

PLEADING IN THE INFORMATION AGE

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*The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* have rejected notice pleading and have embraced instead a "plausibility" standard for pleading, which requires a plaintiff's complaint to present facts suggestive of liability. A recurring criticism of the plausibility standard is that it will weed out many meritorious cases in which the plaintiff was unable to gain access to information relevant to liability prior to the commencement of the lawsuit. This Note argues that these criticisms have largely ignored historical and technological changes in how information is regulated and accessed—changes that mitigate the impact of the plausibility standard. Information asymmetries between plaintiffs and defendants are, for the broad run of cases, less severe today than they were seventy years ago when notice pleading was created. Search costs for information are now lower because of new technologies like the Internet. Laws forcing or facilitating the disclosure of information to the public have also proliferated in recent decades, making building a case easier for plaintiffs. While serious information asymmetries remain in certain types of cases, this Note argues that the best strategy for dealing with such cases is not to return wholesale to notice pleading but to create a "safety valve" mechanism modeled on Rule 56(f) to test whether plaintiffs had access to significant amounts of information concerning the defendant's conduct.*

INTRODUCTION

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² have established a "plausibility" pleading standard that tests whether a plaintiff's complaint contains sufficient factual information to justify going forward into discovery. As critics of the decisions have observed, plausibility pleading is a significant departure from notice pleading, which permitted a plaintiff to get into court even if she possessed few facts concerning the defendant's conduct.

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¹ 550 U.S. 544 (2007).

² 129 S. Ct. 1937 (2009).

Although *Twombly* and *Iqbal* have provoked an outpouring of academic commentary, much of it quite critical,³ commentators have paid surprisingly little attention to technological and regulatory changes in recent decades that have made accessing information easier for plaintiffs. Notice pleading was established by the framers of the Federal Rules of Civil Procedure in 1938 and embraced by the Supreme Court in the 1957 case *Conley v. Gibson*.⁴ At the time, it was thought that resolving cases on the pleadings was contrary to the goal of resolving cases on their merits.⁵ Accordingly, the framers adopted a general rule that the motion to dismiss should *never* be used to test a case's factual merits.

This Note will argue that while this rule may have made sense in 1938, it no longer does today. Information asymmetries between plaintiffs and defendants are, for the broad run of cases, less severe now than they were seventy years ago when the framers of the Federal Rules introduced notice pleading. Search costs for information are lower because of new technologies like the Internet. Once disclosed to any member of the public, damning information is increasingly easy to spread and correspondingly difficult to contain. Equally important, the modern regulatory state has taken an active role in promoting the dissemination of information. Laws forcing or facilitating the disclosure of once-private information have proliferated in recent decades.

³ Commentators have offered several major criticisms of the decisions. First, they have faulted the Court for bypassing the Federal Rules amendment process. *See, e.g.*, Kevin C. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 846–47 (2010) (expressing “regret” over Court’s decision to bypass rulemaking process, because “a design change of this magnitude should occur only after a thorough airing of the choices”). Second, they have criticized the decisions for creating an opaque doctrinal standard that is difficult to apply consistently. *See, e.g.*, Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Access*, 94 IOWA L. REV. 873, 881–83 (2009) (discussing confusion created by *Twombly*). Third, they have criticized the Court’s dismissal of the effectiveness of judicial case management techniques. *See, e.g.*, Edward D. Cavanagh, *Twombly, The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 882–89 (2008) (arguing that *Twombly* demonstrated that Court was “out of touch with the judicial system that it is charged with managing” by relying on 1989 law review article critical of discovery costs and ignoring amendments to discovery rules made since 1993). In addition, commentators have offered the information asymmetry criticism discussed in Part I.C, *infra*.

⁴ *See, e.g.*, A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 461 (2008) (“*Twombly* rankles because it is inconsistent with the liberal pleading regime established by the Federal Rules and previously embraced by the Court itself.”); *see also infra* notes 12–13 and accompanying text (discussing *Conley v. Gibson*, 355 U.S. 41 (1957)).

⁵ *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 355–56 (2010) (“[T]he Federal Rules were originally imbued with a clear preference for merits-based, accurate resolutions of disputes Simplified pleading and broad discovery were designed to promote resolution of disputes on the substantive merits as opposed to procedural technicalities.” (citations omitted)).

These laws make building a case easier for plaintiffs because more information relevant to liability is likely to be in the public domain or accessible from private sources.

Because of these developments, testing the factual sufficiency of cases at the motion to dismiss stage can, in general, be a valuable tool for screening out nonmeritorious cases. At the same time, however, there remain some cases for which very little factual information relevant to making a preliminary assessment of liability is likely to be accessible. Indeed, much of the critical commentary about *Twombly* and *Iqbal* has focused on the standard's disproportionate impact on this subset of cases.⁶ This Note will not challenge the notion that the plausibility standard will be a poor screening mechanism for certain types of cases. It will argue, instead, that such cases are increasingly the exception and should be treated as such.

Rather than returning wholesale to notice pleading, as some have proposed,⁷ policymakers seeking to temper the impact of the plausibility standard should create a mechanism specifically designed to deal with the subset of cases in which there is little available information concerning the defendant's conduct. The Federal Rules already provide a model for such a mechanism in Rule 56(f), which allows a party facing a summary judgment motion to argue that it has not yet had an adequate opportunity to conduct discovery.⁸ Now that the motion to dismiss increasingly resembles the summary judgment motion,⁹ an analogous "safety valve"¹⁰ is needed for those cases where information asymmetries are most severe.

⁶ See *infra* Part I.C.

⁷ See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009) ("A court shall not dismiss a complaint . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible . . ."); Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009) (similar).

⁸ See FED. R. CIV. P. 56(f) ("If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.").

⁹ For discussions of the growing resemblance between the motion to dismiss and summary judgment, see generally Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007) and Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

¹⁰ *Rivera-Torres v. Rey-Hernandez*, 502 F.3d 7, 10 (1st Cir. 2007) (noting that Rule 56(f) "provides a useful safety valve" when parties need more time to respond to summary judgment motions).

This Note proceeds in three parts. Part I introduces the plausibility pleading standard announced in *Twombly* and *Iqbal* and explains its basis in concerns about frivolous litigation and escalating discovery costs. Part I also introduces the information asymmetry criticisms of the plausibility standard, which have emphasized that the standard will disproportionately impact certain types of cases. Part II presents this Note's core argument: that information asymmetries have become less severe in recent decades, offsetting some of the effect of the shift from notice pleading to plausibility pleading. Part II discusses the availability of extensive public information for the plaintiffs in *Twombly* and *Iqbal*, and then focuses on the rise of "informational regulation" statutes and the Internet's impact on search costs. Part III then acknowledges that, despite the increased availability of information, there will nonetheless be some cases where information asymmetries remain quite severe. It proposes adopting a safety valve mechanism modeled on Rule 56(f) to accommodate such cases.

I

PLAUSIBILITY PLEADING

A. *Pleading Doctrine after Twombly and Iqbal*

The Federal Rules of Civil Procedure adopted in 1938 embraced a liberal system of notice pleading in which a plaintiff could get into court even if she possessed little factual information regarding a defendant's misconduct.¹¹ The Supreme Court embraced notice pleading in the 1957 case *Conley v. Gibson*, holding that Rule 8 does not require detailed factual pleading¹² and that a complaint should not be dismissed unless the plaintiff could prove "no set of facts" in support of her claim.¹³ Over a span of fifty years, the Court repeatedly reaffirmed *Conley*,¹⁴ rebuffing attempts by the lower federal courts to extend heightened pleading standards to specific areas of law thought to be prone to frivolous litigation.¹⁵

¹¹ Under Rule 8, a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The Federal Rules, through Rule 9(b), require heightened fact pleading only in cases involving fraud or mistake. FED. R. CIV. P. 9(b). For a discussion of the intent of the framers of the Federal Rules to establish a notice pleading regime distinct from code pleading, see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990-93 (2003).

¹² 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.").

¹³ 355 U.S. at 45-46.

¹⁴ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting) (noting that Court cited *Conley*'s "no set of facts" language "in a dozen opinions").

¹⁵ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (rejecting heightened pleading standard for employment discrimination cases); *Leatherman v. Tarrant Cnty.*

In the last three years, the Court has abandoned notice pleading in favor of “plausibility pleading,” which requires a plaintiff’s complaint to contain enough factual information to render its claims “plausible.”¹⁶ The Court initiated this doctrinal revolution in *Twombly*, an antitrust conspiracy class action against the Baby Bell regional phone companies.¹⁷ In their complaint, the *Twombly* plaintiffs presented no direct evidence of the existence of a conspiratorial agreement among the Baby Bells,¹⁸ and instead pointed only to parallel conduct by the defendants.¹⁹ Unfortunately for the plaintiffs, the conduct they described was just as consistent with perfectly legal and economically rational behavior as it was with conspiracy.²⁰

The Court employed a new term—“plausibility”—in upholding the dismissal of the complaint. According to the Court, antitrust plaintiffs must allege facts “plausibly suggesting” an antitrust violation and cannot rely solely on factual allegations that are “merely consistent with” the existence of a conspiracy.²¹ In keeping with its new focus on

Narcotics Intelligence Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard for civil rights cases against municipalities). See generally Fairman, *supra* note 11 (chronicling lower courts’ imposition of heightened pleading standards in types of actions considered likely to be frivolous).

¹⁶ *Twombly*, 550 U.S. at 570 (requiring complaint to contain “enough facts to state a claim to relief that is plausible on its face”).

¹⁷ The plaintiffs alleged that the Baby Bells, which were the remnants of the 1984 breakup of the AT&T monopoly, conspired to restrain competition in the market for local phone services in the late 1990s. *Twombly*, 550 U.S. at 550–51. For a comprehensive account of the facts and procedural history of *Twombly* and the federal government’s efforts to foster competition in the telecommunications industry, see Epstein, *supra* note 9, at 72–76, 83–94.

¹⁸ The closest thing to direct evidence of a conspiratorial agreement was the public statement, made by the president of one of the defendants, that entering a rival’s territory “might be a good way to turn a quick dollar, but that doesn’t make it right.” *Twombly*, 550 U.S. at 551. The Court gave little weight to this ambiguous statement, see *id.* at 568 n.13, and, as Richard Epstein points out, “it defies common sense to think that any participant would announce its illegal behavior to a newspaper reporter.” Epstein, *supra* note 9, at 91.

¹⁹ Specifically, plaintiffs alleged that the defendants each prevented competitors from entering into their local markets and refused to enter each other’s markets. *Twombly*, 550 U.S. at 551 (citing Consolidated Amended Class Action Complaint ¶ 51, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ 10220)).

²⁰ *Id.* at 553–54 (noting that “conscious parallelism,” standing alone, does not violate the Sherman Act). The Court found plaintiffs’ allegations of parallel conduct “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Id.* at 554. It also noted that each company had strong economic incentives to resist incursions into its own territory from competitors. *Id.* at 566.

²¹ *Id.* at 557; see also *id.* at 570 (requiring complaint to contain “enough facts to state a claim to relief that is plausible on its face”).

plausibility, the Court decided to place the oft-quoted “no set of facts” standard from *Conley* into “retirement.”²²

Numerous debates about the meaning and scope of the new plausibility standard arose in the two years after the decision.²³ In *Ashcroft v. Iqbal*, a *Bivens* action²⁴ against Attorney General John Ashcroft and FBI Director Robert Mueller for the detention of Muslim men in New York after 9/11, the Court provided some much-needed clarity.²⁵ The Court explicitly adopted the plausibility standard, leaving no question that it intended to establish a new doctrinal standard distinct from traditional notice pleading.²⁶ The Court also clarified that *Twombly*’s plausibility standard applies to all civil actions subject to Rule 8.²⁷

Iqbal’s most notable innovation was its identification of a two-step framework for analyzing pleadings.²⁸ In step one, a court should identify and segregate out “pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”²⁹ In step two, the court must assume the truth of all the “well-pleaded” (i.e., nonconclusory) factual allegations, and then “determine whether they plausibly give rise to an entitlement to relief.”³⁰ Whether a claim

²² *Id.* at 563. The Court also put new emphasis on the word “show” in Rule 8, noting that despite the Federal Rules’ elimination of detailed fact pleading, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Id.* at 555 n.3.

²³ See, e.g., *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 968 (9th Cir. 2009) (“Much confusion accompanied the lower courts’ initial engagement with *Twombly*.”); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 458–60 (2010) (summarizing academic debates about meaning and scope of *Twombly*).

²⁴ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (creating implied cause of action against federal actors for constitutional violations).

²⁵ 129 S. Ct. 1937 (2009).

²⁶ See *id.* at 1949 (“[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 570)); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010) (“[T]he *Iqbal* majority did not once use the word ‘notice’ in its opinion or cite the Court’s other basic pre-*Twombly* decisions.”).

