PLEADINGS, PROOF, AND JUDGMENT: A UNIFIED THEORY OF CIVIL LITIGATION

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Abstract: The U.S. Supreme Court's recent pleadings decisions—*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*—have injected considerable chaos into the system of civil litigation. The decisions impose an uncertain "plausibility" requirement and appear to endorse an increased power of district courts to dismiss complaints—a power that may be employed in an unprincipled, normatively problematic manner. The current pleading issues resemble similar issues that have arisen with summary judgment and judgment as a matter of law. This Article argues that there has been a significant failure at both the doctrinal and theoretical levels to relate these three procedural devices to the evidentiary proof process in particular and the system of civil litigation as a whole. It introduces a theory of "procedural accuracy" that explains, clarifies, and provides content to the standards for each device, explains how the theory fits, and explains important aspects of the doctrine for each device. Finally, and most importantly, I defend the theory and its standards as normatively desirable in light of procedural values that underlie the system of civil litigation as a whole.

INTRODUCTION

The U.S. Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* in 2007[1] and *Ashcroft v. Iqbal* in 2009[2] have injected chaos into the world of civil litigation.[3] The decisions reinterpret the pleading re-

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[1] 550 U.S. 544, 570 (2007).

[2] 129 S. Ct. 1937, 1954 (2009).

[3] *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 560 (noting that the "most obvious and immediate consequence" of the new pleading standard has been "enormous confusion and transaction costs as a result of uncertainty about the requirements it imposes and its scope of application"); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that *Bell Atlantic* and *Iqbal* "have destabilized the entire system of civil litigation"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010)

quirements for civil cases and when complaints may be dismissed for failure to state a claim.[4] They also invest district courts with the power to dismiss complaints prior to discovery based on a failure to be "plausible."[5] The Court's glosses on a few words in Federal Rule of Civil Procedure 8(a)(2),[6] and the uncertainty created by "plausible," reach to the foundation of the system of civil litigation, the goals it is meant to achieve, and the values it reflects.[7] The disarray created by these decisions has generated a flurry of scholarship from the world of civil procedure that attempts to explain, interpret, tame, criticize, or justify the decisions in light of the deeper goals and values of the system of civil litigation.[8] These discussions revolve around the fundamental tension between the related concerns for access to courts, participation values, jury rights, and the risk of eliminating meritorious lawsuits, on one hand, and the related concerns for efficiency, *in terrorem* settlements, and meritless lawsuits, on the other hand.[9]

(stating that *Bell Atlantic* and *Iqbal* "have the potential to upend civil litigation as we know it").

[4] *Iqbal*, 129 S. Ct. at 1954; *Bell Atlantic*, 550 U.S. at 570.

[5] *Iqbal*, 129 S. Ct. at 1949; *Bell Atlantic*, 550 U.S. at 557.

[6] *See Iqbal*, 129 S. Ct. at 1950; *Bell Atlantic*, 550 U.S. at 554–55. The Court was interpreting the requirement that complaints must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

[7] *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, 1225 (2008) ("[T]here has been considerable divergence in the normative accounts advanced in the scholarly literature regarding judicial regulatory power over pleading norms.").

[8] *See generally* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849 (2010) [hereinafter Bone, *Plausibility*]; Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873 (2009) [hereinafter Bone, *Pleading Rules*]; Clermont & Yeazell, *supra* note 3; Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. Pa. L. Rev. 441 (2010); Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. & Pol'y 61 (2007); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 Sup. Ct. Econ. Rev. 39 (2008); Douglas G. Smith, *The* Twombly *Revolution?*, 36 Pepp. L. Rev. 1063 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008) [hereinafter Spencer, *Plausibility*]; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1 (2009) [hereinafter Spencer, *Understanding*]; Steinman, *supra* note 3; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 Lewis & Clark L. Rev. 15 (2010) [hereinafter Thomas, *New Summary*]; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 Minn. L. Rev. 1851 (2008) [hereinafter Thomas, *Motion*]; *see also generally* Symposium, *Pondering* Iqbal, 14 Lewis & Clark L. Rev. 1, 1–309 (2010).

[9] The academic discussions have revolved around what Professor Lonny S. Hoffman characterizes as a "traditionalist" position (that *Bell Atlantic* invests too much power in lower courts) and a "reformist" position (that welcomes increased judicial scrutiny over complaints). Hoffman, *supra* note 7, at 1225–26. Much of the academic commentary has been critical of *Iqbal* and *Bell Atlantic*, but for defenses of those decisions, see Bone, *Plead-*

The chaos and controversies surrounding the pleading requirements resemble similar debates about increased use of summary judgment and judgments as a matter of law. As in the pleading context, the confusion with these other two procedural devices derives from the Court's adoption of a vague standard based on a few words in the Federal Rules of Civil Procedure.[10] For both devices, the standard is whether a "reasonable jury" could find for the nonmoving party.[11] And, as with pleadings, the controversy revolves around the relationship between this standard and the power it gives courts to terminate lawsuits in light of the underlying tension between values outlined above.[12] Several scholars have already noted similarities between both the "plausibility" pleading standard and the "reasonable jury" standard and the tension between values they each invoke.[13] The connections are much deeper, however.

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ing Rules, *supra* note 8, at 879–90; Epstein, *supra* note 8, at 98–99; Hylton, *supra* note 8, at 59–62. *But see* Bone, *Plausibility*, *supra* note 8, at 867–83 (criticizing *Iqbal*).

[10] With summary judgment, the relevant language is whether "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2). With judgment as a matter of law, the relevant language is whether "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party." *Id.* 50(a)(1). Rule 50 provides for motions for judgment as a matter of law at trial, see *id.* 50(a), and for renewed motions after a jury's verdict, see *id.* 50(b). The first motion corresponds to a motion for a "directed verdict," and the second corresponds to a motion for "judgment notwithstanding the verdict." *See id.* 50(a)–(b). When I use "judgment as a matter of law," I am referring to both the motion at trial and the renewed motion after a verdict.

[11] The Court has noted that the "reasonable jury" standards in these contexts "mirror" each other. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149–50 (2000); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1134 (2003) ("[I]t is imperative that the Supreme Court provide some clarity rather than leaving the matter entirely to the general anarchy of trial court discretion."); Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 769 (2009) (noting that there is "little guidance on how courts are to decide whether a reasonable jury could find for the plaintiff").

[12] *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 542 (2007); Miller, *supra* note 11, at 1132–34; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1332 (2005); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 715 (2007); Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 96–101 (2006); *see also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 158–60 (2007) (arguing summary judgment is unconstitutional on historical grounds).

[13] *See generally* Epstein, *supra* note 8; Hylton, *supra* note 8; Thomas, *New Summary*, *supra* note 8.

This Article proposes a theory of civil litigation that explains, and gives content to, these connections.[14] Missing from the discussion regarding each of these three procedural devices—pleadings, summary judgment, and judgment as a matter of law—is a satisfactory explanation of how each relates to the civil litigation system in general and to the evidentiary proof process in particular.[15] Understanding how the procedural devices relate to the proof process is integral to understanding the standards for each procedural device in light of the underlying normative goals and procedural values of civil litigation. This Article explains how the content for applying each device necessarily depends on the evidentiary rules that structure the process of legal proof. This explanation has both descriptive and normative value:[16] descriptively, it elucidates the functions of the procedural devices; normatively, it provides criteria for justifying and criticizing possible standards and their applications.[17]

Based on these considerations, this Article develops a theory of "procedural accuracy" to explain and justify standards for each device. The main thesis is that each device functions to align litigation outcomes with the results that are dictated by the evidentiary proof rules.[18] According to this theory, the proof rules implement important policy choices regarding the values underlying the system of civil litigation as a whole, including, most importantly, choices about how best to achieve accurate outcomes and allocate the risk of adjudicative error.[19] Although the procedural devices may either facilitate or frustrate the outcomes that would arise under the proof rules, this Article argues that they ought to facilitate these outcomes. They may do so by aligning

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[14] *See infra* notes 132–157 and accompanying text.

[15] Many of the discussions do invoke procedural norms and values underlying civil litigation, but the failure to sufficiently connect these discussions with legal proof makes them unsatisfactory both descriptively and normatively. For an article that does discuss the recent pleading decisions from an evidentiary perspective, see Ronald J. Allen & Alan E. Guy, *Conley* as a Special Case of *Twombly* and *Iqbal*: Exploring the Intersection of Evidence and Procedure and the Nature of Rules (2010) (unpublished manuscript), *available at* http://works.bepress.com/ronald_allen/3/.

[16] *See infra* notes 132–157 and accompanying text.

[17] *See infra* notes 158–202 and accompanying text. On the need for normative theories of civil procedure, see Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 Okla. L. Rev. 319, 319 (2008).

[18] *See infra* notes 158–202 and accompanying text.

[19] *See infra* notes 158–202 and accompanying text.

outcomes with the proof rules;[20] those that do are justified, but those that do not are normatively problematic.[21]

The Article proceeds in three main Parts.[22] Part I outlines the doctrine for pleadings, summary judgment, and judgment as a matter of law, and it explains the problematic standards for each.[23] It explains that the problems with all three trace to a failure to adequately relate the "plausibility" and "reasonable jury" standards to the proof process and to the normative considerations underlying this process.

Part II presents, in three Sections, the theory of procedural accuracy.[24] First, it discusses the procedural values underlying civil litigation and defines some important terms.[25] Most importantly, it defines what is meant by "procedural accuracy" (which is contrasted with "material accuracy")—roughly, an outcome is procedurally accurate if it accords with the legal proof rules, and an outcome is materially accurate if it accords with what actually happened in the events giving rise to the lawsuit.[26] Next, this Part articulates the theory of procedural accuracy and how it relates to the procedural values of civil litigation.[27] As mentioned above, the main thesis concerns the alignment function of each procedural device.[28] Finally, this Part explores the content of the theory in light of the requirements of the proof rules and articulates standards for each device.[29] It adopts an explanatory conception of the proof rules and provides standards in explanatory terms.[30] For example, the Article argues that a complaint is "plausible" if it presents an explanation of the relevant events that a reasonable jury may be able to accept as the best available explanation.[31] Likewise, the Article argues

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[20] The alignment function must also account for important differences regarding where in the litigation process the procedural devices arise.

[21] *See infra* notes 203–228 and accompanying text.

[22] *See infra* notes 36–131, 132–228, 229–377 and accompanying text.

[23] *See infra* notes 36–131 and accompanying text.

[24] *See infra* notes 132–228 and accompanying text.

[25] *See infra* notes 132–157 and accompanying text.

[26] *See infra* notes 132–157 and accompanying text. Neither procedural nor material accuracy implies the other: a decision may be procedurally accurate and materially erroneous, and vice versa. The distinction is further explored in Part II. *See infra* notes 132–228 and accompanying text.

[27] *See infra* notes 158–202 and accompanying text.

[28] *See infra* notes 158–202 and accompanying text.

[29] *See infra* notes 203–228 and accompanying text.

[30] *See infra* notes 203–228 and accompanying text. For discussions of this conception, see generally Michael S. Pardo, *Second-Order Proof Rules*, 61 Fla. L. Rev. 1083 (2009); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 Law & Phil. 223 (2008).

[31] *See infra* notes 220–224 and accompanying text.

that a "reasonable jury" could find for a nonmoving plaintiff for purposes of summary judgment or judgment as a matter of law if they could find plaintiff's explanation of the events and the evidence to be better than explanations favoring the defendant.[32]

Part III integrates the analysis from Part II into current doctrine for pleadings, summary judgment, and judgment as a matter of law.[33] It explains how the analysis fits with the doctrine, and it extends and further illustrates the analysis by applying the theory to a number of hypothetical examples.[34] Finally, Part III considers and responds to a number of potential counterarguments.[35]

I. Three Procedural Devices in Search of a Theory

Three procedural devices in civil cases cause considerable confusion: (1) pleading standards;[36] (2) summary judgment;[37] and (3) judgment as a matter of law.[38] The problems with these devices include both unclear doctrine, as a descriptive matter, and the lack of a satisfactory normative theory that would justify not only the devices in general but also the particular doctrine and its applications. This Part briefly discusses and explains the problematic standards for these devices.[39]

A. *Pleadings*

The new pleading regime arising from the U.S. Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* in 2007,[40] and *Ashcroft v.*

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[32] *See infra* notes 223–225 and accompanying text. This assumes the plaintiff has the burden of proof under the preponderance rule. *See infra* notes 223–225 and accompanying text.

[33] *See infra* notes 229–377 and accompanying text.

[34] *See infra* notes 229–377 and accompanying text. The examples include negligence, employment discrimination, antitrust, and municipal liability. *See infra* notes 229–275 and accompanying text. Employment discrimination is explored in some detail in Part III.C. *See infra* notes 369–377 and accompanying text. On problems with the reasonable jury standard in this context, see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 438–46 (2004); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577, 592 (2001).

[35] *See infra* notes 229–377 and accompanying text. Many of the counterarguments considered are suggested by other scholarship and thus situate this analysis within the academic literature.

[36] Fed. R. Civ. P. 8, 12(b)(6).

[37] *Id.* 56.

[38] *Id.* 50.

[39] *See infra* notes 40–131 and accompanying text.

[40] 550 U.S. 544 (2007).

Iqbal in 2009,[41] introduced considerable uncertainty into civil litigation.[42] Part of the confusion stems from the fact that the recent changes did not come from an amendment to the Federal Rules of Civil Procedure. Rather, the changes stem from a re-interpretation of the familiar requirement under Rule 8 that a plaintiff's complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[43] Failure to satisfy this standard authorizes a court to grant a defendant's motion to dismiss the complaint for "failure to state a claim on which relief can be granted."[44] The *Bell Atlantic* and *Iqbal* decisions are most significant for interpreting Rule 8 to require that a complaint's "statement of the claim" be "plausible."[45]

Bell Atlantic involved a class action antitrust claim. The plaintiffs, a class of subscribers to local telephone and internet services, filed suit against four companies that together "allegedly control[led] 90 percent or more of the market for local telephone service in the 48 contiguous States."[46] The complaint alleged that the defendants conspired to restrain trade by: (1) inhibiting growth of competing upstart companies in their respective areas, and (2) refraining from competing against one another in the areas each controlled.[47] The success of the claim depended on whether the companies had agreed to either of these al-

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[41] 129 S. Ct. 1937 (2009).

