronts the foundational assumptions that the Federal Rules are transsubstantive and cannot be amended by judicial interpretation."), and Ward, *supra* note 60, at 912 (arguing that varying pleading standards are problematic).

<sup>143</sup> See Posting of Scott Dodson to Civil Procedure Prof Blog, *Beyond Twombly*, <http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html> (May 18, 2009) ("[A]pplying a restrictive pleading standard transsubstantively will surely result in fewer meritorious cases filed, more meritorious cases dis-

useful to the transsubstantivity debate. Take, as just one example, the possibility of crafting different standards for public interest cases.<sup>144</sup> The American system of invasive and liberal discovery may be particularly suited to public interest litigation (even if between private parties in, say, a consumer products class action).<sup>145</sup> In those cases, truth may be more important than efficiency.<sup>146</sup> But in cases involving only private interests, access to low-cost litigation and justice based on “formal truth” may be stronger values. In those cases, a foreign procedural model may be superior.<sup>147</sup> On the other hand, when public interests are already addressed by the political branches, as they are in many foreign countries,<sup>148</sup> perhaps narrowing court access for private litigation of public interests makes some sense.<sup>149</sup> This resurgence of the

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missed, and less unlawful conduct redressed . . .”).

<sup>144</sup> A retreat from transsubstantivity no doubt would have its own workability problems, not the least of which would be the difficulty of designing a category-specific system without creating confusion over when a case falls into one or the other category.

<sup>145</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 15-16 (2001) (noting that private litigation is actually a strong feature of public-interest litigation, providing an alternative or supplement to the administrative state); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 *GEO. L.J.* 693, 731-32 (2007) (arguing that private litigation is a useful adjunct to public regulation).

<sup>146</sup> Professor Hein Kötz has put it this way:

[A] strong case can be made for the view that to the extent to which private litigation serves the vindication of a public interest, the parties must be equipped with robust discovery procedures to ferret out the truth, even at the expense of business or personal privacy. Nor would it seem plausible to put the discovery tools in the hands of judges or parajudicial officials, if only because discovery conducted by a judge or magistrate would not be as thorough as discovery conducted by the parties' lawyers.

Kötz, *supra* note 19, at 75.

<sup>147</sup> Kötz notes that this is the reasoning behind the German system, stating that [t]he typical case at which the German system is aimed [t] involves a comparatively small amount of money, raises no major issue of public policy, and is merely a dispute between private parties about private rights. In such cases it obviously makes sense to give the judge a leading role in the examination of witnesses and wider powers over the evidentiary process, thereby reducing considerably the amount of lawyer effort and cost in exchange for a modest increase in effort and activity on the part of the judge.

*Id.* at 77.

<sup>148</sup> In Europe, public interests generally are addressed by the political branches, not in court, and class actions for such cases are generally unheard of. See *id.* at 75 (stating that European observers find bundling thousands of claims together for one trial to be “astonishing”).

<sup>149</sup> See, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007) (holding that private antitrust claims could not be asserted at least in part because the SEC already extensively regulates the activity). But see Sale, *supra* note 96, at 564 (presuming that the SEC, with limited resources, often pursues only the clear cases of fraud

transsubstantivity debate provides a new opportunity to use comparative analyses for illumination.

Fifth, foreign systems can provide a predictive model of what consequences might follow a change to the American procedural system. Professor Julie Suk, for example, has demonstrated that as civil procedure limits private enforcement of rights, public enforcement (or criminal enforcement) may become prevalent, with some narrowing consequences for the substantive rights at stake.<sup>150</sup> To illustrate, she argues that the limitations on civil discovery in France have pushed employment discrimination claims out of the civil system and into the criminal system, where discrimination claims are enforced primarily through criminal prosecutions.<sup>151</sup> Her argument is illuminating: foreign procedural regimes have much to tell us about the procedural, substantive, and structural consequences of different procedural choices. To the extent that recent trends reflect a deeper policy shift, we would be wise to consider what foreign models have to tell us about the consequences any concomitant rules changes might have.<sup>152</sup>

Sixth, procedural convergence may produce opportunities for harmonization with foreign systems, particularly for transnational litigation. One obstacle to harmonization has been a perception that it would require significant changes to American procedure.<sup>153</sup> But the pleadings convergence described above suggests that that obstacle ought to be less important as the regimes move closer together. In addition, one of the principal costs of harmonization—learning a foreign system<sup>154</sup>—seems like only a modest problem for pleadings har-

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that would survive the heightened pleading standard of the PSLRA anyway).

<sup>150</sup> See generally Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008).