²⁷ *Iqbal*, 129 S. Ct. at 1953 (“*Twombly* expounded the pleading standard for ‘all civil actions’” (quoting FED. R. CIV. P. 1)).

²⁸ The Court considered this framework to be implicit in *Twombly*. See *id.* at 1950 (“*Twombly* illustrates the two-pronged approach.”).

²⁹ *Id.* In the Court’s view, courts are not bound to accept as true “a legal conclusion couched as a factual allegation.” *Id.* (quoting *Twombly*, 550 U.S. at 555). As a result, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949.

³⁰ *Id.* at 1950. If the facts do not allow the court “to infer more than the mere possibility of misconduct,” then the complaint “has not ‘show[n] that the pleader is entitled to relief.’” *Id.* (alteration in original) (quoting FED. R. CIV. P. 8(a)(2)).

is plausible will be highly “context-specific,” requiring trial courts to apply their “judicial experience and common sense.”³¹

The Court applied this framework to *Iqbal*’s complaint. *Iqbal* claimed, among other things, that he was unconstitutionally subjected to harsh conditions of confinement solely on account of his race, religion, or national origin.³² *Iqbal* sought to hold Ashcroft and Mueller liable under both a direct liability theory³³ and a supervisory liability theory.³⁴ The Court took the supervisory liability claim off the table by holding that such claims are not actionable under *Bivens*.³⁵ In the Court’s view, the remaining claim—that the defendants had actually designed or approved the discriminatory policy—was based on allegations that were conclusory.³⁶ The well-pled allegations in the complaint did “not show, or even intimate, that petitioners purposefully housed detainees in [more restrictive conditions] due to their race, religion, or national origin.”³⁷

Together, *Twombly* and *Iqbal* have given rise to debates about and criticism of both the concept of plausibility³⁸ and the distinction

³¹ *Id.*

³² *Id.* at 1942; see also *Iqbal v. Hasty*, 490 F.3d 143, 149 n.3 (2d Cir. 2007) (listing twenty-one claims leveled against various defendants).

³³ *Iqbal*, 129 S. Ct. at 1944 (noting that complaint “names Ashcroft as the ‘principal architect’ of the policy and identifies Mueller as ‘instrumental in [its] adoption, promulgation, and implementation’” (alteration in original) (quoting First Amended Complaint and Jury Demand ¶¶ 10–11, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (04 CV 1809 (JG) (JA))).

³⁴ *Id.* at 1949 (noting plaintiff’s supervisory liability theory).

³⁵ *Id.* (rejecting notion that “a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution”). This substantive law holding may have had a decisive effect on the outcome of the case. See Edward Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 497 (2010) (describing supervisory liability holding as “a crucial step in concluding that the *Iqbal* complaint was insufficient” and noting that “[n]owhere does the majority in *Iqbal* state that it would be implausible to infer that Attorney General Ashcroft knew about, but did nothing to stop, the actions of his subordinates”). But see *Iqbal*, 129 S. Ct. at 1958 (Souter, J., dissenting) (arguing that majority’s supervisory liability holding “has no bearing on its resolution of the case”).

³⁶ *Iqbal*, 129 S. Ct. at 1944 (noting, for example, allegations that Ashcroft was policy’s “principal architect,” that Mueller was “instrumental” in its adoption, that policy was “approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001,” and that Ashcroft and Mueller “each knew of, condoned, and willfully and maliciously agreed to subject” *Iqbal* to policy). But see A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192 (2010) (describing allegations in *Iqbal* as “undeniably . . . non-conclusory and factual in nature”).

³⁷ *Iqbal*, 129 S. Ct. at 1952.

³⁸ Professors Bone and Spencer have offered two leading—and similar—accounts of plausibility. See Bone, *supra* note 3, at 885 (suggesting that plausibility is judged against a “baseline,” defined as “the normal state of affairs for situations of the same general type as those described in the complaint”); A. Benjamin Spencer, *Understanding Pleading*

between conclusory and nonconclusory allegations.³⁹ This Note will not attempt to resolve these doctrinal disputes. What seems clear is that *Twombly* and *Iqbal* have imposed a significantly higher factual standard than was (at least in theory⁴⁰) in place under *Conley*.⁴¹ This standard applies to all actions, and early indications suggest that the lower courts are taking *Iqbal* as a license to apply the plausibility standard aggressively in a variety of contexts.⁴²

As a practical matter, then, the plausibility standard places great pressure upon plaintiffs to load their complaints with facts suggestive of liability. And that, in turn, raises the question of how much information plaintiffs can gather prior to the commencement of discovery.

B. *Plausibility Pleading, Discovery Costs, and Frivolous Litigation*

How much information a plaintiff will be able to obtain prior to discovery depends on a number of factors, not the least of which is the

Doctrine, 108 MICH. L. REV. 1, 1 (2009) (arguing that plausibility depends on whether “a complaint . . . describe[s] events about which there is a presumption of impropriety”). Others have offered alternative descriptions of plausibility. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (providing “transactional” account of plausibility). Or they have rejected the concept as hopelessly malleable. See Clermont & Yeazell, *supra* note 3, at 841 (“[M]easuring plausibility seems . . . obviously unclear. This measure lies entirely in the mind of the beholder.” (citation omitted)).

³⁹ Compare Hartnett, *supra* note 35, at 491 (“A conclusory allegation is one that asserts ‘the final and ultimate conclusion which the court is to make in deciding the case for him,’ that is, one that alleges an element of a claim.” (quoting CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 234 (2d ed. 1947))), with Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 868 (2010) (“[W]hat qualifies an allegation as a ‘legal conclusion’ or as too ‘conclusory’ is not that it tracks the elements of a legal claim too closely. Rather it is that the allegation states facts at too high a level of generality.” (citation omitted)). Scholars have also criticized the conclusory/nonconclusory distinction for being “unclear” and “subjective.” *E.g.*, Clermont & Yeazell, *supra* note 3, at 841.

⁴⁰ See generally Fairman, *supra* note 11 (discussing lower court departures from *Conley*).

⁴¹ See, e.g., Dodson, *supra* note 23, at 461–62 (“[T]he ‘plausibility’ standard is a factual-sufficiency standard that . . . is more restrictive than the previously prevailing factual standard.”); Spencer, *supra* note 38, at 5 (arguing that *Twombly* and *Iqbal* “ratif[ied] the heretofore renegade practice of imposing fact-pleading requirements”).

⁴² See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 598–99 (2010) (finding that rate of grants of motions to dismiss with leave to amend rose from 6% prior to *Twombly* to 19% after *Iqbal*, while grants with prejudice fell from 40% to 37%); see also Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (holding that *Twombly* and *Iqbal* overruled liberal pleading standard for employment discrimination articulated in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), since *Swierkiewicz* was based upon *Conley*). The contextual nature of plausibility may yet limit its impact. See Miller, *supra* note 26, at 38 (noting that variations in “the substantive law governing a case, . . . whether the action turns on objective facts or subjective matters such as intent or motive of the parties, the complexity or simplicity of the case, and whether or not the litigation will be resource consumptive” may limit exercise of judicial discretion).

type of action she intends to bring. As Richard Epstein has noted, the types of actions that the federal courts handle have grown significantly more complex in the seventy years since notice pleading was first introduced.⁴³ Civil rights, complex securities, antitrust, and environmental cases—all staples of current federal dockets—were either unknown or much less common in the 1930s.⁴⁴

Concerns about these new types of cases have inspired the major procedural reforms of recent decades, which have facilitated pretrial resolution of disputes through mechanisms such as summary judgment⁴⁵ and substance-specific heightened pleading standards.⁴⁶ These developments were—quite controversially—responses to the perception of a “litigation explosion” in the federal courts, and were intended to curb frivolous lawsuits, prevent discovery abuse, and relieve overburdened court dockets.⁴⁷

Plausibility pleading—another mechanism favoring pretrial dispute resolution⁴⁸—arose out of the same set of concerns.⁴⁹ Justice Souter’s opinion in *Twombly* stressed that permitting plaintiffs to pursue “sprawling, costly, and hugely time-consuming” discovery could unfairly coerce “cost-conscious defendants to settle even anemic

⁴³ Epstein, *supra* note 9, at 98; see also Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 159 (2010) (“The paradigm of federal litigation when the Federal Rules of Civil Procedure took effect in 1938 was diversity-jurisdiction tort, contract, debt, and other business disputes, as well as patent claims.”).

⁴⁴ Wasserman, *supra* note 43, at 160.

⁴⁵ The Supreme Court’s 1986 summary judgment “trilogy” “brought into the battle against excess litigation a weapon held largely in reserve by the federal courts since the promulgation of the Federal Rules in 1938.” Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73–74 (1990); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Corp. v. Zenith Radio*, 475 U.S. 574 (1986). Other procedural developments designed to respond to the perception of a litigation explosion have included “greater judicial control over discovery, more demanding application of Rule 9(b), and greater prefiltering inquiry obligations under Rule 11.” Arthur R. Miller, *The Pretrial Rush to Judgment: Are the ‘Litigation Explosion,’ ‘Liability Cases,’ and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1015 (2003).

⁴⁶ See *infra* note 124 (discussing Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2006))).

⁴⁷ For a skeptical account of the “litigation explosion” and accompanying procedural reforms, see generally Miller, *supra* note 45.

⁴⁸ For a discussion connecting plausibility pleading and earlier reforms, see Miller, *supra* note 26, at 9–11.

⁴⁹ 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, 1231–33 (2008) (describing “high discovery expenses” and “nonmeritorious litigation” as *Twombly*’s “animating policy purposes”); Spencer, *supra* note 4, at 453 (suggesting that *Twombly* was motivated by “troika of policy concerns—litigation expense, discovery abuse, and overburdened caseloads”).

cases.”⁵⁰ The Court had little faith that district court judges could control such costs through “careful case management,” given the “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”⁵¹ *Iqbal* echoed these concerns in the context of qualified immunity, a doctrine premised on the notion that costly litigation may interfere with government officials’ performance of their duties.⁵²

Twombly and *Iqbal* thus highlight the central disadvantage of notice pleading. While notice pleading has the virtue of opening the courts to plaintiffs with meritorious claims, it also gives plaintiffs with nonmeritorious cases the opportunity to take discovery, which can be quite costly,⁵³ particularly in cases involving electronic discovery.⁵⁴ Because of the expense of discovery, a plaintiff with a nonmeritorious claim may be able to obtain a nuisance settlement—an amount less than the defendant’s projected costs of litigating the case.⁵⁵ Nuisance settlements are a particular risk where the defendants face systematically higher pretrial costs than plaintiffs because defendants possess a vast number of internal records that will be discoverable, while the plaintiffs possess comparatively little discoverable information.⁵⁶ Such

⁵⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559, 560 n.6 (2007).

⁵¹ *Id.* at 559 (internal quotation marks omitted).

⁵² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (noting that litigation, although necessary, “exact[s] heavy costs” in time and resources, detracting from “proper execution of the work of the Government”).

⁵³ Discovery costs can vary dramatically depending on the nature of a suit and the stakes involved. See Thomas W. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 530–31 (1998) (reporting survey results indicating that 15% of cases had no discovery and that discovery expenses were 3% of amount at stake in median case but were 32% or more of amount at stake in 5% of cases).

⁵⁴ See Scott A. Moss, *Litigation Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009) (“[E]-discovery can cost tens or hundreds of thousands of dollars in even fairly typical cases . . .”).

⁵⁵ Commentators have struggled to define a “frivolous” suit. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 528 (1997) (noting “lack of a clear and generally accepted definition of a ‘frivolous suit’”). Nonetheless, as Paul Stancil notes, the “paradigmatically” frivolous suit is one in which both the plaintiff and the defendant objectively determine that there is zero risk that the defendant will be held liable. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 121 (2009). In such a situation, the defendant may nonetheless have a powerful incentive to settle because he faces pretrial litigation costs. *Id.* Despite knowing that her case is meritless, the plaintiff will have an incentive to sue if the defendant’s pretrial costs exceed her own pretrial costs. *Id.* at 122. If the other conditions described in Stancil’s model hold, the plaintiff will be able to obtain a nuisance settlement. *Id.* at 120–24.

⁵⁶ See Stancil, *supra* note 55, at 142 (“[F]or certain cases involving significant pretrial cost disparity, even mutual foreknowledge of frivolousness will be insufficient to deter filing.”). Plaintiffs face low pretrial costs in cases “for which there will be little inquiry into the plaintiff’s activities or damages”—for example, “fraud on the market” claims. *Id.* at

discovery cost asymmetries arise most frequently in the kinds of actions that were rare in the 1930s but now comprise a significant portion of the federal dockets, such as securities, civil rights, antitrust, and environmental suits.⁵⁷

C. *The Information Asymmetry Criticism*

Critics of *Twombly* and *Iqbal* have strongly contested whether the Court's concerns about runaway discovery costs and nuisance settlements are justified.⁵⁸ However, the critics' more powerful argument is that, whatever the costs of discovery, notice pleading is necessary so that plaintiffs lacking firsthand information about a defendant's wrongdoing can obtain "[a]ccess to justice."⁵⁹ This argument is often phrased in terms of the existence of an "information asymmetry" between the parties: that is, the defendant possesses more information directly bearing upon its own liability than the plaintiff does.⁶⁰

Critics of plausibility pleading argue that information asymmetries render the plausibility standard incapable of sorting cases according to their merit. For example, Scott Dodson argues that plausibility is "a poor proxy for meritlessness" because the information

127. By the same token, a defendant's costs tend to be highest in cases focusing on the defendant's conduct. *See id.* at 130 (noting that costs are highest where "scope and depth of genuinely discoverable information . . . is significant" and there is no "obvious factual transaction around which to limit discovery"); *see also Twombly*, 550 U.S. at 559 (noting "obvious" expense of discovery in *Twombly*, nationwide class action "against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years").