[42] *See* Burbank, *supra* note 3, at 560.

[43] FED. R. CIV. P. 8(a)(2). When alleging fraud or mistake, however, parties must "state with particularity the circumstances constituting fraud or mistake." *Id.* 9(b). Rule 8's minimal requirements express the "liberal ethos" of the federal rules in preferring decisions on the merits after full discovery. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40 (1986). Part of the confusion also stems from the exceptional factual circumstances of both *Bell Atlantic* and *Iqbal*—a massive class action (even by class action standards), and a lawsuit against top law enforcement officials regarding their conduct after the attacks on September 11, 2001. *See Iqbal*, 129 S. Ct. at 1942; *Bell Atlantic*, 550 U.S. at 548. Despite these circumstances, the opinions interpret Rule 8's general requirements. *See Iqbal*, 129 S. Ct. at 1949; *Bell Atlantic*, 550 U.S. at 557.

[44] FED. R. CIV. P. 12(b)(6). One way in which a complaint would clearly fail to state a claim is if the allegations described specific conduct that would not give rise to legal liability. *See id.*

[45] *Iqbal*, 129 S. Ct. at 1949; *Bell Atlantic*, 550 U.S. at 570.

[46] *Bell Atlantic*, 550 U.S. at 550 n.1. The companies—BellSouth, Qwest, SBC, and Verizon—are referred to in the opinion as "Incumbent Local Exchange Carriers" ("ILECs"). *Id.* at 550 & n.1.

[47] *Id.* at 550.

leged restraints on trade.[48] If the companies had engaged in the conduct independently, then there was no liability.[49]

The Court noted that Rule 8 requires plaintiffs to provide "fair notice" of the claim and the "grounds" upon which it rests.[50] In construing Rule 8's requirements, the Court rejected the much-cited standard, articulated in its 1957 case *Conley v. Gibson,* that a complaint should be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[51] Rather, the Court explained, the complaint must do more than merely be consistent with liability; it must "raise a right to relief above the speculative level."[52] The Court provided several glosses on what is required to satisfy this above-the-speculative-level requirement: (1) "enough factual matter (taken as true) to suggest that an agreement was made";[53] (2) "plausible grounds to infer an agreement";[54] (3) "allegations plausibly suggesting (not merely consistent with) agreement";[55] (4) allegations must cross the line "between possibility and plausibility"[56] and (5) the line between "factually neutral" and "factually suggestive";[57] (6) "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement";[58] and (7) the standard does "not impose a probability requirement at the pleading stage."[59]

Under the "plausibility" standard, the complaint failed because it alleged only parallel conduct along with a conclusory allegation regarding conspiracy.[60] This was insufficient for two reasons. First, although

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[48] *Id.* at 548–49. The plaintiff's claim, under section 1 of the Sherman Act, required proving that the defendants entered into a "contract, combination . . . , or conspiracy in restraint of trade." *Id.* at 548 (citing 15 U.S.C. § 1 (2000)).

[49] *See id.* at 548–49.

[50] *Id.* at 555.

[51] *Id.* at 561–63 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

[52] *Bell Atlantic*, 550 U.S. at 555.

[53] *Id.* at 556.

[54] *Id.*

[55] *Id.* at 557.

[56] *Id.*

[57] *Id.* at 557 n.5.

[58] *Bell Atlantic*, 550 U.S. at 556.

[59] *Id.*; *see also id.* ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the facts alleged] is improbable . . . .").

[60] *Id.* at 564–65.

> [T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations.

parallel conduct is consistent with a conspiracy, it does not *suggest* a conspiracy because it is rational for the companies to engage in this behavior, even absent an agreement.[61] Moreover, the complaint failed to provide additional details suggesting that an agreement had been made.[62]

Given the Court's varying articulations of the standard it established in *Bell Atlantic,* it is no surprise that, after the decision, judges and scholars were left scratching their heads.[63] Beyond negative glosses—for example, that plausibility is not a probability standard, and that it is something more than mere consistency with liability—the content of "plausibility" was left obscure.

The decision in *Iqbal* did not help matters. In *Iqbal*, a former prison inmate who was detained following the attacks of September 11, 2001 filed suit against John Ashcroft, the former U.S. Attorney General, Robert Mueller, the FBI Director, and other government officials.[64] The plaintiff, a Pakistani Muslim, alleged that, pursuant to a policy designed by the defendants, he was subjected to unconstitutional prison conditions because of his race, religion, or national origin.[65] The defendants asserted qualified immunity at the district court level and moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).[66]

The complaint alleged a constitutional violation based on treatment of the plaintiff while he was detained in a maximum security prison unit.[67] According to the complaint: (1) the FBI, at the direction of Mueller, arrested thousands of Muslim Arab men following September 11; (2) Ashcroft and Mueller approved the policy of keeping the detainees in maximum security conditions; (3) Ashcroft and Mueller decided to subject the detainees to these conditions because of their race, religion, or national origin; (4) Ashcroft was the "principal archi-

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Id. at 564 (citations and footnotes omitted).

[61] *Id.* at 567–68 ("[H]ere we have an obvious alternative explanation . . . a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.").

[62] *Id.* at 549 (characterizing the complaint as "absent some factual context suggesting agreement").

[63] *See* Burbank, *supra* note 3, at 537.

[64] *Iqbal*, 129 S. Ct. at 1942. The opinion involved a motion to dismiss only with regard to Ashcroft and Mueller. *See id.*

[65] *Id.*

[66] *See id.*

[67] *Id.* at 1942–43; *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (determining that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable searches and seizures was violated by federal agents).

tect" of the policy; and (5) Mueller was "instrumental" in adopting and implementing the policy.[68]

In reviewing the requirements of Rule 8, the Court explained that the plaintiff needed to plead a plausible claim that the defendants acted with a discriminatory purpose.[69] According to the Court, a claim is "plausible" when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[70] The Court further articulated the plausibility standard by noting two principles underlying the decision in *Bell Atlantic*.[71] First, courts need not accept "legal conclusions" as true.[72] Second, putting aside legal conclusions, the complaint must contain enough factual detail to present a plausible—and not merely a possible—claim.[73]

Applying these principles, the Court concluded that the allegations were not plausible.[74] The Court treated the allegation that the defendants acted because of race, religion, or national origin as a legal conclusion not entitled to be taken as true.[75] Although the allegations were "consistent" with the defendants acting because of race, religion, or national origin, they were not plausible "given more likely explanations."[76] An "obvious alternative" explanation for the treatment plaintiff experienced was the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential con-

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[68] *Iqbal*, 129 S. Ct. at 1943–44.

[69] *Id.* at 1948 ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.").

[70] *Id.* at 1949.

[71] *See id.* at 1949–50.

[72] *See id.* This "principle" is likely to create confusion going forward because there is no principled analytical distinction between "legal conclusions" and "facts." *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1769, 1769–70 (2003) (explaining that generality, the judge-jury relationship, and conventions regarding the meanings of "law" and "fact" each inform whether adjudicative questions will be labeled "law" or "fact"). In the pleading context, the difference depends primarily on the generality of the allegations—at some point allegations become too general to present a plausible account of what happened, but they do not cease to be "factual." *Bell Atlantic* and *Iqbal* illustrate this nicely. Whether the defendants in *Bell Atlantic* agreed to engage in a conspiracy plainly is a question of fact, as is whether the defendants in *Iqbal* decided to house suspects in maximum security conditions because of race, religion, or national origin. Actions and states of mind are quintessential factual issues. *See* Bone, *Plausibility*, *supra* note 8, at 859–62 (noting that "legal conclusions" under *Iqbal* depend on their generality).

[73] *See Iqbal*, 129 S. Ct. at 1950.

[74] *See id.* at 1950–51.

[75] *See id.* at 1951.

[76] *Id.*

nections to those who committed terrorist acts."[77] Nor did the allegations "show, or even intimate," that the detainees were held in maximum security conditions for discriminatory reasons; rather, they suggested only 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."[78]

The primary problems with the new pleading requirements involve uncertainty created by the plausibility standard and, relatedly, the lack of guidance to, and constraint on, courts in dismissing complaints.[79] Also problematic is how the plausibility standard ought to relate to theoretical issues regarding pleadings in particular and the nature of civil litigation in general. A number of recent articles explore some of these issues, arriving at different points along a continuum that balances access to courts, on one hand, and a concern for screening meritless or weak cases early in the process, on the other.[80] Although these discussions are illuminating, they do not integrate the normative considerations with important theoretical issues involving civil litigation and the nature of legal proof.[81]

B. *Summary Judgment*

Much like difficulties with "plausibility" in the pleading context, the summary judgment standard of whether a "reasonable jury" could find for the nonmoving party raises difficult interpretive and normative issues.[82] Similar to problems in the pleading context, the summary judgment standard fails to provide adequate guidance and constraint with

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[77] *Id.*

[78] *Id.* at 1952. This alternative explanation was similar to the alternative explanation of independent "parallel conduct" in *Bell Atlantic*, in which the complaint did not "plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Id.* at 1950.

[79] *See generally* Burbank, *supra* note 3; A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 How. L.J. 99 (2008) (discussing examples of stronger pleading standards in civil rights cases).

[80] *See generally* Bone, *Plausibility*, *supra* note 8; Bone, *Pleading Rules*, *supra* note 8; Clermont & Yeazell, *supra* note 3; Dodson, *supra* note 8; Epstein, *supra* note 8; Hylton, *supra* note 8; Smith, *supra* note 8; Spencer, *Plausibility*, *supra* note 8; Spencer, *Understanding*, *supra* note 8; Steinman, *supra* note 3; Thomas, *New Summary*, *supra* note 8; Thomas, *Motion*, *supra* note 8; Symposium, *Pondering* Iqbal, *supra* note 8.

[81] *See supra* note 8 and accompanying text.

[82] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–52 (1986).

regard to judicial decision making.[83] Moreover, as with pleadings, the standard is a judicial creation based upon a non-obvious interpretation of other language in a Federal Rule of Civil Procedure.[84] The "reasonable jury" test implements Rule 56's language that a party may move for summary judgment when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law."[85] Finally, as with pleadings, the debates focus on balancing access to courts (in this context, a trial by jury) with the efficiency of screening meritless or weak lawsuits prior to trial.[86] The primary difference, however, is that summary judgment, unlike the typical motion to dismiss, takes place after discovery[87] and is decided based on evidence in the record.[88]

Three U.S. Supreme Court decisions decided in 1986 provide the framework for summary judgment: *Anderson v. Liberty Lobby, Inc.*;[89] *Celotex Corp. v. Catrett*;[90] and *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*[91] Each is briefly summarized below.[92]

In *Anderson,* the Court construed Rule 56's requirement that there be a "genuine" issue for trial as dependent on whether "a reasonable jury could return a verdict for the nonmoving party."[93] In explaining how courts should engage in this "reasonable jury could" inquiry, the Court provided a few guiding principles. First, the determination depends on the burden of proof and the applicable "evidentiary standard of proof" at trial.[94] Thus, in theory, whether a reasonable jury could return a verdict for a party may depend on whether the party would have the burden of persuasion at trial and whether the standard of proof would be by a "preponderance of the evidence" or by "clear and

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[83] *See* Miller, *supra* note 11, at 1133–34 (noting problems with the standard for summary judgment); Thomas, *supra* note 11, at 784 (same).

[84] Fed. R. Civ. P. 56(c)(2).

[85] *Id.*

[86] *See supra* note 12 and accompanying text.

[87] *See* Fed. R. Civ. P. 56(f)(2). A party may seek a continuance to obtain further discovery before responding to a motion for summary judgment. *See id.*

[88] *Id.* 56(c)(2). Summary judgment may be decided based on "the pleadings, the discovery and disclosure materials on file, and any affidavits." *Id.*

[89] 477 U.S. 242.

[90] 477 U.S. 317 (1986).

[91] 475 U.S. 574 (1986).

[92] *See infra* notes 93–121 and accompanying text; *see also* Steinman, *supra* note 3, at 1357 (listing these cases as the three most cited cases of all time by federal courts).

[93] 477 U.S. at 248.

[94] *Id.* at 252.

convincing evidence."[95] Second, courts must draw "legitimate" and "justifiable" inferences in favor of the nonmoving party.[96] Finally, courts must not weigh the credibility of witnesses.[97]

The *Celotex* decision further developed the Court's analysis in *Anderson* by rejecting the requirement that moving parties who would not have the burden of proof at trial (typically defendants) must offer evidence tending to disprove the nonmoving party's allegations.[98] The case involved a wrongful death claim based on exposure to asbestos manufactured or distributed by fifteen defendants.[99] Celotex, one of the defendants, moved for summary judgment on the ground that the plaintiff did not have sufficient evidence showing that plaintiff's deceased husband was exposed to Celotex asbestos.[100] The district court granted summary judgment but the appellate court reversed, reasoning that Celotex had failed to offer evidence negating plaintiff's claim that her deceased husband had been exposed to Celotex asbestos.[101] The Supreme Court reversed and remanded.[102]

Consistent with *Anderson,* the Court explained that the crucial determination is whether a reasonable jury could find for the plaintiff by a preponderance of the evidence.[103] Because Celotex would not have the burden of proof at trial, it had no affirmative obligation when moving for summary judgment to offer evidence tending to disprove or negate

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[95] *See id.* In other words, an inference from the evidence that may be reasonable under the preponderance standard may not be reasonable under the clear and convincing standard. *See id.*

[96] *Id.* at 255.

> [T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id.

[97] *Id.* ("Credibility determinations . . . are jury functions . . . ."). *Anderson* involved a libel suit brought by a not-for-profit "citizens' lobby" against a magazine, its publisher, and other executives for a series of articles allegedly portraying the plaintiffs as "neo-Nazi, anti-Semitic, racist, and Fascist." *Id.* at 245. On remand, the district court concluded that a reasonable jury could find some of the plaintiffs' allegations to be true by clear and convincing evidence, but some it could not. Liberty Lobby, Inc. v. Anderson, Civ. A. No. 81-2240, 1991 WL 186998, at *9 (D.D.C. May 1, 1991).

[98] *Celotex*, 477 U.S. at 323–25.

[99] *Id.* at 319.

[100] *Id.* at 319–20.