<sup>151</sup> See *id.* at 1331-40 (reporting that procedural advantages for anti-employment-discrimination plaintiffs have led to the majority of racial discrimination actions being brought in criminal proceedings).

<sup>152</sup> For an excellent example of what this kind of comparative analysis might look like in the pleading context, see Elizabeth G. Thornburg, *Detailed Fact Pleading: The Lessons of Scottish Civil Procedure*, 36 INT'L LAW. 1185, 1199-1201 (2002) (explaining that recent trends suggest that Scotland is starting to loosen its pleading requirements because the currently stringent standards go too far in preventing plaintiffs from bringing potentially meritorious claims).

<sup>153</sup> See CHASE ET AL., *supra* note 1, at 568 (questioning “whether and how the described differences between American procedure and that prevalent elsewhere can be compromised sufficiently to achieve genuine harmonization”); Dubinsky, *supra* note 22, at 352 (“Transnationalists specializing in procedural law tend to see America’s modern encounter with globalization and its byproduct, transnational litigation, as requiring significant change in American procedural law . . .”).

<sup>154</sup> See Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*,

monization because fact pleading is not entirely foreign to American procedure. It was, after all, a hallmark of the Codes, and many states still require fact pleading.<sup>155</sup> Thus, the pleadings trends discussed above may make palatable the pleading standard proposed by ALI/UNIDROIT: “In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations.”<sup>156</sup> The portion pertaining to evidence is not unlike the Rule 26(a) mandatory disclosures that already apply in federal practice.<sup>157</sup> In short, it seems that the recent trend towards fact pleading in the United States is a small enough step away from traditional American pleading and a big enough step toward pleading practice in other countries that meaningful harmonization between them may occur.<sup>158</sup>

Seventh, the pleading trends may provide an opportunity for America to reduce its isolationism and improve international relations. America puts a disproportionate premium on American procedure.<sup>159</sup> Suggestions for improvement based on foreign models often are ignored or criticized.<sup>160</sup> Perhaps in part because of America’s go-it-alone attitude, many civil law scholars in turn see the common law system (and the American system in particular) as crude and disorganized.<sup>161</sup> Foreign jurists and scholars ridicule American discovery rules.<sup>162</sup> They resist American-style reforms.<sup>163</sup> Pleadings convergence,

45 AM. J. COMP. L. 905, 917-18 (1997) (arguing that retraining lawyers would be a large economic cost of harmonization).

<sup>155</sup> See Dodson, *supra* note 1, at 134 (explaining that California adheres to code pleading and Louisiana to civil law pleading).

<sup>156</sup> ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 11.3 (2006).

<sup>157</sup> FED. R. CIV. P. 26(a) (requiring that parties disclose, “without awaiting a discovery request,” the names of parties with discoverable information, copies of certain documents, computations of damages, and insurance information).

<sup>158</sup> Cf. Clermont, *supra* note 19, at xii (“All this is not to say that transplants are impossible. . . . But any such transplant must be limited in scope and sensitive to context.”).

<sup>159</sup> See *supra* note 23.

<sup>160</sup> See, e.g., Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 761-62 (1988) (criticizing Langbein’s defense of the German procedural system); Reitz, *supra* note 20, at 988 (arguing that cultural differences would make it difficult to adopt the German system).

<sup>161</sup> MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 3.

<sup>162</sup> See Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267,

particularly if justified by comparative sources, may go a long way toward making a good-faith showing of willingness to join the international conversation on civil procedure.<sup>164</sup>

Eighth, if America were to diminish its isolation by moving toward pleading convergence, America might be able to export U.S. procedural law and norms abroad. In the past, American civil procedure exportation has met with mixed results<sup>165</sup> and much skepticism.<sup>166</sup> But a good first step toward turning that around is to have a respected voice in the conversation, and, as my seventh point asserts, the pleading trend may achieve just that. Doing so could give the United States the opportunity to influence, in a distinctly American way, a host of reforms in other countries that are converging toward U.S. procedure. Asian and Russian systems are experimenting with juries,<sup>167</sup> a feature generally unique to U.S. procedure.<sup>168</sup> Other countries are experimenting with aggregate litigation, another quintessentially American phenomenon.<sup>169</sup> The trends provide the opportunity for America to

284 (2006) (noting “the foreign resentment directed toward U.S. discovery practices”); *The Supreme Court, 2006 Term—Leading Cases*, *supra* note 136, at 312 (“Discovery is widely believed to be a major problem with the American civil justice system.”).

<sup>163</sup> For a particularly apt example in the context of class-action development, see Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 179-80 (2009).