⁵⁷ In 2009, 276,397 civil cases were commenced in United States district courts, including 33,761 civil rights cases, 1674 securities cases, 812 antitrust cases, and 741 environmental cases. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 144–46 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf>; *see also* Epstein, *supra* note 9, at 70–71 (describing potentially "great" discovery costs in antitrust cases and suits against local governments); Stancil, *supra* note 55, at 127 (noting cost disparities in "fraud on the market" and employment discrimination claims).

⁵⁸ *See, e.g.,* Miller, *supra* note 26, at 53 (arguing that frequently voiced concerns about frivolous litigation and discovery costs "often reflect[] ideology or economic self-interest" and present picture of civil litigation that "is incomplete and is distorted by a lack of definition and empirical data").

⁵⁹ Spencer, *supra* note 38, at 2.

⁶⁰ *E.g.,* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 73 (2010) (noting difficulties created by new pleading standard "for plaintiffs who are faced with information asymmetry" and proposing limited presuit discovery as solution); Hoffman, *supra* note 49, at 1261 (arguing that "the *Twombly* Court . . . assume[s] that it will be obvious when allegations made are 'hopeless,' but that this assumption "ignores information asymmetries").

some plaintiffs need “is in the hands of defendants.”⁶¹ In the same vein, A. Benjamin Spencer argues that “[u]nder plausibility pleading, one has no confidence that a plaintiff’s dismissed claim was frivolous or nonmeritorious” because “discovery might reveal facts that prove liability.”⁶²

Critics are particularly concerned that information asymmetries will render certain categories of cases difficult to bring under the plausibility standard. Thus, Robert G. Bone has argued that cases turning on “descriptions of the defendant’s state of mind . . . and references to actions taken in private” will fare poorly under plausibility pleading.⁶³ Such cases include actions against corporate defendants, such as securities and antitrust cases, where information concerning “fraud, conspiracy, price-fixing, and corporate governance can be found only in the defendant’s files and computers.”⁶⁴ They also include civil rights cases turning on issues of intent or concerning “insidious practices . . . hidden by agents and employees or . . . buried deep within an entity’s records.”⁶⁵ Similarly, critics worry that information asymmetries will screen out meritorious employment discrimination suits hinging on “comparative data drawn from the employer’s records that simply are inaccessible absent discovery.”⁶⁶

A central assumption of these information asymmetry criticisms is that significant numbers of plaintiffs with meritorious claims cannot present adequate factual information in their complaints because “critical facts are not obtainable through *informal means*.”⁶⁷ This

⁶¹ Dodson, *supra* note 60, at 53.

⁶² Spencer, *supra* note 4, at 481.

⁶³ Bone, *supra* note 39, at 873; *see also* Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2011) (manuscript at 28–29), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568127 (arguing that *Twombly* and *Iqbal* “effectively inhibit[] the emergence of an informational base for rulings on motions to dismiss,” creating same danger “as in any other regulatory enterprise in which the would-be regulator systematically lacks pertinent information—namely, that the regulator will act based upon ideological or at least idiosyncratic predilections”); Spencer, *supra* note 38, at 35 (arguing that information asymmetries are particularly acute in actions that “require suppositions about subjective motivations, states of mind, or concealed activities”).

⁶⁴ Miller, *supra* note 26, at 45.

⁶⁵ *Id.* at 18.

⁶⁶ *Id.*; *see also* Hoffman, *supra* note 49, at 1262 (“[C]orporate wrongdoing suits, civil rights suits, libel suits, intellectual property claims, and labor and employment matters are prominent examples where prospective claimants may face challenges and varying degrees of access to information.”); Spencer, *supra* note 38, at 33 (arguing that “products liability, civil conspiracy, antitrust, and civil rights claims” face information asymmetry problems).

⁶⁷ Dodson, *supra* note 60, at 68 (emphasis added); *see also* Bone, *supra* note 39, at 873 (arguing that information regarding “the defendant’s state of mind” and “actions taken in private” is “often within the exclusive knowledge of the defendant and the plaintiff will usually have considerable difficulty learning much about it before filing”).

Note will not dispute the idea—which finds support in the early empirical studies of plausibility pleading⁶⁸—that there are significant numbers of meritorious claims for which informal investigation will not yield enough factual information to survive the plausibility threshold. Part II, however, will suggest that the relative proportion of federal cases with severe information asymmetries has significantly declined as a result of technological and regulatory changes exogenous to civil procedure which have made informal methods of investigation cheaper and more effective. These developments increasingly enable courts to make an accurate assessment of a claim’s merits prior to discovery.

II

THE DECLINING SEVERITY OF INFORMATION ASYMMETRIES

Despite the importance of the information asymmetry criticism in recent debates about pleading, surprisingly little attention has been given to whether there have been historical shifts in information asymmetries in the seventy years since notice pleading was adopted. Commentators on *Twombly* and *Iqbal* have largely ignored this question,⁶⁹ as have recent theoretical accounts of pleading dynamics.⁷⁰

There is a certain irony in the general neglect of historical shifts in access to information in the current literature on pleading. It is, after all, a commonplace that we live in an “information age.” Indeed, in the area of privacy law, a recurring complaint is that technological

⁶⁸ See generally Hatamyar, *supra* note 42; Alex A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666770. These studies, as Reinert acknowledges, are subject to numerous methodological limitations which suggest that their results should be interpreted with great caution. See *id.* (manuscript at 12–13) (discussing difficulties with studies that “focus[] on the differences in dismissal rates pre-*Twombly*, pre-*Iqbal*, and post-*Iqbal*”); *id.* (manuscript at 48–50) (discussing and responding to methodological objections to his own attempt to assess how cohort of appellate cases from 1990s that survived under *Conley* standard would fare under plausibility standard).

⁶⁹ See generally, e.g., Bone, *supra* note 39; Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535; Cavanagh, *supra* note 3; Dodson, *supra* note 60; Dodson, *supra* note 23; Hartnett, *supra* note 35; Hatamyar, *supra* note 42; Hoffman, *supra* note 49; Miller, *supra* note 26; Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; Spencer, *supra* note 38; Spencer, *supra* note 4; Steinman, *supra* note 38; Thomas, *supra* note 9; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008). Richard Epstein is the notable exception to this trend. See *infra* notes 72–74 and accompanying text.

⁷⁰ See generally Bone, *supra* note 55; Stancil, *supra* note 55.

developments have made information on virtually any topic or person *too* easily obtained today.⁷¹

This Part will seek to remedy this neglect by exploring historical shifts that have increased access to information. It begins by arguing that these shifts are visible in the *Twombly* and *Iqbal* decisions. It then focuses on two primary causes of these shifts: technological developments that have decreased information search costs and the proliferation of laws that either require or facilitate the release of ever-increasing amounts of information from governments, corporations, and other entities.

A. *Twombly, Iqbal, and Public Information*

Twombly and *Iqbal* provide striking examples of the increasing availability to plaintiffs of information concerning defendants' conduct. In both cases, plaintiffs had access to extensive information concerning defendants' activities, and yet that information failed to support their claims, suggesting that those claims lacked merit.

In his article about *Twombly*, Richard Epstein observed that the plaintiffs in that case relied entirely on publicly available information.⁷² In his view, none of the evidence in the *Twombly* complaint "raise[d] a reasonable inference of collusion when taken in light of other relevant public evidence" that the defendants pointed to in their motion to dismiss.⁷³ In such circumstances, Epstein suggests, "the defendant should be able to avoid discovery and obtain a judgment on the pleadings by using the same documents or the same kind of evi-

⁷¹ See, e.g., Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1610–11 (1999) ("By generating comprehensive records of online behavior, information technology can broadcast an individual's secrets in ways that she can neither anticipate nor control. Once linked to the Internet, the computer on our desk becomes a potential recorder and betrayer of our confidences."); Daniel J. Solove, *Privacy and Power: Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1393 (2001) ("[T]he problem is the powerlessness, vulnerability, and dehumanization created by the assembly of dossiers of personal information where individuals lack any meaningful form of participation in the collection and use of their information.").

⁷² See Epstein, *supra* note 9, at 74 ("The plaintiff class . . . alleged no direct evidence of agreement, save arguably one isolated public comment six years later, but pointed instead to public, inherently innocent facts such as their contiguous territory and the clear advantage that each side is said to gain from having as little competition as possible."). Epstein likewise emphasized that plaintiffs relied on evidence "that the defendant firms have extensive opportunities to collude with each other because they are drawn together under a common scheme of regulation," noting that such evidence will be "easily available against all regulated industries," particularly network industries—like telecommunications—in which firms of necessity must interact with each other to connect their networks. *Id.* at 84–85.

⁷³ *Id.* at 84.

dence to show that there is no genuine issue of fact left to be decided on the case.”⁷⁴

Epstein’s account reveals an important fact about *Twombly*: While the plaintiffs did not have access to the defendants’ internal records, they still had access to an impressive amount of publicly available information about the defendants, and yet were unable to present any evidence—even circumstantial evidence—suggestive of wrongdoing. Such publicly available evidence *could* have supported the plaintiffs’ claim: As the Court noted, publicly available information such as simultaneous and otherwise unexplainable changes in pricing by competitors could support an antitrust conspiracy claim.⁷⁵

The plaintiff in *Iqbal* also had access to a great deal of publicly available information about the activities of the defendants in the case—a fact that the academic commentary on the decision has largely ignored.⁷⁶ In particular, plaintiff was able to rely upon a 240-page report published in 2003 by the Office of the Inspector General (OIG Report).⁷⁷ The OIG Report addressed, in detail, the events underlying *Iqbal*’s suit: the arrest and confinement of more than 700 Muslim men for immigration violations following the September 11 attacks.⁷⁸ It

⁷⁴ *Id.* at 81.

⁷⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007) (“Commentators have offered several examples of parallel conduct allegations that would state a [Sherman Act] § 1 claim under [the plausibility standard]. . . . [For example,] ‘complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason’ would support a plausible inference of conspiracy.” (quoting Brief for Respondents at 37, *Twombly*, 550 U.S. 544 (No. 05-1126))).

⁷⁶ See generally sources cited *supra* note 69. A notable exception is Dawinder S. Sidhu, *First Korematsu and now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 *BUFF. L. REV.* 419, 429–30, 448 (2010) (discussing OIG REPORT, *infra* note 77). Sidhu was the author of an amicus brief in support of *Iqbal*. *Id.* at 428.

⁷⁷ See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 DETAINEES (2003), available at <http://www.justice.gov/oig/special/0306/full.pdf> [hereinafter OIG REPORT]. *Iqbal*’s complaint was filed after the OIG Report was published, and *Iqbal*’s merits brief in the Supreme Court encouraged the Court to examine it, noting that although his “complaint does not incorporate the OIG Report in its pleadings, the courts below have looked to the report to place respondent’s allegations in context.” Brief for Respondent Javaid Iqbal at 4, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

The Office of the Inspector General also published a shorter supplementary report presenting the results of the Office’s investigation of allegations that staff members at a detention center in Brooklyn physically and verbally abused detainees. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003), available at <http://www.justice.gov/oig/special/0312/final.pdf>.

⁷⁸ See generally OIG REPORT, *supra* at 77. The OIG’s investigation was initiated pursuant to a provision in the USA PATRIOT Act directing the OIG to examine allegations

was based on an extensive review of Immigration and Naturalization Service (INS) and Federal Bureau of Investigation (FBI) databases and policies and on numerous interviews with both high- and low-ranking officials in the Department of Justice (DOJ), INS, and FBI, including both Attorney General John Ashcroft and FBI Director Robert Mueller.⁷⁹

What is striking about the OIG Report is that it provided direct support for a number of Iqbal's claims—just not the one that ended up being reviewed by the Supreme Court. For example, the OIG Report supported Iqbal's claim that he had been subject to abuse by correctional officers while in custody.⁸⁰ In addition, as the district court reviewing Iqbal's complaint recognized, the OIG Report provided a great deal of information supporting plaintiff's procedural due process claim against the various defendants, including Ashcroft and Mueller.⁸¹ In particular, the OIG Report criticized FBI officials for failing to implement clear, consistent procedures for designating detainees' status⁸² and for their slow pace in processing detainees.⁸³ By contrast, the OIG Report provided little support for Iqbal's claim that Ashcroft and Mueller imposed harsher conditions of confinement

of civil rights violations by Department of Justice personnel. *See id.* at 3 & n.6 (citing USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (codified at 5 U.S.C. app. § 8E (2006))).