[101] *Id.* at 319.

[102] *Id.*

[103] *See id.* at 322–23.

the plaintiff's allegations.[104] Rather, Celotex could meet its initial obligation by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[105] Once the defendant makes this showing, the nonmoving party must respond with sufficient evidence from which a reasonable jury could find in its favor.[106] On remand, the appellate court concluded that the plaintiff did in fact have sufficient evidence to withstand the motion.[107]

Finally, in *Matsushita*, the Court discussed the summary judgment standard for nonmoving parties in the context of antitrust law.[108] Whereas *Bell Atlantic* discussed when allegations are plausible enough to suggest conspiracy at the motion to dismiss stage, *Matsushita* discussed when a plaintiff has sufficient evidence at the summary judgment stage.[109]

Matsushita involved an alleged conspiracy by Japanese television manufacturers to fix prices.[110] The defendants had allegedly conspired to raise prices in Japan and lower prices in the United States.[111] Defendants moved for summary judgment, and the Court concluded that evidence of price differences in Japan and the United States was, without more, insufficient to survive summary judgment.[112] First, the Court

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[104] *Celotex*, 477 U.S. at 323. Confusion regarding the defendant's burden can be traced to the Court's 1970 decision in *Adickes v. S.H. Kress & Co.*, in which the Court appeared to place such a requirement on the defendant. *See* 398 U.S. 144, 157 (1970).

[105] *Celotex*, 477 U.S. at 325. Exactly what is required to "show" or "point out" an absence of evidence is still a subject of debate. Miller, *supra* note 11, at 1063–64 ("One source of confusion is the precise standard by which the moving party discharges its burden of showing the absence of a genuine issue of material fact."); Redish, *supra* note 12, at 1344 (lamenting that the Court "failed to explain exactly what 'pointing out' actually means"); Steinman, *supra* note 12, at 122–26 (discussing this problem). *See generally* David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

[106] *Celotex*, 477 U.S. at 327. The Court noted that the nonmoving party's evidence need not necessarily be in a form admissible at trial. *Id.* at 324.

[107] *See* Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 40 (D.C. Cir. 1987). The plaintiff's evidence consisted of three documents: a transcript of her husband's deposition, a letter from her husband's former employer, and a letter from an insurance company. *Celotex*, 477 U.S. at 320.

[108] *See* 475 U.S. at 585–87.

[109] *See id.* The Court also phrased the general standard as "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party . . . ." *Id.* at 587. The use of "rational" in this context appears to be synonymous with "reasonable." *See infra* note 113 and accompanying text. In other contexts, however, the two terms may mean different things. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 48–54 (1993).

[110] 475 U.S. at 577–78.

[111] *Id.*

[112] *Id.* at 578, 598.

noted that the conspiracy as described by the plaintiff was "implausible" because it "[made] no economic sense."[113] Second, and similar to *Bell Atlantic*, the Court noted that defendants' conduct, as alleged by the plaintiff, was equally consistent with—and indeed maybe more likely the result of—independent conduct by the defendants (which would not give rise to liability).[114] Therefore, without any other evidence of conspiracy, the Court concluded that no reasonable jury could find for the plaintiff.[115] The Court remanded to determine whether "other evidence [was] sufficiently unambiguous to permit a rational trier of fact to find that [defendants] conspired to price predatorily."[116]

In a subsequent decision, the Court clarified the relationship between *Matsushita*'s holding and the summary judgment standard in antitrust cases: "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor . . . ."[117] More generally, *Matsushita* clarified that a nonmoving party cannot survive summary judgment merely by producing some favorable evidence when a reasonable jury could not find in its favor based on that evidence.[118]

Although the three cases provide a framework for assessing motions for summary judgment, they fail to provide criteria to guide and constrain judicial decision making on the crucial issue: whether a particular inference from the evidence in the record could be made by a "reasonable" jury.[119] Without such criteria, the familiar guidelines—to

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[113] *Id.* at 587. The conclusions were based on the lack of an apparent economic motive among defendants. *See id.* at 588–93.

[114] *See id.* at 587–88.

[115] *See id.* at 597.

[116] *Matsushita*, 475 U.S. at 597.

[117] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468–69 (1992) (affirming denial of summary judgment in antitrust case on issue of whether a defendant's lack of market power in the primary equipment market precludes the possibility of market power in derivative aftermarkets).

[118] *See* Redish, *supra* note 12, at 1349–50 (noting that the opinion rejected the "slight evidence" position, in which *any* evidence is sufficient to get to trial).

[119] The Supreme Court's recent decision in *Scott v. Harris* illustrates this problem. *See* 550 U.S. 372, 381–86 (2007). The majority concluded that no reasonable jury could find for the plaintiff in his civil rights claim against a police officer for running him off the road during a high-speed pursuit. *Id.* at 386. In concluding that no reasonable jury could find the officer's action unreasonable, the majority cited to a video recording from a camera on the officer's car and invited readers to see for themselves that the officer's conduct was reasonable. *Id.* at 378 n.5. Justice Stevens watched and disagreed, instead concluding that a reasonable jury *could* find the officer's conduct unreasonable. *See id.* at 389–97. No

consider the burden and standard of proof; to draw reasonable inferences in favor of the nonmoving party; and to not consider witness credibility—fail to provide a principled way of drawing this crucial distinction and instead leave it to, in Professor Arthur Miller's apt phrase, "the general anarchy of trial court discretion."[120] And, as with pleadings, applications of this unprincipled discretion face serious criticisms that courts are denying access to deserving parties for the sake of efficiency by dispensing with lawsuits perceived by some judges to be meritless, weak, or otherwise unpopular.[121]

C. *Judgment as a Matter of Law*

During trial or after a jury's verdict, a party may move for judgment as a matter of law ("JMOL") on the ground that there is insufficient evidence supporting the opposing party on one or more issues.[122] As with the summary judgment standard, the standard for JMOL generally depends on what a reasonable jury could find.[123] Absent criteria separating reasonable from unreasonable inferences, the JMOL standard likewise fails to guide and constrain judges in a meaningful and principled manner. Moreover, from a normative perspective, the fact that the motion arises at or after trial reduces some of the efficiency considerations that are invoked to justify the pleading and summary judgment standards.

The Supreme Court has explained that the JMOL and summary judgment standards "mirror" each other;[124] Federal Rule of Procedure 50(a) states that JMOL may be entered against a party when "a reasonable jury would not have a legally sufficient evidentiary basis to find for

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criteria were provided from either side for how the disagreement could be settled. *See id.* at 372–97. Moreover, there does not appear to be widespread shared intuitions about the reasonableness of the officer's conduct. *See* Dan M. Kahan et al., *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 843–48 (2009).

[120] Miller, *supra* note 11, at 1134.

[121] *See* Bronsteen, *supra* note 12, at 542 (noting that judges' own self-interest in eliminating cases "place[s] a thumb on the scale in favor of the defendant"); Redish, *supra* note 12, at 1354 (discussing the "delegitimizing impact" of aggressive use of summary judgment and arguing that the "democratic system's respect for the individual," the right to a jury, and the "political legitimacy of the adjudicatory process" require judicial restraint); Schneider, *supra* note 12, at 715 ("[G]ender cases illustrate[] the way in which current summary judgment practice permits subtle bias to go unchecked.").

[122] Fed. R. Civ. P. 50; *see supra* note 10.

[123] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

[124] *Id.*; *Anderson*, 477 U.S. at 250–51.

the party."[125] In deciding a motion for JMOL, courts determine whether, based on the evidence admitted at trial, a reasonable jury *could* find for the nonmoving party (or *must* find for the moving party).[126] The decision of what a reasonable jury could do depends on the substantive law, the burden of proof, and the decision rule.[127] Thus, as with summary judgment, what may be reasonable under the preponderance standard may be unreasonable under the clear and convincing standard. Moreover, as with summary judgment, courts must draw reasonable inferences in favor of the nonmoving party and they must not judge the credibility of witnesses.[128]

As with summary judgment, determining when evidence is sufficient for a reasonable jury to find for the nonmoving party has proven to be a notoriously difficult task for courts.[129] Supreme Court and appellate case law provide little general guidance,[130] and the JMOL standard is "difficult to elaborate upon or further define."[131]

II. The Theory of Procedural Accuracy

The "plausibility" pleading standard and the "reasonable jury" standard—in their summary judgment and JMOL manifestations—face similar doctrinal, interpretive, and normative problems.[132] This should not be surprising upon reflection. All three procedural devices func-

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[125] Fed. R. Civ. P. 50(a). Such judgments should be granted only after the non-moving party "has been fully heard" on the issue. *See id.*

[126] *See Reeves*, 530 U.S. at 150. Granting a renewed motion for JMOL thus implies that the jury's verdict was unreasonable. *See id.*

[127] *See id.*

[128] *Id.* Courts may also grant motions for a new trial under Federal Rule of Civil Procedure 50(c) when verdicts are "against the weight of the evidence," and there is disagreement about whether credibility may be considered in this determination. *See* Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. 157, 180–82 (2008).

[129] *See Reeves*, 530 U.S. at 150; *Anderson*, 477 U.S. at 250–51. A JMOL interferes with parties' constitutional right to a jury under the Seventh Amendment when there is sufficient evidence to support a contrary verdict. *See generally* Galloway v. United States, 319 U.S. 372 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931). Thus, having appropriate criteria for delineating when evidence is sufficient is a matter of constitutional importance.

[130] For example, the Court's 1943 opinion in *Galloway v. United States*—which recognized the power of courts to direct verdicts based on insufficiency of the evidence—fails to provide any general criteria for separating reasonable from unreasonable inferences. *Compare Galloway*, 319 U.S. at 387 (concluding that plaintiff's evidence was too speculative to support a verdict), *with* Lavender v. Kurn, 327 U.S 645, 653 (1946) (stating that evidence is insufficient to support a verdict "[o]nly when there is a complete absence of probative facts to support the conclusion").

[131] Miller, *supra* note 11, at 1058.

[132] *See supra* notes 40–131 and accompanying text.

tion, at least in part, to screen out cases that would otherwise be decided at trial. And, for all three devices, the Supreme Court has articulated vague standards that necessarily depend on the underlying proof process, but has not sufficiently tied these standards to underlying proof considerations.[133] As a result, chaos has ensued with each device. Moreover, attempts by scholars to remedy this chaos by offering doctrinal interpretations or normative theories based on a preferred balance between access to courts and the need to eliminate weak, costly, or otherwise undesirable lawsuits are incomplete because they likewise fail to connect the procedural devices to the deeper proof issues on which the devices depend.[134]

This Part provides a general theory that explains and justifies the standards for each device in light of the civil litigation system as a whole.[135] The central idea is that the procedural devices function to align outcomes with the requirements of legal proof.[136] This Part explicates this alignment through the concept of "procedural accuracy."[137] Before turning to the theory, this Part first discusses the procedural values underlying the theory and defines important terms.[138]

A. *Preliminary Considerations: Procedural Values and Two Types of Accuracy*

The three procedural devices—pleadings, summary judgment, and JMOL—occur as parts of a unified system of civil litigation.[139] This system serves a number of important societal functions, primarily: providing a forum for parties to resolve disputes and vindicate rights; incentives to settle disputes; and guidance and deterrence to citizens more generally. An array of procedural values underlies and animates the system, and these values provide criteria by which to evaluate or justify the system and its parts. A brief discussion of these values will help to both clarify and evaluate the theory presented below.[140]

The procedural values that underlie civil litigation include: factual accuracy, efficiency (including costs to parties, courts, and society gen-

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[133] *See supra* notes 40–131 and accompanying text.

[134] *See supra* note 8. For a notable exception exploring procedural issues in light of the underlying proof process, see Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 218–31 (1961).

[135] *See infra* notes 158–228 and accompanying text.

[136] *See infra* notes 158–228 and accompanying text.

[137] *See infra* notes 158–228 and accompanying text.

[138] *See infra* notes 139–157 and accompanying text.

[139] FED. R. CIV. P. 8, 50, 56.

[140] *See infra* notes 141–157 and accompanying text.

erally), participation, respect for substantive rights, notice, predictability, fairness (including notions of equality), and political legitimacy.[141] These values both inform the system and provide standards by which to evaluate it.

In the analysis, this Article gives central importance to *accuracy* for two reasons, one general and one specific.[142] First, in general, accuracy appears to be fundamental because the system could not achieve the other values without a sufficient degree of accuracy.[143] A system that systematically issued false judgments would: impose enormous costs on society as well as undeserved costs on losing parties; seriously diminish any value of notice and participation; create unpredictability that would frustrate the system's guidance and deterrence functions; and rather quickly come to be viewed as unfair and devoid of political legitimacy.[144]

The second, more specific reason for the focus on accuracy is that it appears to be central to the current debates regarding pleadings, summary judgment, and JMOL.[145] Those who argue for more relaxed standards and greater access to courts and juries focus on accuracy (along with participation).[146] They argue that stronger standards will risk dismissing the claims of, or rendering judgments against, otherwise deserving parties.[147] In other words, a downside to stronger standards is that they will result in more pretrial decisions against parties whose allegations are true.[148] Moreover, although the value of participation consists of more than just its contribution to accurate outcomes,[149] we certainly value it, in part, for that reason. Likewise, those who argue for

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[141] *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 594 (2001); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 237–73 (2004).

[142] *See infra* notes 143–153 and accompanying text.

[143] Some procedural rules, such as statutes of limitations, may sacrifice case accuracy in order to foster overall systemic accuracy. *See* Solum, *supra* note 141, at 248 (discussing the distinction).

[144] To put it another way, factual accuracy is a necessary but not sufficient condition for just legal judgments. *See* WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 76 (2d ed. 2006) ("Establishing the truth . . . is a necessary condition for achieving justice in adjudication; incorrect results are one form of injustice.").

[145] *See infra* notes 146–153 and accompanying text.

[146] Bone, *Plausibility*, *supra* note 8, at 878–85; Spencer, *Plausibility*, *supra* note 8, at 431–34; Steinman, *supra* note 3, at 1313; Thomas, *New Summary*, *supra* note 8, at 38–41.

[147] Bone, *Plausibility*, *supra* note 8, at 878–85; Spencer, *Plausibility*, *supra* note 8, at 431–34; Steinman, *supra* note 3, at 1313; Thomas, *New Summary*, *supra* note 8, at 38–41.