<sup>164</sup> A corollary might be the creation of—and increased American involvement in the development of—an international judicial system, as advocated by Professor Jenny Martinez. See generally Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

<sup>165</sup> On the success side, Quebec, a faithful civil law country, supplemented its Code with Americanized discovery principles. See Schlosser, *supra* note 71, at 17 (stating that Quebec made the change despite “its deep-rooted aversion to anything which is English or American”). On the failure side, Japan’s overlay of Americanized procedure onto its civil law code after World War II never took hold. See Marcus, *supra* note 27, at 162 (explaining that Japan returned eventually to its prewar procedural system, which was borrowed from Germany’s procedural system).

<sup>166</sup> See Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT’L L.J. 463, 467-68 (1998) (reporting that German and Swiss proceduralists are highly skeptical of the feasibility of European countries adopting some of the more American contributions to the *Principles of Transnational Civil Procedure*).

<sup>167</sup> See Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 37-38 (2006) (reporting that mixed-jury trials will begin for certain serious criminal offenses in 2009); Associated Press, *South Korea: First Trial by Jury*, N.Y. TIMES, Feb. 13, 2008, at A6. In addition, civil law litigation in general is becoming more concentrated and trial-like. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 113-15 (stating that the trend is toward more concentrated events but comparing the traditional civil law process to the concentrated version).

<sup>168</sup> MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 113.

<sup>169</sup> See Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J.

make a positive impact on the development of global procedural norms instead of perennially being contrasted with them.

Ninth, a comparative conversation might turn inward, thereby bringing in the varied practices of the states. Federal perspectives are so dominant that the state practices, with their wealth of diversity, are often overlooked. Not all judicial systems in the United States adhere to the liberal notice-pleading standard adopted by *Conley*.<sup>170</sup> Embracing a comparativist view may broaden the study of our own state procedural system, revealing that American litigants actually are quite comfortable with different pleading standards and different procedural mechanisms. Recognition of state variation may, in turn, make international comparison or harmonization more palatable because the variation would not seem so foreign.<sup>171</sup>

### CONCLUSION

Whatever one thinks normatively about *Twombly*, *Iqbal*, and recent congressional attempts to implement fact-pleading requirements, I believe these trends present an opportunity for comparative civil procedure. These pleading trends demonstrate a convergence toward foreign fact-pleading models that may ultimately provide the basis for valuable comparative study and analysis.

The likelihood and value of that comparative inquiry can only be strengthened by recognizing convergence in other areas of civil procedure. With recent trends toward judicial case management, restricting discovery, fee shifting, and oversight of jury awards,<sup>172</sup> American procedural exceptionalism may be retreating in a number of areas. If so, then my modest claim about pleading trends may have much broader and more fruitful implications.

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COMP. L. 311, 312-13, 313 n.1 (2003) (listing countries). See generally Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 20-26 (2009) (observing foreign convergence toward U.S. class-action models).

<sup>170</sup> See Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1439-40 (2008) (noting that twenty-six states and the District of Columbia followed *Conley*'s interpretation of pleading rules at the time *Twombly* was decided).

<sup>171</sup> Of course, looking internally to resolve transnational issues may also be limiting. See Dubinsky, *supra* note 22, at 308 (making this point).

<sup>172</sup> See Dodson, *supra* note 1, at 147-49 (discussing trends in case management and jury awards); Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 193 (2007) (finding some convergence in judicial case management); Ward, *supra* note 60, at 913 (discussing recent controls and limitations on discovery).

Of course, the promise of comparative civil procedure is not without its pitfalls. The inquiry must have the breadth and depth to avoid the risk of being misleading<sup>173</sup> or even detrimental,<sup>174</sup> yet it must be modest and gradual enough to be feasible.<sup>175</sup> It remains to be seen whether the pleading trends (and any other convergences) can walk that line successfully enough to reap the comparative benefits.

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<sup>173</sup> See Gidi, *supra* note 21, at 505 (“[A]n isolated comparison of legal rules would lead to an incomplete understanding and misleading picture of the legal systems.”); Marcus, *supra* note 3, at 711 (cautioning against the comparison of procedural features in isolation).

<sup>174</sup> See Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839 (1997) (warning of the unintended consequences of inserting foreign rules into domestic ones without considering the institutional context that led to the rules’ initial development); Marcus, *supra* note 3, at 710 (warning that isolated changes might cause system imbalances).

<sup>175</sup> See Dodson, *supra* note 1, at 143 (“Even small-scale but rapid changes risk causing intrasystem inconsistency if not made with sensitivity to the web of interconnectedness that procedure draws upon.”).