⁷⁹ *Id.* at 6–7.

⁸⁰ *Id.* at 197 (“[T]he evidence indicates a pattern of physical and verbal abuse by some correctional officers at the [Metropolitan Detention Center] against some September 11 detainees, particularly during the first months after the attacks.”); *see also* Iqbal v. Hasty, 490 F.3d 143, 149 n.3 (2d Cir. 2007) (identifying plaintiffs' various claims including excessive force claim against warden and staff of detention facility where Iqbal was held).

⁸¹ The district court, writing before *Twombly*, found that the OIG Report “suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities.” *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *20 n.20 (E.D.N.Y. Sept. 27, 2005). The district court highlighted several passages from the OIG Report indicating the direct personal involvement of various defendants in the challenged policy, including a statement by a senior Department of Justice official that the policy of holding September 11 detainees until cleared by the FBI “came from ‘at least’ the Attorney General.” *Id.* (quoting OIG REPORT, *supra* note 77, at 38). Writing after *Twombly*, the Second Circuit agreed that Iqbal's procedural due process claim was adequately pleaded, but it found that the defendants' conduct did not violate a clearly established procedural due process right and accordingly ordered the claim dismissed. *Hasty*, 490 F.3d at 167–68. Given the OIG Report's detailed support for plaintiff's procedural due process claim, it seems hard to dispute that that claim would have survived plausibility review under the test articulated in the Supreme Court's decision in *Iqbal*.

⁸² *See* OIG REPORT, *supra* note 77, at 70 (criticizing “indiscriminate and haphazard manner in which the labels of ‘high interest,’ ‘of interest,’ or ‘of undetermined interest’ were applied to many aliens who had no connection to terrorism”).

⁸³ *Id.* at 70–71 (finding that clearance process was “understaffed” and characterized by “substantial delay[s]”).

upon detainees on the basis of their race and religion⁸⁴—the only claim considered by the Supreme Court and the one the Court ultimately found implausible.⁸⁵

Of course, one might argue that the lack of procedural protections afforded to the detainees itself supports an inference that higher level officials were motivated by racial discrimination, since the detainees were all Muslims. However, as Professor Nagareda has noted, because “the September 11 attacks had been carried out by Arab Muslim aliens from nations in the Middle East, any Administration official . . . would have been hard pressed to adopt security policies that somehow would not have a dramatically disparate effect upon persons in precisely those categories.”⁸⁶ This context, coupled

⁸⁴ The OIG Report provided evidence of racial discrimination by correctional officers where Iqbal was held. *See id.* at 143–44, 177, 185 (noting statements by detainees that correctional staff had used racial and ethnic slurs in referring to them). However, the OIG Report provided scant support for the claim that higher level officials—such as Ashcroft and Mueller—had imposed harsher conditions of confinement on the September 11 detainees because of their religious beliefs and race. *See generally id.*; accord *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (noting that complaint “alleges that various other defendants, who are not before us, may have labeled him a person . . . ‘of high interest’ for impermissible reasons,” but holding that the complaint did not adequately allege that Ashcroft and Mueller “purposefully housed detainees in [more restrictive conditions] due to their race, religion, or national origin”). Revealingly, the district court, which cited the OIG Report at length for the procedural due process claim, *see supra* note 81, did not cite the OIG Report in its discussion of Iqbal’s racial and religious discrimination claims against higher-level officials, stating instead that it could not “conclude as a matter of law that there is no set of facts consistent with plaintiffs’ allegations that could entitle them to relief.” *Elmaghraby*, 2005 WL 2375202, at *28–29.

Iqbal did attempt to use the OIG Report as support for his racial and religious discrimination claim against Ashcroft and Mueller. *See* Brief for Respondent Javaid Iqbal at 4–5, *Iqbal*, 129 S. Ct. 1937 (citing OIG REPORT, *supra* note 77, at 12–13, 16, 21, 118); *see also* Sidhu, *supra* note 76, at 448 (sympathetically recounting Iqbal’s argument). However, the pages of the OIG Report cited by Iqbal provide little direct evidence in support of the specific claim Iqbal brought against Ashcroft and Mueller. For example, the most troubling passage cited suggested that FBI officials in New York pursued leads that were based—at least in part—on a suspect’s race. *See* OIG REPORT, *supra* note 77, at 16 (“[L]eads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant.”). However, this passage and the others cited provided little evidence that Ashcroft and Mueller imposed harsher conditions of confinement upon detainees *after* they were arrested—the conduct that was the basis for Iqbal’s complaint—on the basis of race or religion. *Accord Iqbal*, 129 S. Ct. at 1952 (“[E]ven if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention . . .”).

⁸⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Supreme Court granted certiorari only on the racial and religious discrimination claims against Ashcroft and Mueller. *Id.* at 1942–43.

⁸⁶ Nagareda, *supra* note 63 (manuscript at 32); *see also Iqbal*, 129 S. Ct. at 1951–52 (“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [September 11] attacks would pro-

with the absence of direct support for plaintiff's racial discrimination claims against Ashcroft and Mueller in the OIG Report, cuts against inferring racial animus from the procedural failings documented in the report.

From an historical perspective, what is perhaps more striking about the OIG Report is that it exists at all: It was only in 1978 that Congress first established Offices of the Inspector General in twelve executive branch departments and agencies and only in 1988 that Congress established such an office in the Department of Justice.⁸⁷

Thus, in both *Twombly* and *Iqbal*, plaintiffs had access to extensive (although certainly not complete) information concerning defendants' activities, but that information provided little support for their claims. While it is not the case that every antitrust conspiracy will leave a public trail or that every civil rights violation will spawn a full-scale government investigation,⁸⁸ these decisions suggest that a much broader array of information relevant to liability is available to plaintiffs today than in decades past.

In some cases, such as *Twombly* and *Iqbal*, publicly available information will either fail to support or even tend to discredit the plaintiff's claims, suggesting that those claims lack merit. In others, as the following sections will suggest, public information can provide valuable support, allowing a complaint to survive the plausibility inquiry.

B. Declining Information Search Costs

Much of the information that a plaintiff may need before filing suit is not necessarily in the defendant's exclusive possession—for example, the identity of witnesses, the cause of the malfunction of a defective product, or the standard of care for a particular medical procedure. Such information is theoretically accessible—in the sense that it is out there, in the world—but it may be costly to acquire. Like anyone else, plaintiffs are sensitive to prices. If information is expen-

duce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. . . . All [the complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”).

⁸⁷ See Inspector General Act of 1978, Pub. L. No. 95-452, § 2(1), 92 Stat. 1101, 1101 (codified as amended in scattered sections of 5 U.S.C. (2006)) (listing twelve departments and agencies); Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(a), 102 Stat. 2515, 2515 (codified as amended in scattered sections of 5 U.S.C. (2006)) (establishing Office of Inspector General in Department of Justice).

⁸⁸ We might expect, however, that many of the most egregious allegations of civil rights violations will lead to such investigations, as they did in the case of the September 11 detainees.

sive to acquire, a plaintiff may simply decide not to pay for it.⁸⁹ Thus, any analysis of information asymmetries between plaintiffs and defendants should be attentive to the price of the factual information plaintiffs need to file suit.

This section argues that modern technological advances have significantly lowered the costs of gathering facts prior to suit in two ways. First, the Internet has made much information that plaintiffs need available at a dramatically lower cost. Second, the Internet has made traditional forms of investigation (such as interviewing witnesses) significantly more efficient and effective.

1. *Information Available on the Internet*

For a potential plaintiff, the Internet contains a vast amount of cheap and potentially helpful factual information.⁹⁰ In some cases, information available online may be sufficient to enable a plaintiff to meet the plausibility standard without additional factual investigation. For example, trademark and copyright owners can monitor the web for infringing uses of their intellectual property (or hire special monitoring firms to do so for them⁹¹).

More commonly, information available on the Internet will help establish a single element of a claim, or provide other information necessary to plead the claim. In a fraud case, the contents of a defendant's website may show that a defendant did in fact make a specific representation.⁹² Likewise, in a medical malpractice case, online databases can help an attorney research the risks and standard of care for a particular procedure.⁹³ Securities plaintiffs can access a free searchable database containing all "registration statements, periodic reports, and other forms" filed with the Securities and Exchange

⁸⁹ See Bone, *supra* note 55, at 589 (arguing that strict pleading rules risk "screening out meritorious cases when investigation costs are too high for plaintiffs to obtain the necessary information before filing").

⁹⁰ See generally CAROLE A. LEVITT & MARK E. ROSCH, *THE LAWYER'S GUIDE TO FACT FINDING ON THE INTERNET* (3d ed. 2007) (identifying hundreds of websites helpful for factual research).

⁹¹ See, e.g., *Intellectual Property (IP) Infringement Monitoring*, CYBER ALERT, http://www.cyberalert.com/app_intellectual_property_infringement.html (last visited Oct. 21, 2010) (offering "online surveillance for copyright infringements, trademark infringements and other types of IP infringements"). Of course, while the Internet facilitates monitoring of these intellectual property rights, it also enables the rampant violation of such rights, as with music file sharing.

⁹² See LEVITT & ROSCH, *supra* note 90, at 79–80.

⁹³ See *id.* at 535–38 (describing how to use online database NLM Gateway to find medical literature).

Commission (SEC).⁹⁴ Similarly, for defective products actions, government-sponsored websites provide access to a variety of recall notices.⁹⁵ The web also provides increasing amounts of information regarding the operations of government, thanks to the 1996 Electronic Freedom of Information Act Amendments,⁹⁶ which require federal agencies to operate electronic “reading rooms” containing administrative orders, agency policy statements, and staff manuals.⁹⁷

These online sources often will not, by themselves, provide a plaintiff with enough information to satisfy the plausibility standard. But by dramatically lowering the cost of obtaining certain necessary pieces of information, the Internet saves plaintiffs time and money, enabling them to reallocate resources toward unearthing less readily available information.⁹⁸

The ease of communication on the Internet can also aid plaintiffs. As Elizabeth Chamblee Burch has noted, online discussion forums increasingly help plaintiffs in mass tort class actions establish a common group identity.⁹⁹ Websites devoted to the discussion of a particular product or medical condition can likewise facilitate the rapid dissemination of information necessary to support a plausible claim. For example, in 2008, thousands of purchasers of the new 3G iPhone participated in a discussion thread on Apple’s website devoted to problems with the phone’s reception.¹⁰⁰ The discussion board, along

⁹⁴ See *Filings and Forms*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/edgar.shtml> (last visited Oct. 21, 2010).

⁹⁵ See, e.g., RECALLS.GOV, <http://www.recalls.gov> (last visited Oct. 21, 2010).

⁹⁶ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended in 5 U.S.C. § 552 (2006)).

⁹⁷ 5 U.S.C. § 552(a)(2) (2006) (outlining requirements for electronic reading rooms).

⁹⁸ Modern technology has likely had another, more indirect effect upon factual asymmetries: By lowering the cost of legal research, Internet databases have freed up resources for additional factual investigation. Commercial legal databases such as Lexis and Westlaw “increasingly market their databases to solo and small firm practitioners” and offer “[l]ower cost pricing plans . . . for subscriptions to portions of the database.” Randy Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J.L. & TECH. 67, 73 n.16 (2005). Free websites also provide much useful legal information. See, e.g., GOOGLE SCHOLAR, <http://scholar.google.com> (last visited Oct. 21, 2010) (permitting searches of “[l]egal opinions and journals”); Legal Info. Inst., *U.S. Code*, CORNELL U. L. SCH., <http://www.law.cornell.edu/uscode> (last visited Oct. 21, 2010) (searchable version of entire U.S. Code); *Securities Class Action Clearinghouse*, STAN. L. SCH., <http://securities.stanford.edu/> (last visited Oct. 21, 2010) (providing filings related to federal class action securities fraud litigation since 1995).

⁹⁹ See Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 23 (2009) (discussing example of Yahoo! discussion group formed by plaintiffs in Vioxx litigation).

¹⁰⁰ Ashley Phillips & Ki Mae Heussner, *Apple Hit with 3G iPhone Lawsuit*, ABC NEWS (Aug. 20, 2008), <http://abcnews.go.com/Technology/story?id=5617800&page=1>.

with extensive media coverage, soon gave rise to a class action lawsuit.¹⁰¹

2. *The Internet's Impact on Traditional Forms of Investigation*

Traditional methods of factual investigation, focusing on gathering information from the client and from witnesses, remain fundamental to many cases.¹⁰² To acquire certain pieces of information necessary to satisfy the plausibility standard, plaintiffs often must talk directly to people who have worked for or dealt with the defendant.