[148] Although aggressive use of these devices will often result in pro-defendant decisions, aggressive use of summary judgment and JMOL can also result in erroneous pro-plaintiff decisions.

[149] On the value of participation, see Solum, *supra* note 141, at 273–305.

stronger standards also focus on accuracy (along with efficiency).[150] They argue that stronger standards will foster efficiency by eliminating more meritless claims earlier in the litigation process.[151] The "meritless" claims are those that are false, or would not be—or are unlikely to be— proven at trial.[152] Moreover, as with participation, the value of efficiency is important, in part, because of its contribution to accuracy: a system that is more efficient at screening meritless claims will have more resources to devote to claims with merit.[153]

A caveat must be presented. Although accuracy is given central importance, the significance of other procedural values—for example, efficiency, participation, and fairness—should not be diminished. Each presents a legitimate independent criterion by which to evaluate the analysis, and the Article discusses these other values when pertinent.

Another preliminary consideration must also be addressed. This concerns an ambiguity in what is meant by "accurate" in litigation contexts. The factual allegations that underlie parties' claims may be accurate because they accord with what actually happened in the circumstances described,[154] or they may be accurate because the parties have proven them in court by satisfying the applicable evidentiary proof rules. This Article refers to the former as "material accuracy" and the latter as "procedural accuracy."[155] A simple example illustrates the difference. Suppose (1) a negligence case involving a car accident turns solely on whether the plaintiff or the defendant ran a red light, and (2)

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[150] *See* Bone, *Pleading Rules*, *supra* note 8, at 930–35 (arguing a penalty system "might be appropriate for intentional meritless filings"); Epstein, *supra* note 8, at 71; Hylton, *supra* note 8, at 45–48.

[151] *See* Bone, *Pleading Rules*, *supra* note 8, at 930–35; Epstein, *supra* note 8, at 71; Hylton, *supra* note 8, at 45–48.

[152] There is an ambiguity lurking here with "accurate." A decision could be accurate because it correctly identifies (or "corresponds" with) the events in dispute, or a decision may be accurate because it correctly identifies (or "corresponds" with) whether the claim has been proven. I return to this important distinction shortly. *See supra* note 154 and accompanying text.

[153] *See* Bone, *Pleading Rules*, *supra* note 8, at 930–35.

[154] In addition to disputes about historical facts, parties may also dispute whether current conditions exist or whether further conditions are likely to exist. Any of these determinations may be materially accurate.

[155] An error in this second sense may be considered a "probatory" error because legal fact-finders will have erred in evaluating the probative value of the evidence. *See* Fed. R. Evid. 403; *see also* Larry Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology 12, 13, 210–11 (2006) (distinguishing between material errors, probatory errors, and errors in applying criminal procedure doctrine such as the exclusionary rule); Bruce L. Hay, *Allocating the Burden of Proof*, 72 Ind. L.J. 651, 662 (1997) ("An erroneous outcome, as we have defined it, occurs when the party whom the evidence supports nonetheless loses . . . .").

the defendant did in fact run the red light. A judgment for the plaintiff is materially accurate and a judgment for the defendant is a material error, regardless of the evidence supporting either side. By contrast, a judgment for the plaintiff is procedurally accurate if the plaintiff proved the elements of her claim by a preponderance of the evidence, and this same judgment would be a procedural error if she did not prove one of more of the elements by a preponderance of the evidence,[156] regardless of what actually happened at the stoplight. Note that neither material nor procedural accuracy depends on the other—it is possible for a materially accurate judgment to be procedurally erroneous and for a procedurally accurate judgment to be materially erroneous.

The distinction between material and procedural accuracy not only clarifies an ambiguity but is fundamental to my theory.[157]

B. *The Theory of Procedural Accuracy*

The theory of procedural accuracy consists of three premises.[158] First, the law of evidence and the trial proof process function to increase the *material* accuracy of judgments and to allocate the risk of material error among the parties in a fair and socially desirable manner.[159] Second, the procedural devices of pleadings and motions to dismiss, summary judgment, and JMOL function to increase *procedural* accuracy by aligning outcomes with what would be dictated by evidentiary proof rules at trial.[160] The three procedural devices are serving material accuracy indirectly by aligning outcomes with the evidentiary proof rules that focus on material accuracy directly. Third, given this alignment function, the procedural devices depend upon the underlying proof rules and thus, the standards for implementing the devices ought to be informed by the requirements (and goals) of the proof rules.[161]

1. Evidence Law and Material Accuracy

The law of evidence focuses on material accuracy, and allocating the risk of material error, with two types of rules. The first type ("micro-

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[156] Likewise, a judgment for the defendant would be procedurally accurate when the plaintiff failed to prove one or more elements, and this judgment would be a procedural error if the plaintiff proved each of the elements.

[157] *See infra* notes 158–202 and accompanying text.

[158] *See infra* notes 159–202 and accompanying text.

[159] *See infra* notes 162–181 and accompanying text.

[160] *See infra* notes 182–195 and accompanying text.

[161] *See infra* notes 196–202 and accompanying text.

level" rules) regulates the admission or exclusion of individual items of physical evidence or testimony.[162] These rules regulate the flow of information to legal fact-finders and control the evidentiary basis on which decisions will be made.[163] A primary goal of these rules is to increase the material accuracy of decisions both by admitting probative evidence and by excluding evidence likely to decrease material accuracy; evidence would be likely to decrease material accuracy if it were irrelevant or had a tendency to mislead, confuse, be misinterpreted, or otherwise detract from the goal of accurate fact-finding.[164] The second type ("macro-level" rules) regulates how fact-finders ought to make decisions based on the admitted evidence as a whole. These rules include burdens of proof and decision rules for when the burdens of proof are satisfied (for example, a "preponderance of the evidence"),[165] and they instruct fact-finders on when the elements of a claim or affirmative defense have been proven.

The macro-level rules focus on material accuracy and the risk of material error by specifying how to reach decisions when faced with uncertainty.[166] To illuminate how the rules do this, it may help to first reflect on what factual decision making would look like in the absence of these rules. If fact-finders could be certain as to what happened in

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[162] *See* Fed. R. Evid. 102, 403, 412(b)-(c), 501, 611(a), 807, 901(b).

[163] *See id.* 102, 403, 412(b)-(c), 501, 611(a), 807, 901(b).

[164] *See id.* 102 (stating that the rules shall be construed so that "truth may be ascertained and proceedings justly determined"). The rules also serve a number of other procedural values: efficiency, *see id.* 403, 611(a); predictability, *see id.* 901(b); notice, *see id.* 807, 412(c); and substantive rights, *see id.* 412(b)(C), 501.

[165] Nothing in my analysis will turn on a distinction between "rules" and "standards." For a discussion of these rules in light of this distinction, see Pardo, *Second-Order*, *supra* note 30, at 1105–07. The macro-level rules also include evidentiary presumptions and comment on the evidence.

[166] Many courts and scholars have discussed the role of legal decision rules. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 755 (1982) (explaining that decision rules reflect judgments about "the weight of the private and public interests affected," and "a societal judgment about how the risk of error should be distributed between the litigants"); Addington v. Texas, 411 U.S. 418, 423 (1979) (explaining that a decision rule "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision"); *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (explaining that the choice of a decision rule "reflect[s] a very fundamental assessment of the comparative social costs of erroneous factual determinations"); Laudan, *supra* note 155, at 12, 13, 210–11; Alex Stein, Foundations of Evidence Law 133–34 (2005); David Hamer, *Probabilistic Standards of Proof, Their Complements and the Errors That Are Expected to Flow from Them*, 1 U. New Eng. L. J. 71, 74–81 (2004) (Austl.); D.H. Kaye, *Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do*, 3 Int'l J. Evidence & Proof 1, 1–28 (1999); Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. Pa. L. Rev. 1159, 1159–74 (1983).

any given case, then the macro-level proof rules would be unnecessary. Moreover, if a rule required fact-finders to be absolutely certain before finding a claim proven, this would lead to a large number of material errors and would unfairly allocate all of the risk of error to plaintiffs.

To illustrate these points, consider again the simple negligence case involving an automobile accident in which the plaintiff claims that the defendant ran a red light and caused the accident. Now, suppose the evidence at trial shows it to be much more likely (but not certain) that the defendant ran the light and caused the accident. Assuming the evidence is a good indicator of the truth, a decision for the defendant is more likely to be inaccurate and places the risk of error on the plaintiff. Moreover, if we imagine 100 similar cases in which the plaintiffs' allegations are much more likely to be true (than the defendant versions of what occurred), then 100 decisions for defendants is systematically likely to produce a significant number of material errors while placing the risk of error solely on the plaintiffs. The "preponderance of the evidence" rule responds to these concerns. By requiring an outcome for plaintiffs when their claims are more likely true, the rule mandates the findings that are more likely to be true.[167] Assuming the evidence is a good indicator of truth, the rule ought to foster material accuracy.[168] The preponderance rule also divides the risk of error roughly equally among the parties.[169] This allocation is justified because of the perceived rela-

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[167] To further illustrate this point, consider the following probabilistic example. Suppose 100 cases in which the plaintiff's claim is 0.6 likely and the preponderance rule requires proof beyond 0.5 (where certain truth equals 1 and certain falsity equals 0). One would expect 60 of these cases to be correctly decided and 40 to be in error. But if one raises the decision rule to somewhere higher than 0.6, then one would expect 60 errors and 40 correct decisions. This refers to expected errors, not actual errors. *See* Hamer, *supra* note 166, at 79; Kaye, *supra* note 166, at 1–28. The numbers assume that the probability assessments reflect the actual likelihood of a proposition being true. To the extent the probability assessments deviate from the actual likelihood, actual errors are likely to deviate from expected ones. Although the probabilistic example is useful for illustrating these points, this Article argues below that a probabilistic conception is not the best way to think of decision rules for purposes of the procedural devices.

[168] *See* Stein, *supra* note 166, at 144 (arguing that decisionmakers will "maximize the total number of correct decisions by treating their best chances of arriving at the factually correct result as decisive"); *id.* ("[T]he error-minimizing objective treats every error as a fixed disutility unit (u) . . . . Under this assumption, utility demands that a party whose case has a probability P prevails whenever $Pu > (1\text{-}P)u$, that is, whenever $P > 0.5$.").

[169] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants . . . ."). The rule allocates the risk "roughly" equally because ties go to the defendant. The best justification for this tiebreaker is that plaintiffs are arguing for a resolution that disrupts the status quo and thus should bear the risk of error when the evidence is in equipoise. A similar justification supports the rule that an evenly divided appellate panel

tive importance, significance, or costs of the two types of errors (false positives and false negatives),[170] as well as the desire to create a fair and neutral forum in which to resolve civil disputes.[171]

One important exception includes certain types of civil cases in which errors favoring plaintiffs are considered to be more significant, problematic, or costly than errors favoring defendants. In these cases, the "clear and convincing evidence" standard applies to one or more elements of the plaintiff's claim.[172] Prominent examples include fraud,[173] civil commitment,[174] deportation,[175] denaturalization,[176] termination of parental rights,[177] decisions to terminate life,[178] and proof of malice in

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results in an affirmance of the underlying judgment. For an illuminating discussion of tiebreaking rules in law, see Adam M. Samaha, *On Law's Tiebreakers*, 77 U. Chi. L. Rev. (forthcoming 2010), *available at* http://ssrn.com/abstract=1572923.

[170] *See Grogan*, 498 U.S. at 286; Herman & Maclean v. Huddleston, 459 U.S. 375, 391 (1983); *In re Winship*, 397 U.S. at 371 ("In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.").

[171] *See* Ronald J. Allen, *Burdens of Proof, Ambiguity, and Uncertainty in Modern Legal Discourse*, 17 Harv. J.L. & Pub. Pol'y 627, 633–34 (1994) ("[T]he typical civil case involves a contest between two indistinguishable parties vying over some good, and there is no reason in advance to favor one party over the other. We thus strive to treat them equally by making errors against them in a roughly symmetrical fashion . . . ."); Ronald J. Allen, *The Error of Expected Loss Minimization*, 2 Law, Probability & Risk 1, 4 (2003) ("[T]he preponderance rule manifests the general social policy to be fair and even handed to all the parties . . . and equal treatment is incontrovertibly one critical component of fairness . . . ."); *see also* Solum, *supra* note 141, at 286–89 (discussing the role of equality in procedural justice).

[172] *Addington*, 411 U.S. at 424 ("[T]his Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases."). Rather than applying decision rules to types of cases, an alternative scheme might allow individual juries or judges to decide which rule to apply. The Supreme Court has rejected this alternative:

> Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.' Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Santosky, 455 U.S. at 757 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)); *see also* Stein, *supra* note 166, at xi ("There is no moral, political, or economic justification for allowing private adjudicators . . . to allocate the risk of error as they deem fit.").

[173] *See* James W. Moore et al., Moore's Federal Practice § 60.21 (Daniel R. Coquillette et al. eds., 3d ed. 1997).

[174] *See Addington*, 411 U.S. at 423–24.

[175] *See* Woodby v. INS, 385 U.S. 276, 277 (1966).

[176] *See* Schneiderman v. United States, 320 U.S. 118, 119 (1943).

[177] *See Santosky*, 455 U.S. at 747.

[178] *See* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 265 (1990).

defamation cases involving public figures.[179] In these cases, the concern for material accuracy (and the consequent risk of error) is skewed asymmetrically against plaintiffs and in favor of defendants more so than under the preponderance rule.[180] In particular, in cases in which plaintiffs' claims are proven by a preponderance of the evidence but not by clear and convincing evidence, plaintiffs will lose and bear the risk of error even though their claims are more likely than not to be materially accurate.[181]

2. Alignment and Procedural Accuracy

Although trial provides the central forum for proof in civil litigation, many cases do not make it that far and some that do are decided without reliance on the fact-finder's verdict.[182] For cases that do not settle, the primary mechanisms for ending cases prior to, at, or after trial are the motion to dismiss, summary judgment, and JMOL.[183] Even if civil trials are relatively rare,[184] one should not underestimate the influence of the trial's proof rules on the litigation process as a whole because the three procedural devices depend on, and function to align outcomes with, the proof rules.[185] The devices, in other words, foster procedural accuracy, and this type of accuracy is determined by the underlying proof rules. Moreover, the idea of *procedural* accuracy illuminates the two primary justifications for the devices: to avoid the trial process when one outcome is mandated by the proof rules and to prevent outcomes that are contrary to those rules (procedural errors).[186]

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[179] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (1964).