The rise of the Internet has significantly lowered the costs and enhanced the effectiveness of these traditional forms of investigation. Using online telephone directories, lawyers trying to contact potential witnesses can obtain witness phone numbers either for free or for a small fee.¹⁰³ Attorneys may use background-check sites that enable users to quickly locate public records concerning companies or individuals.¹⁰⁴ Attorneys can also use social networking sites such as Facebook to track down witnesses or learn about the opposing party.¹⁰⁵ Finally, job-search websites such as Monster.com enable plaintiffs investigating a particular company to search through tens of millions of résumés to identify the company's former employees.¹⁰⁶

¹⁰¹ *Id.*

¹⁰² See Brian Michael Goodwin & Lori V. Berke, *Informal Witness Investigation*, in *THE LITIGATION MANUAL: PRETRIAL* 202, 208 (John G. Koeltl & John S. Kiernan eds., 1998) (“[A lawyer] may need to hit entire neighborhoods, manufacturing plants, or university campuses, interviewing hundreds of persons on the chance that one or two will know something helpful.”).

¹⁰³ See LEVITT & ROSCH, *supra* note 90, at 255–60 (noting free online telephone directories and fee-for-search sites).

¹⁰⁴ See, e.g., KNOWX, <https://www.knowx.com/statmnts/priceinfo.jsp> (last visited Oct. 27, 2010) (permitting searches for, among other things, marriage and divorce records, lawsuits and judgments, corporate records, bankruptcy filings, and professional licenses).

¹⁰⁵ For an example of such research derailing a lawsuit already on file, see Sean Wajert, *Informal Discovery Leads to Dismissal in MDL*, MASS TORT DEF. (Feb. 2, 2010, 5:52 AM), <http://www.masstortdefense.com/2010/02/articles/informal-discovery-leads-to-dismissal-in-mdl/> (discussing case in which “plaintiff’s claims of severe disability were refuted by Internet (specifically Facebook) photos discovered by defendants that appeared to show plaintiff competing in strenuous high-speed powerboat races”).

¹⁰⁶ See MONSTER.COM, <http://www.monster.com/> (last visited Oct. 21, 2010); *Web Site Reviews: Monster.com*, FORBES.COM, <http://www.forbes.com/bow/b2c/review.jhtml?id=5567> (last visited Oct. 21, 2010) (noting that Monster’s résumé database contains more than 41 million resumes); see also *Resume Database*, CAREERBUILDER, <http://www.careerbuilder.com/jobposter/products/searchresumesinfo.aspx?> (last visited Oct. 21, 2010) (offering employers access to “36 million potential candidates”). Résumé searches are particularly useful for identifying a company’s former employees, who may be more willing than current employees to talk about wrongdoing at the company. Communications with former employees are also less likely to be barred by ethical no-contact rules. See Mark H. Aultman, *The Story of a Rule*, 2000 LAW REV. MICH. ST. U. DETROIT C.L. 713, 737 (noting that in most states “former employees are not included” under ethical no-contact rules).

Such searches can generate leads for witness interviews, which may, in turn, provide enough factual information to survive the plausibility standard.¹⁰⁷

Estimating the cost savings for plaintiffs due to Internet research is a task beyond the scope of this Note. Nonetheless, it seems fair to assume that such savings are significant and that they have enabled cost-sensitive plaintiffs to initiate suits that would have been impossible to bring only a few decades ago.

C. *The Rise of Informational Regulation*

In addition to technological advancements, recent decades have witnessed a broad trend in American law toward the increased use of “informational regulation”—the regulation of conduct through information disclosure.¹⁰⁸ Although informational regulation is hardly new,¹⁰⁹ it has become dramatically more common since the 1960s and has often been favored as an alternative to command-and-control regulatory measures.¹¹⁰ Informational regulation is often praised for enhancing the ability of consumers to make informed choices and improving the democratic process by facilitating oversight of both public and private actors.¹¹¹ A less commonly recognized benefit of

¹⁰⁷ Using Monster.com in this fashion would appear to violate the site’s terms of use. *See Terms of Use*, MONSTER.COM, <http://my.monster.com/terms/default.aspx> (last visited Oct. 21, 2010) (stating that Monster’s “resume database . . . may be used only for lawful purposes by individuals seeking employment and career information and employers seeking employees”). Nonetheless, in researching this Note this author spoke to a partner at one prominent plaintiff-side firm in New York who confirmed that investigators at his firm regularly searched Monster.com and similar sites in this way. The same firm also searches for former employees of companies it is investigating on the professional networking website LinkedIn. *See About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Oct. 21, 2010).

¹⁰⁸ *See* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613 (1999) (“[I]nformational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law.” (emphasis omitted)).

¹⁰⁹ *Id.* at 618 (noting duties to disclose imposed by common law on sellers and establishment of Securities and Exchange Commission during New Deal).

¹¹⁰ *Id.* at 618–19.

¹¹¹ *See id.* at 619, 624 tbl.1 (drawing distinction between “market-enhancing” statutes and statutes that “enhance democratic processes” and listing examples of each). By subjecting those who disclose information to the risk of consumer or political backlash, such statutes may make more coercive forms of regulation—such as direct administrative oversight or private litigation—unnecessary in the first place. *See id.* at 619 (arguing that where information regulations are in place, “[t]he risk of sanctions from shareholders and state legislatures may well produce . . . improvement even without regulation”).

Information regulation is not without drawbacks. As Sunstein notes, “[p]eople have a limited ability to process information” and have difficulty evaluating how to respond to low-probability events (such as the risk of cancer from ingesting a substance). *Id.* at 627. These criticisms are of less relevance to information processing by plaintiffs’ attorneys for

informational regulation is that it increases the stock of information that plaintiffs can draw upon in framing their complaints.

This section will take a broad view of what constitutes “informational regulation.” First, it will discuss statutes that *mandate* information disclosure, such as the Freedom of Information Act. Second, it will discuss laws that *facilitate* the release of privately held information, such as whistleblower statutes. Third, it will discuss laws that establish executive branch agencies—such as Offices of the Inspector General—that have a freestanding mandate to investigate and publicize information about wrongdoing. Together, these developments make available significant amounts of information that would not have been accessible to plaintiffs when notice pleading was established in the 1930s.

1. *Mandatory Information Disclosure Laws*

The most straightforward forms of informational regulation require private or government actors to disclose information. In the sphere of the regulation of private entities, a variety of health, safety, and environmental statutes require information disclosure.¹¹² Extensive information disclosures may also result from the heavy regulation of a particular industry, such as the telecommunications industry.¹¹³

several reasons. Plaintiffs’ attorneys typically are (and have every economic incentive to be) skilled investigators capable of searching for, and filtering, relevant information efficiently. Plaintiffs’ attorneys also often specialize in particular areas of law—employment, antitrust, securities, etc.—which enables them to learn what types of information sources are likely to be most valuable to them. In the context of Internet research, there are investigative handbooks designed to train attorneys on how to effectively use various types of search engines and other databases. *See, e.g.*, LEVITT & ROSCH, *supra* note 90. In addition, an ever-increasing proportion of the legal profession has grown up with and is comfortable navigating the Internet.

However, we might expect that many pro se plaintiffs will have difficulty taking advantage of increases in the availability of information. As Sunstein notes, “[d]isclosure strategies may . . . have disproportionately little effect on people who are undereducated, elderly, or poor.” Sunstein, *supra* note 108, at 628. This Note’s claims are therefore limited to plaintiffs represented by attorneys, who are, as a group, more likely to be proficient at gathering and filtering information. For an argument against applying *Twombly* and *Iqbal* to pro se plaintiffs, see generally Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. (forthcoming 2010) (on file with the *New York University Law Review*).

¹¹² *See* Sunstein, *supra* note 108, at 619–24 (collecting examples); *see also* William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1701 (1999) (assessing various justifications for laws “requiring insurance organizations and health care providers to disclose information to the public”).

¹¹³ As Richard Epstein notes in his discussion of *Twombly*, “in many regulated industries, such as securities or telecommunications, all sorts of regulatory proceedings [exist] that can sniff out signs of antitrust violations.” Epstein, *supra* note 9, at 93.

Environmental law contains a number of disclosure requirements beneficial to plaintiffs. “Right to know” laws require public disclosures concerning the use of chemicals and pollutants that affect the cleanliness of air and water. For example, the Emergency Planning and Community Right to Know Act of 1986¹¹⁴ requires companies using or making certain chemicals “to file annual pollution discharge reports and requires the EPA to make those reports accessible to the public in an Internet database.”¹¹⁵ Similar “right to know” provisions exist in the Clean Air Act¹¹⁶ and the Safe Drinking Water Act.¹¹⁷ Federal law also requires the disclosure of known lead hazards during real estate transactions.¹¹⁸

Public health disclosure requirements can likewise benefit plaintiffs. Pursuant to the FDA Modernization Act of 1997, the National Institutes of Health maintains a website containing the results of over 90,000 clinical trials sponsored by the government and private industry.¹¹⁹ In 2007, following highly publicized revelations that pharmaceutical companies had withheld the results of unfavorable clinical trials,¹²⁰ Congress imposed stricter disclosure requirements for trials of drugs and devices subject to FDA regulation.¹²¹ The statute also gives the FDA greater authority to require pharmaceutical manufac-

¹¹⁴ 42 U.S.C. § 11023 (2006).

¹¹⁵ Stephen M. Johnson, *Junking the “Junk Science” Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 46 (2006). The same statute permits plaintiffs to bring suit when regulated entities fail to meet their disclosure obligations. 42 U.S.C. § 11046(a)(1) (2006).

¹¹⁶ Johnson, *supra* note 115, at 46 & n.27 (noting that 1990 amendments to Clean Air Act require facilities storing or handling hazardous substances to prepare and make public risk management plans (citing 42 U.S.C. § 7412(r)(1) (2000); 40 C.F.R. § 68.165 (2000))).

¹¹⁷ *Id.* at 46 & n.28 (noting that 1996 amendments to Safe Drinking Water Act “require drinking water suppliers to notify consumers within 24 hours of certain violations of the law” and to distribute to consumers annual reports describing “the source and quality of their drinking water, the health and environmental effects of contaminants in their drinking water, and the compliance history of the drinking water supplier” (citing 42 U.S.C. § 300g-3(c) (2000))).

¹¹⁸ See Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1018, 106 Stat. 3897, 3910–11 (codified at 48 U.S.C. § 4852d (2006)).

¹¹⁹ Pub. L. No. 105-115, § 113, 111 Stat. 2293, 2311 (1997) (codified at 42 U.S.C. § 282(j) (2006)) (directing National Institutes of Health to establish clinical trial “data bank”); *About ClinicalTrials.gov*, CLINICALTRIALS.GOV, <http://clinicaltrials.gov/ct2/info/about> (last visited Oct. 21, 2010).

¹²⁰ See, e.g., Barry Meier, *Medicine’s Data Gap: Selective Disclosure; Two Studies, Two Results, and a Debate Over a Drug*, N.Y. TIMES, June 3, 2004, at C1 (discussing controversy over SmithKline Beecham’s decision not to publicize negative results of study of antidepressant Paxil).

¹²¹ Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, § 801, 121 Stat. 823, 904–22 (to be codified at 42 U.S.C. § 282).

turers to undertake new clinical trials of drugs that have already been approved for sale to the public.¹²²

Federal securities laws similarly require the disclosure of significant amounts of information that may be useful to plaintiffs. The Securities Act of 1933 and the Securities Exchange Act of 1934 both require extensive information disclosures regarding securities, including the registration of securities and the filing of annual and quarterly reports.¹²³ These requirements provide a wealth of information to investors who believe they may have been defrauded.¹²⁴ One helpful disclosure requirement mandates that trading activity by company managers be disclosed to the market.¹²⁵ When pleading securities fraud claims, plaintiffs often point to abnormal insider trading activity gleaned from such disclosures in order to show scienter.¹²⁶ Plaintiffs' pleadings also frequently rely on the fact that a company has issued an accounting restatement, which is required to correct a

¹²² *Id.* § 901, 121 Stat. at 922 (to be codified at 21 U.S.C. § 355(o)).

¹²³ *See* Securities Act, 15 U.S.C. §§ 77f–77h, 77j (2006) (requiring, among other things, registration of securities publicly offered by companies and issuance of prospectuses in connection with public offerings); Securities Exchange Act, 15 U.S.C. §§ 78l(a), 78m(a)(2) (2006) (requiring, among other things, registration of securities listed and traded on exchange and filing of annual and quarterly forms with SEC).

¹²⁴ Although securities fraud claims are subject to the more stringent pleading standards enacted in the Private Securities Litigation Reform Act of 1995 (PSLRA), securities law nonetheless provides instructive examples of how disclosure requirements can help plaintiffs overcome factual pleading standards. The PSLRA requires that a plaintiff's complaint identify "each statement 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." 15 U.S.C. § 78u-4(b)(1) (2006). For allegations of scienter, plaintiffs must, "with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2); *see also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) (requiring inference of fraudulent scienter to be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference"). Of course, due to the greater stringency of the PSLRA pleading standards, there is a heightened risk that information asymmetries will block meritorious securities claims. For an argument that the PSLRA screens out nonnuisance claims, particularly claims lacking hard evidence of fraud or unusual insider trading, see Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 37 (2009) ("PSLRA has had a screening effect; a substantial percentage of suits that would have resulted in a nonnuisance settlement prior to the PSLRA would not have been filed after Congress adopted the PSLRA.").

¹²⁵ *See id.* § 78p (requiring directors and officers of company to file statement with SEC disclosing sales and purchases of company's securities).

¹²⁶ *See* Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J.L. ECON. & ORG. 627, 635 (2006) ("To establish intent, plaintiffs' lawyers frequently point to stock sales by executives and directors, arguing that these insiders knowingly perpetrated fraud to inflate stock prices and profit from selling their company stock holdings.").

material misstatement and thus is considered strong evidence that a material misstatement has been made.¹²⁷ Looking forward, the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act contains numerous disclosure provisions that may benefit plaintiffs in both securities cases and other types of actions.¹²⁸

Disclosure statutes also regulate the conduct of public actors. In recent decades, Congress has passed a number of information disclosure statutes designed to enhance oversight of government officials, including open meetings laws and campaign finance disclosure requirements.¹²⁹ From the perspective of offsetting information asymmetries, the most notable information disclosure laws are the Freedom of Information Act (FOIA) and its state counterparts.¹³⁰

¹²⁷ See Stephen J. Choi & A.C. Pritchard, *The Supreme Court's Impact on Securities Class Actions: An Empirical Assessment of* Tellabs 13 (Univ. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 09-016, N.Y.U. Sch. of Law Law & Econ. Research Paper Series, Paper No. 09-34, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457085 (“The presence of . . . a restatement indicates a higher likelihood of wrongdoing and thus a stronger case for the plaintiffs.”); Johnson et al., *supra* note 125, at 633–34 (“Some of the strongest evidence to satisfy [the material misstatement or omission] requirement available to plaintiffs’ lawyers is a violation of generally accepted accounting principles (GAAP) that results in an earnings restatement, which is required only when earnings have been materially misstated.”). Restatements can also provide support for an inference of scienter, although courts have generally been unwilling to find that the existence of restatements, without more, establishes an inference of scienter. See, e.g., *Ezra Charitable Trust v. Tyco Int’l, Ltd.*, 466 F.3d 1, 13 (1st Cir. 2006) (holding that existence of restatement “does not raise a significant inference of scienter”). However, where GAAP violations are particularly large in dollar terms, the existence of a restatement may be sufficient to establish scienter. See, e.g., *In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 637 (E.D. Va. 2000) (“[T]he alleged GAAP violations and the subsequent restatements are of such a great magnitude . . . as to compel an inference that fraud or recklessness was afoot.”).

¹²⁸ Pub. L. No. 111-203, § 115, 124 Stat. 1376, 1403–06 (2010). For example, the Act permits the newly created Bureau of Consumer Financial Protection to prescribe rules to ensure that the features of financial products are “fully, accurately, and effectively disclosed to consumers” *Id.* § 1032(a). In addition, the Act grants consumers the right to request information concerning the financial products they obtain, *id.* § 1033(a), and provides for disclosure of information concerning executive compensation, *id.* § 953, asset-backed securities, *id.* § 942, and residential mortgages, *id.* §§ 1419–20.

¹²⁹ See Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (codified at 5 U.S.C. § 552b (2006)) (requiring, absent presence of statutorily specified exception, that “every portion of every meeting of an agency shall be open to public observation”); Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 100–06 (2010) (providing overview leading types of campaign finance disclosure laws).

¹³⁰ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007). Originally enacted in 1966, FOIA creates a court-enforceable right for any member of the public to access federal agency records upon request. *Id.* For a guide to state freedom of information laws, see *State FOI Laws*, FREEDOM OF INFO. CENTER, <http://www.nfoic.org/state-foi-laws> (last visited Oct. 21, 2010).

While FOIA contains a number of exemptions that permit agencies to withhold information under specific circumstances,¹³¹ and the processing of FOIA requests is often slow,¹³² FOIA nonetheless makes a striking amount of information available that previously would have remained inaccessible.¹³³ Information obtained through FOIA can support a variety of claims, including those characterized by serious information asymmetries. For example, FOIA has been used to uncover information concerning unsafe products, environmental pollution, the misuse of government funds,¹³⁴ and the abuse and torture of War on Terror detainees in U.S. custody.¹³⁵

¹³¹ See 5 U.S.C. 552(b) (2006) (listing exemptions). One exemption incorporates into FOIA various civil discovery privileges, such as the attorney-client, attorney work-product, and deliberative process privileges. See *id.* § 552(b)(5) (exempting intra-agency memoranda); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (holding that exemption 5 exempts from disclosure documents privileged in civil litigation). The other exemptions extend to a variety of records that a plaintiff might be able to obtain in discovery, including records concerning secret national security matters, records outlining agency personnel rules, records containing trade secrets and confidential financial information, personnel and medical files, records prepared for law enforcement purposes, and records prepared in the course of the regulation of financial institutions. 5 U.S.C. § 552(b)(1)–(4), (6)–(8) (2006).

¹³² See PETE WEITZEL, *SUNSHINE IN GOV'T INITIATIVE, FEWER REQUESTS, FEWER RESPONSES, MORE DENIALS 2* (2009), available at <http://www.sunshineingovernment.org/stats/highlights.pdf> (“[A]gencies continue to miss the statutory response deadline in a majority of cases . . .”).

¹³³ Each year, federal agencies process several hundred thousand FOIA requests. See *Costs Rise as Work Force Declines, Backlog Soars*, *SUNSHINE IN GOV'T INITIATIVE*, <http://www.sunshineingovernment.org/stats/costs98-08.pdf> (last visited Oct. 21, 2010) (tracking number of FOIA requests processed annually from 1998 to 2008); see also U.S. DEP'T OF JUSTICE, *FREEDOM OF INFORMATION ACT ANNUAL REPORT: FISCAL YEAR 2009*, pt. V.B.1 (2009), available at http://www.justice.gov/oip/annual_report/2009/sec5.pdf (indicating 21,793 requests were fully granted and 7339 were partially granted or partially denied by Department of Justice during 2009 fiscal year). Agencies also disclose increasing amounts of information online. See *supra* notes 96–97 and accompanying text; see also Barack Obama, Memorandum of Jan. 21, 2009, 74 Fed. Reg. 4683 (Jan. 21, 2009) (urging agencies to “take affirmative steps to make information public” and to “use modern technology to inform citizens about what is known and done by their Government”).

¹³⁴ See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660–61 (1984) (explaining that consumer group used FOIA “to report on unleaded gasoline additives, hazardous denture cleaners, dangerous home car repair ramps, and other unsafe products”); *id.* at 660 (describing FOIA request which uncovered that “[t]ests of drinking water near uranium mines in western New Mexico disclosed high levels of radioactivity and toxic wastes”); *id.* at 661 (providing examples of misuse of government funds uncovered through FOIA).

¹³⁵ See *Accountability for Torture: Documents Released Under FOIA*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/accountability/released.html> (last visited Oct. 29, 2010) (providing links to numerous documents concerning abuse and torture released in response to ACLU FOIA requests). Of course, actions seeking relief for such abuses may still be blocked by other doctrines, such as the state secrets privilege. See Beth George,

Disclosures required by federal spending programs can also help plaintiffs. Title IX plaintiffs can take advantage of two disclosure requirements imposed upon universities participating in federal financial aid programs. First, plaintiffs can draw upon reports regarding campus security policies to help show deliberate indifference to sexual harassment or assault.¹³⁶ Second, Title IX plaintiffs who have been denied an equal chance to participate in athletic activities can look to federally-mandated reports on athletic participation rates.¹³⁷ Disclosures tied to federal spending can also benefit other types of plaintiffs. For example, reports created as a condition of receiving federal funds for the support of children in foster care can help support impact suits seeking systemic reform of state foster care agencies.¹³⁸

2. *Laws Facilitating Information Disclosure*

A variety of legal protections that facilitate the unearthing of secret information have also come into being since notice pleading was created in 1938. Changing First Amendment doctrines have provided heightened protections for the disclosure of confidential information¹³⁹ and against libel actions.¹⁴⁰ Congress has also facilitated information disclosure on the Internet by providing operators of web-

Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1697–98 (2009).

¹³⁶ See 20 U.S.C. § 1092(f) (2006) (requiring universities participating in federal student financial aid programs to prepare annual reports concerning campus security policies and crime statistics); cf. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (holding that universities “may be liable for their deliberate indifference to known acts of peer sexual harassment”).

¹³⁷ Federal law requires financial aid program participants to disclose racial and gender data for their athletic programs. 20 U.S.C. § 1092(g) (2006). The U.S. Department of Education makes this information available online. See *Equity in Athletics Data Analysis Cutting Tool*, U.S. DEP’T OF EDUC., <http://ope.ed.gov/athletics/> (last visited Oct. 28, 2010) (“This database consists of athletics data that are submitted annually as required by the Equity in Athletics Disclosure Act.”).

¹³⁸ State foster care agencies receiving federal funding must cooperate with the U.S. Department of Health and Human Services in the creation of Child and Family Services Reviews (CFSRs) concerning their compliance with federal child welfare standards. See 45 C.F.R. § 1355.31–37 (2009) (outlining requirements for CFSRs); see also *Complaint ¶ 98*, *Dwayne B. v. Granholm*, No. 06-13548 (E.D. Mich. filed Aug. 8, 2006) (citing CFSR review findings as evidence that defendants “have long been on notice of the severe failures in the child welfare system they operate”).

¹³⁹ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (rejecting government’s request for injunction to prevent publication of Pentagon Papers); see also *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (prohibiting punishment for publication of lawfully obtained truthful information about matter of public significance “absent a need to further a state interest of the highest order” (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979))).

¹⁴⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing “actual malice” standard for defamation actions brought by public officials).

sites with broad immunity for defamatory statements made by third parties.¹⁴¹

The legal development with the most direct impact on plaintiffs is the rise of whistleblower protection statutes. Like other informational regulation strategies, whistleblower statutes have become increasingly popular since the 1960s and 1970s.¹⁴² In their most common form, whistleblower statutes protect employees who reveal information concerning illegal conduct at their workplace by providing them with a cause of action for wrongful termination or other retaliation by their employers.¹⁴³ Numerous federal statutes have adopted anti-retaliation provisions in recent decades.¹⁴⁴ During this same period, many state courts have recognized a wrongful termination tort against employers who fire whistleblowers.¹⁴⁵ In addition to providing for civil penalties, since 2002 federal law has also imposed stiff criminal penalties on those who retaliate against whistleblowers.¹⁴⁶

Although there is considerable variation in state and federal whistleblower protections, whistleblower statutes tend to provide protection in the areas of law that present significant information asymmetry concerns, including civil rights and securities fraud.¹⁴⁷ As Judge Posner has noted, anti-retaliation provisions can help plaintiffs' law-

¹⁴¹ See Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2006); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (noting that Congress created immunity for third party statements made on websites to protect "freedom of speech in the new and burgeoning Internet medium").

¹⁴² See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 99 (2000) (noting proliferation of such statutes in recent decades).

¹⁴³ Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 4 (2007) ("The primary means by which state and federal law has sought to protect whistleblowers is by providing them with a cause of action against their employer if they suffer retaliation for blowing the whistle.").

¹⁴⁴ See, e.g., Asbestos School Hazard Detection & Control Act of 1980, 20 U.S.C. § 3608 (2006) (prohibiting retaliation against whistleblowers); Energy Reorganization Act of 1978 § 10, 42 U.S.C. § 5851(a) (2006) (same). The Sarbanes-Oxley Act of 2002 also prohibits retaliation against whistleblowers who pass information to federal law enforcement, to Congress, or to their supervisors. 18 U.S.C. § 1514A (2006).

¹⁴⁵ See Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 442 (2009) (discussing modification of traditional common law at-will employment doctrines to make room for wrongful termination tort).

¹⁴⁶ Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1513 (2006) (making retaliation against employee who provides to law enforcement "truthful information relating to the commission or possible commission of any Federal offense" crime punishable by up to ten years in prison).