[180] *See supra* notes 173–179 and accompanying text.

[181] Similar policies underlie the "beyond a reasonable doubt" rule in criminal cases. *See In re Winship*, 397 U.S. at 358–68.

[182] *See infra* notes 184–195 and accompanying text.

[183] *See* FED. R. CIV. P. 12(b)(6), 50, 56.

[184] *See* Clermont & Schwab, *supra* note 34, at 438–41.

[185] The trial's proof rules also play a significant role in settlements, which are informed by predictions about likely trial outcomes. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Resolution*, 13 J. LEGAL STUD. 1, 12–30 (1984). More generally, under conventional economic models of civil litigation, lawsuits will be brought when expected judgments exceed litigation costs, and cases will settle when the difference between the parties' expected outcomes is less than the sum of litigation costs. *See, e.g.*, Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408–10, 417–27 (1973). In such models, both expected outcomes and litigation costs will depend on the underlying rules that structure the proof process. *See id.*

[186] The devices thus foster both efficiency and procedural accuracy. The trade-off is that losing parties are denied the value of participation at trial, which may have independent value apart from accuracy. *See* Solum, *supra* note 141, at 273–305.

Factual disputes will make it to trial when a plaintiff's claim meets a threshold level of plausibility at the pleading stage and the factual dispute is "genuine" at the summary judgment stage.[187] With pleadings, a claim is plausible when the plaintiff has provided an account of the relevant events that a reasonable jury could accept under the applicable proof rules. A claim is not plausible when a reasonable jury could not accept it under the applicable proof rules. Whether a claim is plausible is *not* a conclusion about whether it is materially true or false. The U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* in 2007 and *Ashcroft v. Iqbal* in 2009 was quite plain that a claim might be true (materially) but still not be plausible.[188]

With summary judgment, a dispute is "genuine" only if a reasonable jury could find for either side.[189] An argument that the dispute is not genuine is an argument that one outcome is mandated by the evidence and the macro-level proof rules.[190] Then, once cases proceed to trial, JMOL likewise turns on whether a reasonable jury could reach a particular decision.[191] With both devices, what is "reasonable" in a given case will be a function of the evidence, the burden of proof, and the decision standard.[192] More specifically, the relevant inquiry is whether a reasonable jury *could* or *must* find for the party with the burden of proof to the level of proof required by the decision rule. As with pleadings, this inquiry is *not* whether there is only one reasonable conclusion about whether the allegations are true (i.e., materially accurate). The inquiry is whether there is only one reasonable conclusion, based on the evidence, about what the decision ought to be according to the proof rules of the trial. In other words, the inquiry is whether

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[187] Fed. R. Civ. P. 56. Some of the subject matter of factual proof in law involves not only historical facts but also the application of legal norms to historical facts (for example, in determining negligence).

[188] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 546 (2007). This follows directly from the Court's rejection of its "no set of facts language" in the 1957 case of *Conley v. Gibson*, and its explanation that a claim must be more that merely "possible" to survive a motion to dismiss. A possible claim is one that might be materially true. *Bell Atlantic*, 550 U.S. at 546.

[189] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–56 (1986). The nonmoving party's evidence need not be admissible at trial, so long as it could be reduced to an admissible form. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). For example, a hearsay statement in the record might be acceptable for summary judgment, but the declarant may need to testify at trial if the statement does not fall under a hearsay exemption or exception.

[190] *See Anderson*, 477 U.S. at 250–56; *supra* notes 165–166.

[191] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000).

[192] What may be a reasonable decision under the preponderance rule may not be reasonable under the clear and convincing evidence rule. *Anderson*, 477 U.S. at 250–56.

there is only one reasonable conclusion about what is the procedurally accurate outcome.

In performing this alignment function, the procedural devices serve two important goals. First, they prevent procedural errors that would frustrate the goals of the proof rules. Put another way, procedural accuracy serves the goals of material accuracy and fair risk-of-error allocation indirectly by ensuring that outcomes accord with the macro-level evidentiary rules that are designed to serve these goals directly. Second, the devices promote efficiency to the extent they produce procedurally accurate outcomes while avoiding the trial process (or aspects of it).[193]

Finally, if the devices functioned in ways that hindered rather than fostered *procedural* accuracy, they would risk frustrating the important social policy goals regarding *material* accuracy and the risk of error implemented by the trial proof structure as part of the litigation process as a whole. For instance, suppose a procedural device required plaintiffs to show more than that a reasonable decisionmaker could find in their favor under the proof rules. Under this standard, plaintiffs bear a greater risk of error than under the trial proof structure.[194] If the risk of material error at trial was allocated equally among the parties as a matter of policy, it would now be shifted to a greater degree onto plaintiffs. A semblance of equality at the proof stage would be destroyed by the procedural device. On the flip side, suppose a procedural device required less of plaintiffs than that a reasonable decisionmaker could find in its favor under the proof structure. The procedural device would risk the possibility of procedural error—a finding that is inconsistent with what is required under the proof structure—by letting the case proceed. This risk would be borne by defendants entitled to outcomes in their favor under the proof rules. This risk of *procedural* error would create an additional risk of *material* error that defendants must bear in addition to the risk they already bear under the proof structure. Even if later proceedings rectify the possibility of procedural error, the device would forfeit any efficiency benefits that would flow from ending cases earlier when one outcome is mandated by the proof rules.[195]

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[193] This assumes that the costs of implementing the procedural devices are lower than the costs of trial. For an argument that they may not be lower in summary judgment situations, particularly if the absence of summary judgment would induce parties to settle earlier, see Bronsteen, *supra* note 12, at 536–38.

[194] Plaintiffs' risk now includes both that a reasonable jury could find against it and the risk of failing to meet the more onerous procedural standard.

[195] *See* Bone, *Pleading Rules*, *supra* note 8, at 930–35; Epstein, *supra* note 8, at 71.

3. Civil Procedure's Dependence on Evidence Law

The third premise in the argument follows straightforwardly from the first two premises.[196] If the evidentiary proof rules impose requirements designed to achieve goals regarding material accuracy (premise one), and the procedural devices function to align outcomes with the requirements of the proof rules (premise two), then to function properly the standards for implementing the procedural devices must derive their content, in part, from the requirements of the proof rules (premise three).

This is not to suggest that the same standard applies or ought to apply for each procedural device. Although the alignment function depends on what is required by the proof rules, the standards must also account for important differences regarding where in the litigation process the procedural devices arise. For example, although evidence needs to be admissible at the JMOL stage, it does not necessarily need to be admissible at summary judgment.[197] And with pleadings, the decision must be made on the basis of allegations, rather than submitted evidence, made prior to an opportunity for discovery. Still, the general dependence manifests itself in a number of doctrinal features recognized by the Supreme Court when articulating the relevant standards.[198] These include: incorporating the applicable decision standard at trial into the "summary judgment" and JMOL standards;[199] the requirement at summary judgment that evidence be reducible to admissible evidence;[200] and the determination that the plausibility of claims at the pleading stage depends on the plausibility of alternative explanations of the relevant events.[201]

Although these features gesture toward this procedural dependence, the Court has failed to take the final, and crucial, logical step of articulating what is required to make a pleading "plausible" or a factual conclusion "reasonable" in light of the evidentiary proof rules. This failure is a problem for reasons that may now be obvious. One cannot tell, for example, whether a jury conclusion is "reasonable" or "unrea-

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[196] *See infra* notes 197–201 and accompanying text.

[197] *See supra* note 106.

[198] *See infra* notes 199–201 and accompanying text.

[199] *See Anderson*, 477 U.S. at 254–55 ("It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.").

[200] *See supra* note 106.

[201] *See Iqbal*, 129 S. Ct. at 1951; *Bell Atlantic*, 550 U.S. at 567–68.

sonable" according to the evidence and the proof rules unless one knows what is required by the proof rules—that is, when particular evidence will satisfy them and when it will not. Connecting the procedural devices to these deeper proof issues will give content to the theory of procedural accuracy. [202] It will also, in turn, help to clarify and justify particular standards in light of this alignment function within the litigation system as a whole.

C. *Giving Content to the Theory of Procedural Accuracy*

The theory of procedural accuracy explains the primary function of the procedural devices and justifies this function in light of the procedural goals of the system of civil litigation. This function is the alignment of outcomes with the proof rules, and it is justified by the values of accuracy and a fair distribution of the risk of error.[203] Identifying and justifying this function, however, does not yet tell us how to implement it. Implementing the theory requires linking the content of the procedural devices with the content of proof rules.

Any procedural standard that depends on what "reasonable" jurors could conclude or which claims are "plausible" must employ some conception of what is required by the proof rules. This is a major gap in discussions regarding these devices. What is "reasonable" or "plausible" is a function of who will have to prove what (burdens of proof) and to what standard. In the vast majority of civil cases, the applicable proof rules require plaintiffs to prove the elements of their claims (and defendants to prove the elements of affirmative defenses) by a preponderance of the evidence.[204] But discussions of the procedural devices, in both case law and academic commentary, fail to provide some explanation or criteria by which to assess when an element has been proven by a preponderance of the evidence. How, for example, can one determine whether a particular jury conclusion—that an element has been proven under the preponderance rule—is "reasonable" without some prior understanding of when evidence satisfies the preponderance rule?

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[202] *See infra* notes 203–228 and accompanying text.

[203] This function also serves a number of other procedural values such as efficiency (by ending cases when one outcome is mandated by the proof rules), participation and the right to a jury (when consistent with the underlying structure of proof), deterrence, and guidance regarding the substantive law.

[204] *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 3.3 (3d ed. 2003) (noting that "the prevailing view" of the preponderance rule requires the jury to be "persuaded that the points to be proved are more probably so than not").

The question should give us pause. The determination necessarily presupposes some conception of what the preponderance rule requires, if only implicitly. This presupposition most likely depends on the common, but problematic, conception of the proof rules as probabilistic. For example, the preponderance rule requires proof beyond a 0.5 likelihood, with 1 representing certain truth and 0 representing certain falsity.[205] Because the decision rules specify outcomes when there is factual uncertainty, the probabilistic interpretation may be seen as a useful way to conceive of that uncertainty and relate it to the underlying goals of accuracy and distributing the risk of error. As a general matter, however, this interpretation suffers from deep conceptual problems and empirical limitations that make it ill-suited as either an explanatory or a normative theory of the proof rules. I have discussed these problems in depth elsewhere and many of them can be put to the side for purposes of this discussion.[206] Simply as a pragmatic matter, the probabilistic conception is an ill-suited tool for providing content to the procedural devices and for guiding and constraining their applications.

To illustrate, suppose that with summary judgment or JMOL the applicable standard was articulated as whether, based on the evidence, a reasonable jury could find that the element was proven beyond 0.5 likely. How are judges to decide which findings are "reasonable" and which are "unreasonable"? One option might be to rely on objective data, if it exists, regarding how likely the alleged fact is given the available evidence.[207] Courts, however, virtually never have sufficient data for this option to work. Additionally, if courts did have a truly objective answer,[208] then it would be the only reasonable conclusion, rendering the jury superfluous. The court simply should enter judgment based on this answer. A second option might be to rely on subjective judgments of fact-finders about the likelihood. But these assessments could be anything at all between 0 and 1, and there are no criteria for separating "reasonable" from "unreasonable" assessments (other than the equally

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[205] *See* Hamer, *supra* note 166, at 77.

[206] For discussions of these problems, see Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. Legal Stud. 107, 107–10 (2007); Pardo, *Second-Order*, *supra* note 30, at 1100–02; Pardo & Allen, *supra* note 30, at 247–51.

[207] For example, one could look for base-rate data regarding how often the disputed fact is true when the evidentiary fact is true as compared to how often the disputed fact is false when the evidentiary fact is true.

[208] Actually, the "truly objective" answer to this question will be 1 or 0, as the event either did or did not happen.

subjective assessments of the judge).[209] Likewise, if the "plausibility" pleading standard required some probabilistic threshold, then these same problems would arise, and it would contradict the Court's explicit statement that it was not imposing a "probability" requirement.[210]

Fortunately, there is a more theoretically useful way to characterize the proof rules for purposes of the procedural devices.[211] Rather than focus on probabilistic relationships between the evidence and the facts to be proven, this alternative looks at explanatory relationships between the two.[212] Under this conception, fact-finders examine whether particular explanations, if true, would better explain the evidence and disputed events than alternative explanations.[213] For example, in the simple negligence example concerning the car accident posed above, the relevant inquiry would depend on how well the fact that the defendant ran the red light explains the evidence and the events (as compared to alternative explanations). Of course, what makes one explanation better than another will depend on the judgment of fact-finders, but this approach improves on the probabilistic conception by focusing the inquiry on features of the evidence.[214] The quality of competing

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[209] *See* Ronald J. Allen, *Rationality, Algorithms, and Juridical Proof: A Preliminary Inquiry*, 1 Int'l J. Evidence & Proof 254, 255 (1997) ("[V]irtually any relationship at all can exist between subjective assessments of liability and the truth of factual assertions at trial.").

[210] *Bell Atlantic*, 550 U.S. at 556; *see also id.* ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . . .").

[211] *See infra* note 212 and accompanying text.

[212] *See* Pardo, *Second-Order*, *supra* note 30, at 1100–02; Pardo & Allen, *supra* note 30, at 247–51. This conception views the inferences at trial as primarily "abductive" or as "inferences to the best explanation," rather than as probabilistic ("enumerative") inferences. The idea of "inference to the best explanation" has been explored more fully in the philosophy of science. *See* Peter Lipton, Inference to the Best Explanation 55–69 (2004); Gilbert Harman, *The Inference to the Best Explanation*, 74 Phil. Rev. 88, 88 (1965); *see also* Amalia Amaya, *Inference to the Best Legal Explanation*, *in* Legal Evidence & Proof 135–56 (Hendrik Kaptein et al. eds., 2009); Douglas N. Walton, Abductive Reasoning 35 (2004); Paul R. Thagard, *Evaluating Explanations in Law, Science, and Everyday Life*, 15 Current Directions Psychol. Sci. 141, 141–45 (2006).

[213] This process generally involves two steps: generating possible explanations (those of the parties and others formulated by fact-finders) and then examining which one best explains the evidence.

[214] Explanations involve both "acts of explaining" and the explanations themselves, both of which concern epistemic relationships between propositions. Explanations typically provide answers or understanding about, for example, why something happened, why it is the way it is, why it is true, or how it functions. *See* Peter Achinstein, The Nature of Explanation 74–102 (1983); *see also* Philip Johnson-Laird, How We Reason 177 (2006) ("An explanation accounts for what we do not understand in terms of what we do understand."). Most importantly, explanations are "contrastive" in the sense that we assess the strength of an explanation by contrasting it with other competing explanations. *See* Lipton, *supra* note 212, at 33 ("A contrastive phenomenon consists of a fact and a foil, and

explanations will depend on the details of individual cases, but a number of general criteria will often make one explanation better than another. For example, a consistent explanation will be better than a contradictory one; one that explains more of the evidence and the most important and disputed items of evidence will be better than one that fails to explain key items of evidence; and an explanation that better fits with the backgrounds, experiences, and knowledge of fact-finders will be better than one that requires them to make implausible or unrealistic assumptions.[215] The criteria cannot be combined into an algorithmic procedure for determining outcomes, but the focus on features of the evidence provides a more objective focal point for judicial discussions of why particular conclusions are reasonable or not.

Under the explanatory approach, the proof rules may be understood based on how they fit with this process of comparing alternative explanations. The preponderance rule is satisfied when the best of the available explanations favors the party with the burden of proof, in the sense that this explanation includes the elements the party must prove.[216] By contrast, the proof requirements have not been met when the best available explanation favors the other party, in the sense that it fails to include one or more of the elements. Assuming that the quality of an explanation is a good indication of its likely truth,[217] this conception accords with the goals and values underlying the preponderance rule (and the litigation system) regarding accuracy and the risk of er-

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the same fact may have several different foils. We may not explain why the leaves turn yellow in November *simpliciter*, but only for example why they turn yellow in November rather than in January, or why they turn yellow in November rather than blue.").

[215] These general criteria for evaluating explanations apply broadly in a variety of different domains, see Thagard, *supra* note 212, at 141–45, and they are the criteria that jurors employ in deciding cases. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 521–44 (1991) (identifying criteria jurors use to construct narrative accounts of the evidence at trial); *see also* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 135 (2007) ("Many subsequent studies . . . have lent support to the basic assumptions of the story model."); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 212 (2006) ("[T]he jurors attempted to construct plausible accounts of the events that led to the plaintiff's suit. They evaluated competing accounts and considered alternative explanations for outcomes.").

[216] For further elaboration of the trial proof rules in explanatory terms, see generally Pardo, *Second-Order*, *supra* note 30.

[217] Of course, sometimes the best available explanation of the evidence will turn out to be false. This is the general "problem of induction" that affects both probabilistic and explanatory conceptions of proof.

ror.[218] Because a better explanation is more likely to be true than a worse one, the rule specifies the outcomes that are more likely to be accurate than their alternatives. Moreover, the rule divides the risk of error roughly equally among the parties because each bears a reciprocal risk of error whenever the best available explanation is not in its favor. Similarly, when the decision rule rises from the preponderance standard to the "clear and convincing" evidence standard, the best available explanation must favor the plaintiff and be clearly and convincingly better than the alternatives. This requirement shifts a corresponding risk of error onto plaintiffs and away from defendants in accord with the policy of the rule.[219]

This explanatory approach to the proof rules thus provides criteria for articulating the standards for the procedural devices in light of their alignment function, taking into account differences among the devices and when they arise in the litigation process.

At the pleading stage, plaintiffs will satisfy the plausibility threshold by pleading a claim that provides a plausible explanation of the relevant events that would entitle the plaintiff to relief.[220] If, however, there is an alternative explanation of the events that a reasonable jury must find at least as plausible and that would not entitle the plaintiff to relief, then the claim ought to be dismissed—unless the plaintiff's allegations "raise a reasonable expectation that discovery will reveal evidence" making the claim plausible.[221] If there is an equally (or more) plausible explanation

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[218] Which explanations to consider will depend on how the parties contrast their cases (and their theories of what happened). Explanations can sometimes be disjunctive (a party may claim that "either X or Y happened" and that each possibility supports its case), and fact-finders ought to consider the conjunction of available explanations that support each side. Moreover, the better explanation may sometimes be quite general ("some negligent act by the defendant caused my accident" in a res ipsa loquitur case) rather than a specific, detailed account. The requisite level of specificity will depend on the substantive law and how the parties contrast their cases.

[219] *See Addington*, 411 U.S. at 423. Explanatory considerations may be used to articulate the "beyond a reasonable doubt" standard and its underlying policy goal of allocating the risk of error away from criminal defendants. *See* Pardo, *Second-Order*, *supra* note 30; Michael S. Pardo, *On Misshapen Stones and Criminal Law's Epistemology*, 86 Tex. L. Rev. 347, 347–83 (2007).

[220] This Article elaborates on what would make an explanation "plausible" in the next Part. *See infra* notes 229–245 and accompanying text.

[221] *See* Fed. R. Civ. P. 11(b)(3) (requiring that attorneys signing pleadings represent that "the factual contentions have evidentiary support" or will likely have such support "after a reasonable opportunity for further investigation or discovery"). Potential costs and other burdens of discovery appeared to be motivating factors in both *Bell Atlantic* and *Iqbal*, and what is necessary to create a "reasonable expectation" may therefore rise as these costs and burdens rise. *See* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 Fla. L. Rev. 1, 15–17 (2010) (suggesting a similar relation-

favoring the defendant, and discovery will not (likely) change matters, then no reasonable jury could find for the plaintiff under the applicable proof rules. Dismissing the claim will thus align the outcome with the proof rules—fostering the goals of accuracy, fair allocation of the risk of error, and efficiency. By contrast, if the plaintiff's allegations raise a reasonable expectation that discovery will make the claim more plausible, then the complaint ought to proceed. At this early stage in the process, if there is such an expectation, then it is too early to tell whether a reasonable jury could find for the plaintiff. Dismissing a case under these circumstances will risk frustrating the goals of the proof rules by eliminating procedurally accurate claims and producing outcomes that do not align with the proof rules. In terms of the underlying procedural values, this will frustrate accuracy and shift an additional, unjustified risk of error onto plaintiffs.[222]

At summary judgment and with JMOL, nonmoving plaintiffs need to show that a reasonable jury could find their explanations of the evidence and events to be a better explanation than those favoring the defendant.[223] Moving plaintiffs would have to show that any reasonable

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ship). This is also consistent with a dynamic conception of Rule 8 that adapts to changes in litigation contexts. *See* Allen & Guy, *supra* note 15. This, however, does not mean that the meaning of "plausibility" shifts. Similar concerns arise with the issue of certification for proposed class actions, and these concerns are also accommodated within the framework developed here. Proposed class actions will sometimes depend on claims that shared evidence is sufficient to prove common issues under the applicable legal standards, and they will sometimes depend on disguised claims to change underlying legal standards. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 111–23 (2009) (discussing potential dangers when the latter is the case). Whether a proposed class action depends on a change in, or a controversial interpretation of, the underlying substantive law ought to be considered by judges at the class-certification stage; otherwise, the same standards ought to apply as to whether a complaint is plausible, whether it raises a reasonable expectation of producing favorable evidence, or whether shared evidence is sufficient to survive summary judgment. *See id.* at 130–33 (arguing that certification questions that turn on the sufficiency of the evidence should be resolved at summary judgment and questions that turn on interpretations of the substantive law should be resolved at the class-certification stage).

[222] It will also frustrate other important procedural values, including participation and the right to a jury, deterrence, and guidance with regard to the substantive law.

[223] This assumes the preponderance rule applies. Defendants would thus argue that a reasonable jury could not find plaintiffs' explanations to be better. Under the clear and convincing evidence rule, plaintiffs would argue that a reasonable jury could find their explanations to be clearly and convincingly better, and defendants would argue that a reasonable jury could not find plaintiffs' explanation to be much better than defendants' (even if, perhaps, they could find plaintiffs' explanation to be slightly better). In other words, the defendant is entitled to judgment when a reasonable jury would have to find (1) defendant's explanation is better, or (2) the explanations are even, or (3) plaintiff's explanation is better, but only slightly better. *See* McNair v. Coffey, 234 F.3d 352, 355 (7th

jury *must* find their explanations to be better.[224] These standards would align outcomes with the proof rules and serve the underlying values of accuracy and fair allocation of the risk of error. A higher or lower standard at these stages would fail to align outcomes with the proof rules, frustrate procedural accuracy, and shift an additional, unjustified risk of error onto one side.[225]

This concludes the outline of the theory of procedural accuracy.[226] In the next Part, examples are provided to test the theory and explore its implications.[227] The theory is also further integrated into existing doctrine, and several potential counterarguments are considered.[228]

III. Applying and Testing the Theory of Procedural Accuracy

The implications of the theory of procedural accuracy can readily be explored using a number of cases and examples. In exploring these implications, the theory is integrated with current doctrine and case law, and the relationship between the analysis and normative considerations underlying the system of civil litigation is explained.[229] Four hypothetical examples are used to illustrate the procedural accuracy standards at each procedural stage.[230] These examples were chosen because of their prevalence in discussions of the procedural issues and their prevalence and importance in federal civil litigation, and because the different types of issues provide a general overview of the procedural issues as a whole.[231]

The examples focus on the substantive areas of negligence, employment discrimination, antitrust, and municipal liability.

Cir. 2000) (characterizing the clear and convincing rule as "where all close cases go to the defendant").

[224] This again assumes the preponderance rule applies. Defendants would thus argue that a reasonable jury could find their explanations at least as good, if not better, than plaintiffs' explanations. Under the clear and convincing evidence standard, plaintiffs would argue that a reasonable jury must find their explanations clearly and convincingly better. Defendants would argue that a reasonable jury could find their explanations better, equal to, or only slightly worse than plaintiffs' explanations.

[225] When there is doubt about whether a jury verdict aligns with the proof rules, the judge may grant a motion for a new trial. *See supra* note 128.

[226] *See supra* notes 158–225 and accompanying text.

[227] *See infra* notes 229–275 and accompanying text.

[228] *See infra* notes 276–377 and accompanying text.

[229] *See infra* notes 230–377 and accompanying text.

[230] *See infra* notes 232–234 and accompanying text.

[231] They also illustrate applications among cases with varying levels of complexity and cost.

Example 1 (negligence): Plaintiff brings a claim for negligence, alleging that Defendant's negligent driving caused an automobile accident in which Plaintiff suffered serious injuries.[232]

Example 2 (employment discrimination): Plaintiff brings a claim for employment discrimination against her employer under Title VII, alleging that she was fired because of her sex.

Example 3 (antitrust): Plaintiffs bring a class action claim alleging that Defendants, three large grocery store chains, conspired to fix prices on certain products in certain markets. The complaint alleges that in areas without "discount" grocery retailers, the three defendants maintained consistently higher prices on several items than in areas with a discount store.[233]

Example 4 (municipal liability): Plaintiffs bring a claim under 42 U.S.C. § 1983 against a municipality, alleging that the plaintiffs were arrested for violating a local ordinance that prohibits the selling of goods in a local park without a license because of an unconstitutional policy or custom of the police to arrest only Muslim artists or those displaying pro-Islamic-themed art.[234]

A. *Pleadings*

A civil complaint generally requires "a short and plain statement of the claim showing that the pleader is entitled to relief,"[235] and defendants may move to dismiss a complaint for "failure to state a claim upon which relief can be granted."[236] The requirement of a short and plain statement serves a number of uncontroversial functions: it provides notice to defendants of the nature of the claim and the grounds upon which the claim rests; it frames the legal issues to determine whether the allegations, if true, would entitle the plaintiff to legal relief under the

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[232] Form 11 in the Appendix of Forms to the Federal Rules of Civil Procedure provides the following example of an adequate complaint for negligence: "2. On [Date], at [Place], the defendant negligently drove a motor vehicle against the plaintiff." FED. R. CIV. P. FORM 11; *see* FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").

[233] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 549 (2007) (involving a price fixing conspiracy claim).

[234] *See* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting a "heightened pleading" standard for municipal liability claims).

[235] FED. R. CIV. P. 8(a)(2).

[236] *Id.* 12(b)(6).

applicable substantive law;[237] and it allows courts to determine whether claim or issue preclusion applies because of a prior judgment.[238] More controversially, this requirement now authorizes a screening function to dismiss claims that are not plausible.[239]

According to the theory of procedural accuracy, the screening function ought to align outcomes with the requirements of the proof rules. The previous Part provided the following standard: plaintiffs will satisfy the plausibility threshold by pleading a claim that provides a plausible explanation of the relevant events that would entitle the plaintiff to relief.[240] If, however, a reasonable jury would find that an alternative, equally plausible explanation of the events exists that would not entitle the plaintiff to relief, then the claim ought to be dismissed unless the plaintiff's allegations "raise a reasonable expectation that discovery will reveal evidence" rendering plaintiff's claim more plausible than the competing explanation.[241]

In applying this standard, courts are to accept as true the factual allegations in the complaint and draw reasonable inferences from those facts in favor of the plaintiff. Three features of this standard should be emphasized: the meaning of "plausible," the comparative nature of the assessment, and the potential role of discovery. First, an explanation of the relevant events is plausible when it provides a tentative, acceptable account of the disputed events. More than one explanation of the events may each be plausible, even when they are inconsistent with each other.[242] So long as, given what is known about the events, the explana-

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[237] One uncontroversial reason to dismiss a complaint for failure to state a claim is when the factual allegations, even if true, do not describe conduct giving rise to legal liability.

[238] These are the functions envisioned by Judge Charles Clark, the principal architect and advocate of minimal "notice" pleading. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 457 (1941).

[239] According to Professor Robert G. Bone, the U.S. Supreme Court's 2007 *Bell Atlantic Corp. v. Twombly* decision appears to impose a "thin" screening model that aims to eliminate only "truly meritless suits," but its 2009 decision in *Ashcroft v. Iqbal* appears to impose a "thick" model that aims to screen "weak lawsuits" as well. *See* Bone, *Plausibility*, *supra* note 8, at 849–50. It is not clear, however, whether "merit" is defined in terms of material or procedural accuracy.