¹⁴⁷ See Tippet, *supra* note 143, at 3, 5 n.23 (summarizing state and federal variations, describing whistleblower protections in Sarbanes-Oxley Act, and noting that majority of states provide protection for disclosures concerning civil rights violations).

yers in securities fraud cases obtain inside information from employees.¹⁴⁸ Whistleblower statutes also indirectly benefit plaintiffs by encouraging the disclosure of information to law enforcement officials, who may then bring enforcement actions that lead to the public disclosure of inside information.¹⁴⁹

Thus, although whistleblower statutes are limited by their reliance on voluntary disclosure by employees,¹⁵⁰ such statutes have nonetheless had a positive effect in encouraging employees to reveal illegal conduct at their workplaces.¹⁵¹ With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,¹⁵² whistleblower protections are likely to provide even greater benefits to potential plaintiffs. Following the example of the False Claims Act,¹⁵³ the Dodd-Frank Act requires the SEC to pay an award to whistleblowers who provide information that leads to a judicial or administrative action in which the SEC recovers more than one million dollars.¹⁵⁴

¹⁴⁸ See *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 711 (7th Cir. 2008) (suggesting that plaintiffs in securities actions can plead complaints “without assuring confidentiality to the employees whom they interview, . . . [because] it is unlawful for an employer to retaliate against an employee who blows the whistle on a securities fraud”).

¹⁴⁹ See *infra* notes 155–56 and accompanying text (noting that government enforcement actions may provide valuable information to private plaintiffs).

¹⁵⁰ See Tippet, *supra* note 143, at 2 (noting that fears of social ostracism limit willingness of many employees to become whistleblowers).

¹⁵¹ For examples of cases providing protection against wrongful retaliation, see *Tabb v. District of Columbia*, 605 F. Supp. 2d 89, 97–98 (D.D.C. 2009) (refusing to grant defendant’s summary judgment motion in action where plaintiff alleged she was wrongfully retaliated for revealing that children in foster care were sleeping in agency offices because of lack of foster homes) and *Collins v. Stolzenberg*, 970 F. Supp. 303, 304–05 (S.D.N.Y. 1997) (noting jury verdict in favor of and awarding attorneys fees to plaintiff who was fired for exposing “hazardous health and safety conditions” at hospital at which she worked).

¹⁵² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁵³ The False Claims Act permits private citizens to bring what are known as *qui tam* actions on behalf of the United States government for acts of fraud against the government. Successful plaintiffs are entitled to receive a portion of the government’s recovery. 31 U.S.C. § 3730(d) (2006).

¹⁵⁴ Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841–49 (2010). The Dodd-Frank Act also contains a similar provision providing financial incentives to disclose information to the Commodity Futures Trading Commission. *Id.* § 748, 124 Stat. at 1739–46.

It should be noted that unlike the False Claims Act, which allows private plaintiffs to maintain their actions unless the government opts to assume control of the case, see 31 U.S.C. § 3730(b)–(c), the Dodd-Frank Act requires the government to prosecute all suits in which whistleblowers are compensated. Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841–49 (2010) (permitting compensation only for “any judicial or administrative action brought by the Commission”). In addition to providing financial incentives, the Dodd-Frank Act also provides anti-retaliation protections for whistleblowers who disclose information to the SEC. Pub. L. No. 111-203, § 922(h), 124 Stat. 1376, 1845–87.

3. *Government Investigations*

Government agencies can also ferret out secret information helpful to plaintiffs. Investigations by the SEC into securities fraud or by the Justice Department into civil rights abuses or antitrust violations can uncover information supporting parallel civil litigation.¹⁵⁵ To the extent that government investigations are more aggressive than they were in the past, more information is likely to reach the public.¹⁵⁶

Government investigations into wrongdoing obviously predate the notice pleading standard developed in 1938. Nonetheless, recent decades have seen the institutionalization of new forms of investigative bodies in the executive branch. One striking example of this development has already been touched on above: Since 1978, the federal government has seen the rapid expansion of Offices of the Inspector General (OIGs).¹⁵⁷ Today, there are sixty-nine statutory Inspector General offices in the federal government.¹⁵⁸ While the central mission of such offices is to detect and prevent fraud by federal employees and contractors,¹⁵⁹ they also often use their extensive

¹⁵⁵ See HAROLD S. BLOOMENTHAL, *SARBANES-OXLEY ACT IN PERSPECTIVE* § 11:1 (2009) (“The Act may also assist plaintiffs’ counsel to the extent additional information may become available as the result of increased enforcement activity by the Commission, the [Public Company Accounting Oversight Board], and the Department of Justice resulting from the adoption of the Act.”).

¹⁵⁶ Assessing relative levels of these kinds of government enforcement over time is beyond the scope of this Note. Enforcement levels depend on a variety of factors, including the priorities of the political party currently in power.

¹⁵⁷ See *supra* note 87 and accompanying text (noting establishment of OIGs by Congress). Similar investigative bodies have also arisen at the state and local level. For example, since its founding in 1944, the jurisdiction of the New York City Commission on Human Rights has steadily expanded and now includes the power to investigate discrimination in employment, housing, and public accommodations, as well as bias-related harassment. *History of the Human Rights Commission*, N.Y.C. COMM’N ON HUM. RTS., <http://www.nyc.gov/html/cchr/html/history.html> (last visited Oct. 21, 2010). Recent decades have also seen the expansion of nonprofit advocacy organizations that prepare research reports that can inform litigation by the organization and by those with similar goals. See, e.g., *Publications*, BRENNAN CENTER FOR JUST., <http://www.brennancenter.org/content/resources/publications/> (last visited Oct. 21, 2010) (linking to dozens of research reports concerning, among other topics, voting rights, campaign finance law, and criminal justice reform).

¹⁵⁸ COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, <http://www.ignet.gov/> (last visited Oct. 21, 2010).

¹⁵⁹ *Id.* (noting that OIGs have mandate to “detect and prevent fraud, waste, abuse, and violations of law . . . in the operations of the Federal Government”).

investigative powers¹⁶⁰ to uncover other kinds of illegalities that might otherwise remain hidden.¹⁶¹

The Department of Justice's OIG, in particular, has issued a number of reports that have unearthed useful information concerning civil rights violations. For example, the same report that supported some of the claims in *Iqbal* was used to support a finding of plausibility in *Al-Kidd v. Ashcroft*, a suit challenging the use of the material witness statute to preemptively detain those suspected terrorist activities.¹⁶² A DOJ OIG report also played a significant role in *Doe v. Mukasey*, a lawsuit challenging the FBI's post-September 11th use of National Security Letters.¹⁶³

¹⁶⁰ See Inspector General Act, 5 U.S.C. app. 3 § 6(a) (2006) (granting OIGs access to "all" agency records, power to subpoena "the production of all information" necessary in performance of their investigations, and power to conduct interviews of agency staff under oath).

¹⁶¹ Of course, not all new agencies armed with investigative powers are effective. See, e.g., Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1580 (1999) (noting criticisms of effectiveness of Equal Employment Opportunity Commission).

¹⁶² 580 F.3d 949 (9th Cir. 2009), cert. granted, No. 10-98, 2010 WL 2812283 (U.S. Oct. 18, 2010). Al-Kidd sued former Attorney General John Ashcroft, alleging that he created a policy under which the federal material witness statute was illegally used to preemptively detain him. *Id.* at 951-52. Al-Kidd's complaint cited DOJ memoranda quoted in the OIG Report "which describe the use of 'aggressive arrest and detention tactics in the war on terror,' . . . including the use of material witness warrants to confine aliens suspected of terrorist involvement . . ." *Id.* at 954-55 (quoting OIG REPORT, *supra* note 77, at 12). In finding Al-Kidd's claim that Ashcroft misused the material witness statute plausible, the Ninth Circuit relied, in part, on the complaint's "extensive citations to the OIG Report" to support an inference that Ashcroft was aware of and purposefully supported the "abuses occurring under the material witness statute." *Id.* at 976.

¹⁶³ National Security Letters (NSLs) are a type of administrative subpoena used to obtain information from telephone companies and Internet service providers concerning the activities of their subscribers. *Doe v. Mukasey*, 549 F.3d 861, 864 (2d Cir. 2008). Recipients of NSLs were not permitted to disclose the fact that the FBI sought information from them to anyone other than their attorney or those to whom disclosure was necessary in order to comply with the NSL. 18 U.S.C. § 2709(a), (c) (2006). The report's criticisms of the FBI's misuse of NSLs clearly resonated with the district court, see *Doe v. Gonzales*, 500 F. Supp. 2d 379, 395 (S.D.N.Y. 2007) ("[T]he NSL . . . poses profound concerns to our society, not the least of which, as reported by the OIG, is the potential for abuse in its employment."), *aff'd in part & rev'd in part*, *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and the Second Circuit, see 549 F.3d at 880 (citing report's conclusion that FBI had violated NSL statute as support for its holding that government must seek judicial review when it imposes nondisclosure requirement for NSLs), both of which found portions of the NSL statute unconstitutional. See also OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 124 (2007), available at <http://www.justice.gov/oig/special/s0703b/final.pdf> ("[T]he FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies."). Although the *Doe* case began before *Twombly* and was at the summary judgment stage when the report was released, see 500 F. Supp. 2d at 396 (explaining government's motion to dismiss must be considered motion for summary judg-

Although not every OIG report concerning civil rights violations will provide enough information to survive plausibility review,¹⁶⁴ and many civil rights violations will never yield an OIG report due to limited resources, these examples suggest that internal government investigations can help some plaintiffs—particularly those subject to the most egregious civil rights violations—obtain enough information to survive plausibility review.

Thus, informational regulation statutes, which largely arose after notice pleading was adopted in 1938, have had a significant impact on the amount of information available to plaintiffs. Their effect has been amplified by the rise of the Internet. Together, these changes call for courts to embrace an expanded notion of what constitutes a “reasonable” pre-suit investigation¹⁶⁵—and make it fair to expect that such investigations will yield more information than they once did. These technological and regulatory trends, which show no signs of abating,¹⁶⁶ also suggest that debates about pleading standards must recognize that civil discovery is but one of several methods by which plaintiffs access information, and that the alternatives to discovery are becoming increasingly valuable.

Of course, these developments will not permit all meritorious claims to survive plausibility review. Disclosure statutes contain exemptions that inevitably leave much information out of reach, government investigators have limited resources, and whistleblower statutes still provide only a patchwork of protections. As the next Part will discuss, certain types of cases are particularly vulnerable to dis-

ment), the weight these courts gave to the report suggests that the plaintiff could have relied on it to survive plausibility review had the case been filed after *Twombly*.

¹⁶⁴ A disturbing example is *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). In rejecting Arar’s *Bivens* claim arising from the conditions of his confinement in the United States (prior to his extraordinary rendition to Syria), the majority found that Arar failed to adequately specify the actions taken by the individual defendants and therefore failed *Iqbal*’s plausibility standard. *Id.* at 569. However, as Judge Parker noted in dissent, an OIG Report on Arar’s rendition “confirmed the broad contours of Arar’s mistreatment” and supported his allegations that high level officials were personally involved in approving the conditions under which he was held. *Id.* at 618.

¹⁶⁵ See FED. R. CIV. P. 11(b) (requiring attorney submitting any pleading to certify that she conducted “an inquiry reasonable under the circumstances”). Of course, it would be a mistake to demand that a potential plaintiff search every nook and cranny of the public domain for information about the defendant. See Miller, *supra* note 26, at 44 (“It is much too facile to say that the pleader should be obliged to explore the entire public domain.”). Nonetheless, as technological and regulatory developments make it easier to cheaply and quickly search for information, it seems fair to expect plaintiffs to engage in more thorough investigations prior to suit.

¹⁶⁶ See *supra* notes 128, 152–54 (noting that recently passed Dodd-Frank Act contains both mandatory disclosure and whistleblower provisions).

missal under the plausibility standard, creating the need for the adoption of a mechanism to mitigate the standard's effects.

III

REFORMING PLAUSIBILITY PLEADING: THE NEED FOR A SAFETY VALVE

A. *The Disparate Impact of Advances in Information Access*

The plausibility standard is transsubstantive, applying to all civil actions brought under Rule 8.¹⁶⁷ Information asymmetries, by contrast, are not similar across substantive areas of law,¹⁶⁸ and neither are the benefits of the technological and regulatory developments discussed in Part II. Recent advances in information access thus have a disparate impact on different types of claims, providing extensive information to some plaintiffs—thereby enabling them to meet the plausibility standard—while providing little helpful information to others.

As noted in Part I.C, the claims that are likely to fare the worst under a plausibility standard are those concerning behavior occurring in private or those involving the defendant's mental state. Those engaged in illegal conduct obviously have strong incentives to keep their activities secret, and plaintiffs may thus encounter difficulty obtaining probative evidence prior to discovery in such cases.

The growth of informational regulation may also prove to be of little benefit where the defendant is not subject to extensive information disclosure requirements or other regulation. Thus, antitrust plaintiffs suing firms in lightly regulated industries with strong incentives to collude may, unlike the *Twombly* plaintiffs,¹⁶⁹ possess claims that are likely to be meritorious. Yet they will often be unable to obtain access to persuasive evidence of such collusion.¹⁷⁰ Similarly, mandatory disclosures may provide relatively little information concerning small and closely held companies.¹⁷¹

¹⁶⁷ In this Part, I leave aside the contested doctrinal issue of the "contextual" nature of the plausibility standard. For greater discussion of the debates this issue has triggered, see *supra* notes 31, 38–39 and accompanying text.

¹⁶⁸ See *supra* Part I.C.

¹⁶⁹ See *supra* note 20 (noting that *Twombly* defendants had strong incentives to engage in parallel course of conduct even without colluding).

¹⁷⁰ For antitrust cases, one solution to the information problem is to look, as the *Twombly* Court did, to the economic incentives of the defendants within the structure of their industry. See generally Epstein, *supra* note 9 (analyzing economic incentives of telecommunications firms in *Twombly*).

¹⁷¹ In addition, such defendants are likely to have less of a presence on the Internet, and their current and former employees may be more difficult to identify and less willing to share information, rendering the Internet less useful as an investigative tool.

As discussed in Part II, the rise of informational regulation and the Internet are likely to render certain civil rights, environmental, product liability, and securities claims easier to bring successfully under a plausibility standard. At the same time, however, some claims in these areas of law are still characterized by significant information asymmetries.¹⁷²

Civil rights litigation illustrates how advances in informational regulation help some plaintiffs but not others. Mandatory disclosure rules targeted at particular types of institutions, such as universities, or public agencies, such as foster care systems, can provide certain types of civil rights plaintiffs with a wealth of information relevant to the merits of their claims.¹⁷³ FOIA disclosures can likewise reveal little-known government policies and provide detail on their operation. However, information disclosures under FOIA may be inadequate to reveal the existence of unofficial policies that are never reduced to writing or are subject to a FOIA exemption,¹⁷⁴ forcing plaintiffs to rely on government investigations (which may not occur) or engage in relatively costly interview investigations (which may prove fruitless).¹⁷⁵

Similarly, although some plaintiffs will have access to the kind of extensive public record available in *Iqbal*,¹⁷⁶ civil rights plaintiffs alleging discriminatory intent will often have difficulty obtaining information bearing on their claims prior to discovery. As Suzette Malveaux has noted, identifying “evidence of discrimination is difficult because of the often subtle and institutional forms it takes.”¹⁷⁷ When defendants avoid articulating discriminatory animus overtly—

¹⁷² For an argument that the plausibility standard may block certain kinds of public interest environmental lawsuits, see S. Scott Foster, *Breaking the Transsubstantive Pleading Mold: Public Interest Environmental Litigation After Ashcroft v. Iqbal*, 35 WM. & MARY ENVTL. L. & POL’Y REV. (forthcoming) (manuscript at 14–17), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564294.

¹⁷³ See *supra* notes 136–38 and accompanying text.

¹⁷⁴ See Wasserman, *supra* note 43, at 180 (noting that “FOIA might be useful as a pre-filing discovery tool for uncovering formal and official agency policies and memoranda,” but not for allegations concerning “a *sub rosa* policy—a widely accepted custom not reduced to writing or formal rule”); see also *supra* note 131 (discussing FOIA exemptions).

¹⁷⁵ In addition, there are some civil rights claims—such as excessive force claims—for which a plaintiff’s own firsthand experience should provide an adequate basis of knowledge to survive plausibility review. See, e.g., *Poff v. Gempler*, No. 09-CV-1165, 2010 WL 1172607, at *2–3 (E.D. Wis. Mar. 23, 2010) (finding prisoner’s allegations of use of excessive force and failure to protect by correctional officers adequate under *Iqbal*).

¹⁷⁶ See *supra* notes 76–83 and accompanying text.

¹⁷⁷ Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 89 (2010).

as most, by now, have learned to do¹⁷⁸—legal and illegal conduct will increasingly look the same to external observers, undercutting the effectiveness of the plausibility standard.¹⁷⁹

Employment discrimination cases illustrate this difficulty. Victims of employment discrimination are unlikely to have access to information directly suggesting that they were discriminated against.¹⁸⁰ As Scott Dodson has noted, information asymmetries are particularly acute for hiring discrimination, because employers are rarely obliged to give a reason for their decisions.¹⁸¹ A victim of discrimination in hiring is unlikely to benefit from the information advances described in Part II. Because of the lack of mandatory information disclosure rules targeted at discrimination by private employers, there is likely to be little information of value in the public domain. Such plaintiffs may have to rely on voluntary whistleblowers (who may or may not enjoy retaliation protections¹⁸²) or hope for a government investigation by a body like the Equal Employment Opportunity Commission.¹⁸³

The foregoing discussion attempts to highlight major areas of law where the developments described in Part II are likely to provide relatively little benefit. At the same time, I would like to offer a caveat. The benefits of the information revolution do not necessarily map neatly onto areas of law and types of claims. The availability of information may vary greatly depending on the type of industry involved in

¹⁷⁸ See, e.g., *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (“[W]hile discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind.”).

¹⁷⁹ See Malveaux, *supra* note 177, at 89 (“[B]ecause complaints alleging intentional discrimination will often set forth factual allegations consistent with illegal and legal conduct, such complaints are more vulnerable to dismissal under the plausibility standard.”); see also *Aman*, 85 F.3d at 1082 (“Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior.”).

¹⁸⁰ See Dodson, *supra* note 60, at 67–68 (discussing employment discrimination plaintiffs’ lack of access to information).

¹⁸¹ *Id.* By contrast, plaintiffs bringing hostile work environment claims should presumably be able to describe the hostile and unwelcome conduct they witnessed firsthand in their workplace. It thus seems not unreasonable to apply the plausibility standard to such claims. *But see* Seiner, *supra* note 69, at 1051 (describing hostile workplace claims and arguing that “plaintiff[s] should not be required to plead the specific acts that comprise the hostile work environment, as this would go well beyond the scope of notice pleading”).

¹⁸² See *supra* note 147 and accompanying text (noting state variations in whistleblower protections).

¹⁸³ By contrast, victims of discrimination in the public sector can access FOIA and its state counterparts, and federal employees have the benefit of federal whistleblower protections. See 5 U.S.C. § 2302(b)(8) (2006) (protecting federal employees against retaliation for disclosing legal violations, gross mismanagement, or dangers to public safety unless such disclosures are specifically prohibited by law).

a case. Geography may also introduce variance: States have different freedom of information laws,¹⁸⁴ and government enforcement and investigations can be more or less aggressive depending on the jurisdiction and the priorities of elected officials. Thus, the availability of information is highly contextual. The next section proposes the adoption of a procedural fix to plausibility pleading that would be sensitive to the amount of information available to the plaintiff in a given case.

B. Reforming Plausibility Pleading by Modifying Rule 56(f)

The information asymmetry criticisms discussed in Part I.C are correct that the plausibility standard is likely to have a disparate impact on certain kinds of cases. Where those criticisms fall short is in ignoring the changes in access to information discussed in Part II. These changes suggest that notice pleading, which creates the risk of nuisance settlements discussed in Part I.B, is no longer the ideal mechanism for screening pleadings.¹⁸⁵

What is needed, instead, is a mechanism that is sensitive to the amount of information available to plaintiffs. The plausibility standard can be an effective screening mechanism for cases like *Iqbal* and *Twombly*, where there is a significant amount of information available to plaintiffs prior to discovery. However, it may overscreen in cases where plaintiffs have relatively little access to information concerning the defendant's conduct or intentions. This Note therefore proposes reforming pleading standards by adopting a "safety valve" mechanism designed to examine how much information was available to the plaintiff.

Specifically, now that the motion to dismiss increasingly resembles the summary judgment motion,¹⁸⁶ rulemakers should adopt a mechanism analogous to Rule 56(f) for use in response to motions to dismiss for failure to state a plausible claim. Rule 56(f) permits a party facing summary judgment to argue that it has not had an adequate chance to conduct discovery.¹⁸⁷ A party making a 56(f) motion must

¹⁸⁴ See FREEDOM OF INFOR. CENTER, *supra* note 130 (providing guide to state freedom of information laws).

¹⁸⁵ *Contra supra* note 7 (noting recent proposals in Congress to revert to notice pleading).

¹⁸⁶ See *supra* note 9.

¹⁸⁷ See FED. R. CIV. P. 56(f) ("If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order."). The Rule seeks to "safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006).

“‘set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist’ and ‘indicate how the emergent facts . . . will influence the outcome of the pending summary judgment motion.’”¹⁸⁸

The modified version of Rule 56(f) proposed by this Note would focus on the extent of a plaintiff’s access to information concerning the defendant’s conduct. It would require the plaintiff to specify, in an affidavit, the sources of information she was able to consult when framing her complaint. To succeed, the affidavit must show that the plaintiff was unable, after conducting a diligent search for information bearing on the defendant’s liability, to access such information because it rested in the hands of the defendant.

To provide a concrete example, a plaintiff in a civil rights suit facing a motion to dismiss could attest that her attempts to obtain information through FOIA were denied on the basis of FOIA exemptions or that the government failed to process her FOIA request in a timely manner. The plaintiff might also attest that the likely witnesses to the conduct were either impossible to identify or refused to respond to requests to be interviewed. Likewise, a plaintiff suing a private company for employment discrimination could allege that the company is subject to few mandatory disclosure requirements, that its employees refused interview requests because they lacked whistleblower protections, and so forth.

The defendant would then have an opportunity to respond. The defendant could point to sources of public information about itself that the plaintiff failed to consult, or to sources that support contrary inferences to those made in the complaint.¹⁸⁹ The defendant could also argue that the plaintiff failed to conduct a reasonable search. It might argue, for example, that a FOIA request likely would have revealed relevant information, that the plaintiff made an inadequate attempt to talk to witnesses, or that a prior government investigation failed to turn up incriminating evidence.

There are several points to note about this proposal to adopt a modified version of Rule 56(f). First, succeeding on the motion will be easiest for plaintiffs where information asymmetries are most severe. Indeed, one might expect that in certain types of cases—such as pri-

¹⁸⁸ C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 44 (1st Cir. 1998) (quoting Resolution Trust Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994)).

¹⁸⁹ Professor Epstein has likewise suggested that courts should allow defendants to point to information in the public realm to counter the inferences drawn in a plaintiff’s complaint. *See supra* notes 72–74 and accompanying text. Where this proposal differs from his is in its focus on assessing whether there is enough information in the public realm to justify dismissing a case prior to discovery.

vate employment discrimination suits—the granting of such motions would be routine, as long as the plaintiff demonstrates that she has conducted a diligent search for information. Conversely, succeeding on the motion will be most difficult in cases like *Twombly* and *Iqbal*, where the plaintiff already has access to extensive information concerning the defendant’s conduct.¹⁹⁰ Second, this proposal is compatible with some other proposed reforms of the plausibility standard, such as suggestions that plaintiffs be granted the opportunity to engage in very limited discovery at the start of a lawsuit.¹⁹¹ Third, this proposal could be tailored to those cases where nuisance settlements are most likely: suits with disparities in discovery costs.¹⁹²

CONCLUSION

While critics of *Twombly* and *Iqbal* have rightly noted that certain types of cases will be disproportionately impacted by the plausibility standard because of information asymmetries, they have ignored how much information plaintiffs *do* have access to because of modern technological advances and the rise of informational regulation. These developments can be expected to offset some of the effects of the plausibility standard, thus enabling courts to screen many cases prior to discovery with reasonable accuracy. Where information asymmetries remain severe, creating a risk that meritorious cases will be screened out, the solution is not to go back to notice pleading, but rather to assess the extent to which the plaintiff had access to information concerning the defendant’s conduct. This Note proposes adopting a mechanism analogous to Rule 56(f) to perform this function. With this safety valve in place, the plausibility standard will be better able to screen out meritless cases without also dismissing meritorious ones.

¹⁹⁰ In *Twombly*, for example, the defendants—major telecommunications companies—were heavily regulated entities subject to the authority of the FCC. See *Verizon Comms. Inc. v. Law Offices of Trinko LLP*, 540 U.S. 398, 411–16 (2004) (discussing regulation of telecommunications industry). Likewise, the plaintiff in *Iqbal* had access to the extensive research presented in the OIG Report. See *supra* notes 76–87 and accompanying text.

¹⁹¹ For such a proposal, see generally Dodson, *supra* note 60. A modified version of Rule 56(f) could be combined with Dodson’s proposal as follows: Where a plaintiff succeeds on her modified Rule 56(f) motion by demonstrating that she has had limited access to information about the defendant’s conduct, she could be granted limited discovery to attempt to amplify the allegations in her complaint. If this effort is successful, she would proceed to full discovery. The addition of a mechanism like Rule 56(f) to Dodson’s proposal could help address one of the risks he acknowledges about limited initial discovery: that it “may open the doors to fishing expeditions that would otherwise be deterred by the investment of filing a formal lawsuit.” *Id.* at 40–41.

¹⁹² See *supra* notes 53–57. Where such disparities are not present, and the risk of nuisance litigation is thus less serious, there should be a presumption that the plaintiff should succeed on her modified Rule 56(f) motion.