[240] *See supra* note 220 and accompanying text.

[241] *See supra* note 221 and accompanying text.

[242] Although "plausibility" obviously has important connections with probability or likelihood, it is a distinct notion. A failure to appreciate this point may be causing some of the confusion created by *Bell Atlantic*'s use of "plausible." *See* 550 U.S. at 556. Judgments about cardinal probabilities obey the axioms of the probability calculus. For example, if the probability of a proposition, *P*, is 0.6, then the probability of the negation of that proposition, *not-*

tion seems like it could be true, then the explanation is plausible.[243] Second, explanations are "defeasible" in the sense that an apparently plausible explanation may be rendered implausible by new information or by an alternative, contradictory explanation that better explains the events and is thus more likely.[244] Finally, because new evidence may alter the comparative plausibility assessment, a seemingly implausible claim ought to proceed when a plaintiff's complaint "raises a reasonable expectation that discovery will reveal evidence" favoring the plausibility of plaintiff's claim.[245]

1. Applications of the Pleading Standard

These three aspects of pleadings explain the results in the U.S. Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, and its 2009 decision in *Ashcroft v. Iqbal*.[246] Although the alleged conspiracy in *Bell Atlantic* may have been a plausible explanation of the defendants' alleged conduct in the absence of any other explanations, there was an "obvious alternative" explanation—independent parallel conduct—that

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P, is 0.4 (i.e., *P* + *not-P* = 1). Plausibilistic judgments need not conform in this way. As Douglas Walton explains, "[b]oth a proposition and its negation can be plausible":

> To say something is plausible means that it seems to be true based on appearances. It is even more plausible if it is consistent with other propositions that seem to be true. It can be even more plausible if it is tested by experiment. A plausible inference is one that can be drawn from the given apparent facts in a case suggesting a particular conclusion that seems to be true.

Walton, *supra* note 212, at 35. Plausible reasoning, however, is "defeasible" in that propositions that seem plausible may be defeated by new information. *See infra* note 244.

[243] *See supra* note 242 and accompanying text.

[244] Reasoning based on plausibility and defeasibility follows a non-monotonic logic. For a useful introduction and discussion, see G. Aldo Antonelli, *Non-monotonic Logic*, Stan. Encyclopedia of Phil. (Apr. 14, 2010), http://plato.stanford.edu/entries/logic-nonmonotonic/.

> The term "non-monotonic logic" covers a family of formal frameworks devised to capture and represent *defeasible inference*, i.e., that kind of inference of everyday life in which reasoners draw conclusions tentatively, reserving the right to retract them in the light of further information. Such inferences are called "non-monotonic" because the set of conclusions warranted on the basis of a given knowledge base, given as a set of premises, does not increase (in fact, it can shrink) with the size of the knowledge base itself.

Id. For discussions of defeasibility in law, see Douglas Walton, Witness Testimony Evidence, Argumentation, Artificial Intelligence, and Law 29–33 (2008); Frederick Schauer, *Is Defeasibility an Essential Property in Law?*, *in* Law & Defeasibility (J. Ferrer et al. eds., forthcoming 2010), *available at* http://papers.ssrn.com/abstract=1403284 ("Defeasibility is widespread in law").

[245] *See Bell Atlantic*, 550 U.S. at 556; *see also supra* note 221.

[246] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009); *Bell Atlantic*, 550 U.S. at 570.

was at least as good (if not better).[247] Thus, there was no apparent way, based on the information alleged, for a reasonable jury to conclude that the plaintiffs' explanation was better, even when the factual allegations are assumed to be true and reasonable inferences are drawn in favor of the plaintiffs.[248] Moreover, the allegations failed to raise "a reasonable expectation" that discovery would reveal evidence from which a reasonable jury could find the illegal-agreement explanation to be more plausible than the independent-parallel-conduct explanation.[249]

Similar analysis applies to *Iqbal*.[250] Intentional discrimination by the defendants may be a plausible explanation for their conduct toward the plaintiff (and others) in the absence of any other plausible explanations.[251] But there was an "obvious alternative" explanation that explained the defendants' conduct at least as well (if not better)—"nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."[252] Thus, there was no apparent way for a reasonable jury to conclude the plaintiff's explanation was better.[253] Nor did the factual allegations raise a reasonable expectation that discovery would reveal evidence rendering the intentional discrimination explanation more plausible.[254]

By contrast, consider two other recent cases in which the Court held complaints to be sufficient.[255] In 2007 in *Erickson v. Pardus,* decided shortly after *Bell Atlantic,* the U.S. Supreme Court held sufficient a prisoner's Eighth Amendment claim that he was being denied necessary medical treatment for hepatitis C, and that this denial was endangering his life.[256] The complaint was deemed sufficient because it provided a plausible account of the relevant events, one that a reasonable jury could find better than any alternative explanations.[257] Moreover,

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[247] *See Bell Atlantic*, 550 U.S. at 567.

[248] *See id.*

[249] *Id.* at 556; *see also supra* note 221.

[250] *See Iqbal*, 129 S. Ct. at 1947–54.

[251] *See id.*

[252] *Id.* at 1951.

[253] *See id.*

[254] *See id.* The Court noted that even "controlled" or limited discovery would put a burden on the defendants and that this burden was unjustified given the generality of the factual allegations. *Id.* at 1952–54.

[255] *See infra* notes 256, 258 and accompanying text.

[256] Erickson v. Pardus, 551 U.S. 89, 93–95 (2007).

[257] *Id.* at 94.

> The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was "endangering [his] life." It alleged this

even if the defendants offered an alternative explanation as part of a motion to dismiss, a reasonable jury could still have found the plaintiff's explanation to be more plausible, assuming the factual allegations in the complaint were true.

Similar analysis applies to the 2002 U.S. Supreme Court decision in *Swierkiewicz v. Sorema N.A.*,[258] an employment discrimination case cited favorably in both *Bell Atlantic* and *Erickson*.[259] The Court held the complaint was sufficient when the plaintiff provided details leading up to his termination, the relevant dates, and the names and nationalities of the people involved.[260] Consistent with the Court's statement in *Bell Atlantic* that Rule 8 does not impose a "probability" requirement, in neither *Erickson* nor *Swierkiewicz* did the Court assess the probability or likelihood of success by the plaintiff at trial.[261] The complaints were sufficient because they provided plausible accounts that a reasonable jury could find better than any alternative explanation of the relevant events and evidence.[262]

Turning to the examples from the beginning of this Part, in the first example (negligence), the plaintiff will satisfy the pleading standard by providing the relevant date and location of the accident along with an allegation that the defendant's negligent driving caused the accident.[263] More details about how the defendant was negligent are not

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> medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment. This alone was enough to satisfy Rule 8(a)(2).

Id. (citation omitted). It is not even clear yet what the alternative explanations might be. *See id.*

[258] 534 U.S. 506, 508 (2002).

[259] *See Erickson*, 551 U.S. at 93–94; *Bell Atlantic*, 550 U.S. at 555–56.

[260] *Swierkiewicz*, 534 U.S. at 514.

> [P]etitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.

Id.

[261] *See Erickson*, 551 U.S. at 93–95; *Swierkiewicz*, 534 U.S. at 511–14.

[262] *See Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'").

[263] This satisfies Form 11 in the Appendix of Forms to the Federal Rules of Civil Procedure. *See supra* note 232.

necessary. Negligent driving by the defendant provides a plausible explanation that a reasonable jury could find to be a better explanation of the events than explanations favoring the defendant. Even if the defendant were to provide an alternative explanation (for example, the plaintiff's or a third party's negligent driving caused the accident) as part of a motion to dismiss, a reasonable jury could still find the plaintiff's explanation to be better given the factual allegations in the complaint. Moreover, there may be a reasonable expectation that discovery will reveal additional information bearing on the negligence question.[264]

With the second example (employment discrimination), consistent with *Swierkiewicz,* the plaintiff will satisfy the pleading standard by providing the relevant details and dates regarding her employment and termination, along with an allegation that she was discharged because of her sex.[265] That she was discharged because of sex provides a plausible explanation of the relevant events; at this point, a reasonable jury may be able to find it the best available explanation at trial. The defendant may counter with a non-discriminatory explanation, but at the pleading stage, even when faced with an alternative defense explanation, the complaint will still be sufficient if a reasonable jury could find the plaintiff's explanation is better given the factual allegations in the complaint.[266]

The third example (antitrust) is similar to *Bell Atlantic.*[267] Although a conspiracy to fix prices may explain the pricing patterns among the stores, the alternative explanation of independent parallel conduct is a just as good (if not better) explanation of the relevant events.[268] Therefore, at this point the complaint is not plausible because a reasonable jury could not find that conspiracy is more plausible than independent conduct.[269] Moreover, as in *Bell Atlantic,* the complaint does not yet provide enough information to raise a reasonable expectation that discov-

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[264] For example, depositions of the parties and any available witnesses may provide this expectation.

[265] *See Swierkiewicz*, 534 U.S. at 508; Dolgaleva v. Va. Beach City Pub. Schs., 364 F. App'x 820, 826–27 (4th Cir. 2010) (citing *Swierkiewcz* and finding the pleading standard satisfied in a national origin discrimination case where the plaintiff's complaint named the defendant and the date of her job application, alleged she was the most qualified applicant, and alleged she was told her national origin was held against her in the hiring decision).

[266] The plaintiff will likely have to respond to the defendant's alternative explanation at summary judgment or JMOL. *See infra* notes 312–377 and accompanying text.

[267] *See Bell Atlantic*, 550 U.S. at 548.

[268] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., Inc., 475 U.S. 574, 585–93 (1986) (involving an alleged conspiracy to fix prices of television sets sold in Japan, and to fix and maintain low prices for the sets exported and sold in the United States).

[269] *See id.* This is a consequence of substantive antitrust law. *See id.*

ery will reveal evidence rendering the conspiracy explanation more plausible than independent conduct.[270] The complaint would raise this reasonable expectation by providing more details about the nature of the conspiracy, how it could be verified, where the relevant conversations took place, and so on.[271]

The fourth example (municipal liability) is more straightforward.[272] Assuming the factual allegations are true, the complaint provides a plausible explanation of the relevant events (i.e., the arrests).[273] Unlike *Iqbal* (and *Bell Atlantic*), there does not appear to be an alternative explanation that explains the events as well.[274] If one is proffered as part of a motion to dismiss (e.g., the police arrest everyone without a license, regardless of religion), a reasonable jury could still find that the plaintiffs' explanation better explains the relevant events. Moreover, the complaint raises a reasonable expectation that discovery will reveal evidence bearing on the plausibility of the plaintiffs' explanation (and any competing explanations), including information about the number of arrests and details about those arrested.[275]

2. Counterarguments to Analysis of the Pleading Standard

One might challenge the analysis of the pleading standard on descriptive or normative grounds: either the standard applied does not adequately capture the "plausibility" requirement or it is not what the "plausibility" requirement ought to be.[276] In either case, one might object that the standard employed is too weak or too strong. Each of these potential counterarguments is responded to below.[277]

a. *The Procedural Accuracy Standard May Be Too Weak*

One may argue that, descriptively, the procedural accuracy standard is too weak. Recent scholarship suggests that it might be. In attempting to articulate the plausibility standard, a number of scholars have argued that the standard is substantially similar to the standard for

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[270] *See Bell Atlantic*, 550 U.S. at 570.

[271] *See supra* note 221 and accompanying text.

[272] *See infra* notes 273–275 and accompanying text.

[273] *See Leatherman*, 507 U.S. at 167 (holding municipal liability complaint to be sufficient based on allegations of the particular incidents giving rise to allegedly unconstitutional conduct).

[274] *See id.*

[275] *See id.*

[276] *See infra* notes 278–311 and accompanying text.

[277] *See infra* notes 278–311 and accompanying text.

summary judgment (or perhaps even higher).[278] In other words, a complaint states a "plausible" claim only if a reasonable jury could find for the plaintiff based on what is known at the time of the pleadings.[279] But such a standard would be incorrect for two related reasons. First, the Court has already explained that the pleading standards of the Private Securities Litigation Reform Act (the "PSLRA"),[280] which are higher than Rule 8, are lower than the summary judgment standard.[281] For example, the standard for pleading scienter under the PSLRA is as follows: "A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and *at least as* compelling as any opposing inference one could draw from the facts alleged."[282] Because this standard is lower than the summary judgment standard, and the Rule 8 requirements are lower still, then *a fortiori* the Rule 8 pleading standard must be lower than the summary judgment standard.[283] Second, such a standard would ignore the role that discovery may play in rendering a claim more plausible. As the Court explained in *Bell Atlantic,* even a claim that may seem, at the pleading stage, to be less plausible than an alternative explanation may still survive a motion to dismiss if the allegations suggest a "reasonable expectation" that discovery will reveal evidence rendering the claim plausible.[284]

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[278] *See generally* Epstein, *supra* note 8; Hylton, *supra* note 8; Spencer, *Understanding*, *supra* note 8; Thomas, *New Summary*, *supra* note 8.

[279] *See* Epstein, *supra* note 8, at 82 ("[T]he Supreme Court and the District Court treated the defendant's motion to dismiss as though it set up a 'mini-summary judgment' that is available solely when the plaintiff relies on public information and its ostensible economic implications."); Thomas, *New Summary*, *supra* note 8, at 41 ("The motion to dismiss is now the new summary judgment motion, in standard and possibly effect."). Professor A. Benjamin Spencer provides a descriptive standard (the "presumption of impropriety" standard) that is even higher than the summary judgment standard: "if lawful reasons *could* explain factual occurrences reported in a complaint *just as well as* unlawful ones might, no such showing of entitlement has been made." Spencer, *Understanding*, *supra* note 8, at 15 (emphasis added). Under this standard, plaintiffs would have to show not only that a reasonable jury *could* find their explanation to be more plausible (the standard at summary judgment), but would also have to make the more difficult showing that a reasonable jury *could not* find a pro-defendant explanation at least as plausible. *See id.* In other words, plaintiffs would need to show, based on what is known at the pleading stage, not only that they could survive summary judgment but that they are entitled to summary judgment. *See id.*

[280] *See* 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.).

[281] *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007).

[282] *Id.* at 324 (emphasis added).

[283] *See id.* Professor Bone also notes the lower standard in *Bell Atlantic:* "It is also clear that the Court does not mean to impose a standard as strict as . . . [the PSLRA] requires for scienter allegations . . . ." Bone, *Pleading Rules*, *supra* note 8, at 881 n.42.

[284] *Bell Atlantic*, 550 U.S. at 556.

b. *The Procedural Accuracy Standard Should Be Stronger*

Even if the procedural accuracy standard is descriptively accurate, perhaps the standard ought to be stronger.[285] For example, Professor Richard Epstein has argued in favor of applying the summary judgment standard at the pleading stage in antitrust cases similar to *Bell Atlantic*.[286] But, as a general matter, applying this standard is normatively problematic because it potentially disrupts the underlying values expressed by the trial proof rules regarding accuracy and fairness.[287] Plaintiffs who must provide more than a plausible explanation of the events, or suggest a reasonable expectation that discovery will reveal favorable evidence, will necessarily bear a greater risk of error.[288] Given the comparative nature of proof, this is particularly unfair in cases in which we do not yet know the defendant's alternative explanation. A stronger standard will also lead to additional procedural errors (and thus potential material errors) whenever a complaint is dismissed and the plaintiff's explanation at trial would have been better than the explanations that favor the defendant.[289]

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[285] *See infra* notes 286–288 and accompanying text.

[286] Epstein, *supra* note 8, at 99 ("[W]hen the full record at the time of the motion to dismiss does not support any plausible factual inference of guilt, then it is time to invoke a mini-summary judgment under the guise of a motion to dismiss."). Professor Epstein argues that cases ought to proceed only when "the likelihood of a positive case is high enough to justify" discovery costs. *Id.* at 81. By "positive," he is apparently referring to material accuracy. *See id.; see also id.* at 68 (expressing concern for "false positives" over false negatives); Hylton, *supra* note 8, at 54 ("In any case in which there is considerable doubt as to whether the plaintiff will be able to survive summary judgment, . . . the courts should dismiss at the pleading stage.").

[287] It would also frustrate other important procedural values such as participation.

[288] Professor Epstein contends that the costs are likely to be asymmetrical in antitrust cases and that there are therefore good reasons to treat false positives as more serious than false negatives. *See* Epstein, *supra* note 8, at 68. If this is true, then as a matter of policy it may justify raising the proof rule to "clear and convincing evidence." As things currently stand, however, the applicability of the preponderance rule suggests that the risk of error ought to be allocated to the parties in a roughly even manner. Additionally, requiring plaintiffs to meet the summary judgment standard at two stages, while defendants have to meet it, at most, at one stage, will shift more of the risk of error onto plaintiffs. One could perhaps implement Professor Epstein's proposal at the pleading stage, however—while maintaining a roughly equal allocation of the risk error—by either precluding defendants (but not plaintiffs) from moving for summary judgment or by lowering plaintiffs' burden of persuasion at trial and placing the burden of persuasion on defendants.

[289] Professor Epstein contends that the summary judgment standard should apply when the allegations are based on "public information." *Id.* at 82. The "public information" requirement, however, precludes discovery when discovery might render what appears to be an implausible explanation (based on the public information) plausible. *See id.* This is an additional risk borne asymmetrically by plaintiffs. Cases with high discovery costs could, nonetheless, require more to raise a reasonable expectation. *See supra* note 221.

c. *The Procedural Accuracy Standard Is Too Strong*

Perhaps the proposed standard is too strong, either descriptively or normatively. A recent article by Professor Adam Steinman suggests that both may be the case.[290] According to Professor Steinman, the "conventional wisdom" that *Bell Atlantic* and *Iqbal* impose a plausibility requirement is wrong as a descriptive matter.[291] He contends that the problem with the complaints was that they were "conclusory," and that "plausibility" may be a way to save a conclusory complaint but not a way to dismiss a non-conclusory complaint.[292] For example, he argues that the complaint in *Bell Atlantic* alleged conduct consistent with an agreement but did not "contain 'an independent allegation of the actual agreement.'"[293] Likewise, in *Iqbal*—where the complaint alleged that (1) Ashcroft and Mueller approved of the policy to subject the plaintiff to the alleged detention conditions because of religion and national origin, (2) Ashcroft was the "principal architect" of the policy, and (3) Mueller was "instrumental" in implementing it—Professor Steinman contends the agreement was a "distinct" event and the complaint failed because it did not allege sufficient details about the content of this agreement.[294] The failure of both complaints was that they described the goals or future consequences of agreements without identifying the nature or contents of the agreements themselves.[295]

Professor Steinman's reading of these cases is provocative and an important challenge to the "conventional interpretation" of the pleading cases, but it does not stand up to close scrutiny. The idea of "conclusory" allegations cannot support the weight it is being asked to bear.[296] Professor Steinman proposes defining "conclusory" in "transactional" terms: an action is conclusory when it "fails to identify what real world events are alleged to have occurred."[297] But anyone reading either complaint would know to what real world events the plaintiffs are referring: an agreement not to compete in *Bell Atlantic* and a policy to discriminate in *Iqbal*.[298] It is not clear how merely saying "agreement" (as opposed to

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[290] Steinman, *supra* note 3, at 1293.

[291] *See id.* at 1298.

[292] *Id.* ("[C]onclusoriness is a basis for *refusing* to accept the truth of an allegation; implausibility is not." (emphasis added)).

[293] *See id.* at 1339.

[294] *See id.* at 1337.

[295] *See id.* at 1335–39.

[296] Allegations are "conclusory" when they are too general to provide a plausible explanation of the relevant events. *See supra* note 72.

[297] Steinman, *supra* note 3, at 1339.

[298] *See Iqbal*, 129 S. Ct. at 1942; *Bell Atlantic*, 550 U.S. at 548.

"conspiracy") in the complaint in *Bell Atlantic* would make it any less conclusory.[299] Nor is it clear how saying, shortly after September 11, 2001, that Ashcroft and Mueller approved of "subject[ing] Plaintiffs to [harsh] conditions of confinement as a matter of policy solely" because of their religion and national origin is any less conclusory than saying that one designed and the other implemented a policy with these effects for these reasons.[300] Moreover, a number of satisfactory examples of complaints are similarly "conclusory" and would fail the transactional standard. The complaint in *Swierkiewicz*, for example, described "underlying acts or events"—"the plaintiff's firing."[301] But, like *Iqbal*, this is simply the future consequence of a prior action (the decision to fire plaintiff because of age), and the complaint does not describe the *content* of that decision.[302] And, as in *Iqbal* and *Bell Atlantic*, the reason for the future action is what matters for purposes of the substantive law. Similarly, Form 11 describes the defendant's negligent driving but does not allege what this defendant *did* that was negligent.[303]

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[299] Along with a "conspiracy" to restrain trade, the Sherman Act also mentions "contract[s]" to restrain trade as giving rise to liability. 15 U.S.C. § 1 (2006). If the complaint in *Bell Atlantic* had said "contract" rather than "conspiracy," it would have been just as conclusory. Thus, it is hard to see how "having an agreement" is less conclusory than "having a contract" (which implies an agreement—and more).

[300] *See* Steinman, *supra* note 3, at 1336. As Steinman notes, the complaint alleged that the defendant "agreed to subject Plaintiffs to [harsh] conditions" and did so "solely on account of their religion, race, and / or national origin and for no legitimate penological interest." *Id.* at 1308 & n.97. The complaint used "agreed," which Professor Steinman contends was the problem in *Bell Atlantic*, and it makes clear both the nature of the policy and the reasons for it. *See id.* at 1339.

[301] *Id.* at 1299 n.17 (citing generally *Swierkiewicz*, 534 U.S. 506).

[302] *See id.* at 1342 ("Swierkiewicz did not need to explain *why* he believed the defendant fired him for invidious reasons."). For example, the complaint does not allege the *contents* of the employer's thoughts when he decided to fire the plaintiff, nor does it allege the *content* of the words spoken if the decision was made as part of a conversation. But, if this content does not matter, why should similar content of the agreement in *Bell Atlantic* or policy in *Iqbal* matter?

[303] Professor Steinman contends Form 11 is sufficient because it describes the fact that "the defendant drove his car against the plaintiff." *Id.* at 1341. But this does not itself give rise to liability, and adding an allegation that the defendant was driving "negligently" would fail under Professor Steinman's definition of "conclusory." The complaint does not yet describe what the defendant *did* to make his conduct negligent. *See id.* at 1343 n.287 (arguing that the complaint in *Iqbal* is insufficient because of "uncertainty about Ashcroft and Mueller's individual involvement in a willful and malicious agreement to subject Iqbal to harsh conditions of confinement"). More generally, Professor Steinman contends that if a complaint identifies the "transactional core" of an event, "it does not need to further explain *how* or *why* an event is alleged to have a particular quality or characteristic." *Id.* at 1341.

d. *The Procedural Accuracy Standard Is Too Strong from a Normative Perspective*

Putting aside descriptive exegesis, a final counterargument to the procedural accuracy standard is that it is too strong from a normative perspective.[304] Professor Steinman's analysis also suggests such a counterargument. He explores "a deeper theory of the role pleadings ought to play in civil adjudication" and arrives at "a new paradigm" that he refers to as "plain pleading."[305] The "deeper theory" aspect aims at satisfying the pleading functions of "notice-giving, process-facilitating, and merits-screening,"[306] and the "plain pleading" standard requires that allegations "necessary to establish a viable claim" must "identify a tangible, real-world act or event."[307] Under this standard, courts need not accept conclusory allegations as true because, if they did, it would be "impossible to determine whether the acts or events . . . would even establish a viable claim."[308] Any higher pleading standard, however, would prevent "meritorious claims from ever seeing the light of day" or would "prevent[] plaintiffs with potentially meritorious claims from reaching" further stages in the adjudicative process.[309] Yet, from a normative perspective, this proposed paradigm is problematic. A standard of whether it is "impossible" to tell whether a claim is without merit or whether a claim is "potentially meritorious"[310] would fail to align decisions at this stage with the proof rules, would shift more of the risk of error onto defendants, and would eliminate any efficiency benefits when one outcome is dictated by the proof rules. It would therefore risk a greater number of procedural errors (and hence material errors) than the procedural accuracy standard.[311]

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[304] *See infra* notes 305–311 and accompanying text.

[305] Steinman, *supra* note 3, at 1347, 1348–49.

[306] *Id.* at 1347.

[307] *Id.* at 1339. The complaints in *Iqbal* and *Bell Atlantic* alleged real-world events, e.g., a policy toward detainees and an agreement not to compete.

[308] *Id.* at 1349.

[309] *Id.* at 1350–51.

[310] *See id.* at 1350–51. It is not clear whether "meritorious" refers to material or procedural accuracy. *See id.* Either way, however, a standard based on the possibility of recovery reduces to the rejected *Conley* standard. *See id.*

[311] In terms of procedural values, this standard trades efficiency for participation, but, more importantly, it ignores the considerations regarding accuracy and allocation of the risk. In these regards, it is the inverse of Professor Epstein's proposed standard. *See* Epstein, *supra* note 8, at 98–99.

B. *Summary Judgment*

A court may grant summary judgment when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[312] There is a genuine issue of material fact when a reasonable jury could find for either party at trial on that issue; there is no genuine issue when "there can be but one reasonable conclusion."[313] The reasonable jury determination (1) is based on information about the case contained in "pleadings, the discovery and disclosure material on file, and any affidavits,"[314] and (2) "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[315] In other words, the determination involves an assessment of what a reasonable jury could do given the evidence in the record and the applicable burdens of proof and decision standard at trial. The assessment takes place without judging the credibility of witnesses and by drawing reasonable inferences and construing any ambiguities or conflicts in the evidence in favor of the nonmoving party.[316]

The theory of procedural accuracy provides criteria for answering the crucial, but often elided, summary judgment question: when is a particular jury conclusion reasonable (or unreasonable) given the evidence in the record and the applicable proof rules? As a general matter, this question ought to turn on whether a reasonable jury could or must find a particular explanation to be the best available explanation. When the plaintiff has the burden of proof by a preponderance of the evidence and the defendant moves for summary judgment, judgment should be entered only if a reasonable jury *could not* find the plaintiff's explanation to be better than any available explanations that favor the defendant.[317] When the plaintiff moves for summary judgment, judgment should be entered only if a reasonable jury *must* find the plaintiff's explanation to be better than those that favor the defendant. Under the theory of procedural accuracy, this standard would align applications of summary judgment with the macro-level rules of the trial—thereby fostering material accuracy and maintaining a proper balance regarding the risk of error—while guiding and constraining applications.

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[312] Fed. R. Civ. P. 56(c)(2).

[313] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

[314] Fed. R. Civ. P. 56(c)(2).

[315] *Anderson*, 477 U.S. at 252.

[316] *See id.*

[317] Under the clear and convincing evidence rule, a reasonable jury would have to be able to find the plaintiff's explanation to be clearly and convincingly better.

1. Applications of the Summary Judgment Standard

The standard provided by the theory of procedural accuracy explains and justifies a number of aspects of three U.S. Supreme Court decisions decided in 1986: *Anderson v. Liberty Lobby, Inc.*, *Celotex Corp. v. Catrett*, and *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*[318]

Anderson established that summary judgment determinations depend on the "evidentiary standard of proof" that would apply at trial.[319] This means that a reasonable inference under the preponderance standard may not be reasonable under the clear and convincing evidence standard. From the perspective of procedural accuracy, this is exactly right. A lower standard—one that did not incorporate the trial proof rule—would create the risk of procedural errors because some claims would make it past summary judgment even though a contrary outcome would be mandated by the trial proof rules.[320]

Celotex rejected the requirement that parties moving for summary judgment who would not have the burden of proof at trial (typically defendants) must offer evidence tending to disprove the nonmoving parties' (typically plaintiffs') allegations.[321] This rejection is consistent with the theory of procedural accuracy: placing a higher burden on moving parties than they would bear at trial creates the opportunity for procedural errors by allowing cases to proceed through the litigation process when one outcome is mandated by the trial proof rules.[322] The outcome in *Celotex* is also consistent.[323] At trial the plaintiff needed to prove by a preponderance of the evidence that he was exposed to the defendant's asbestos.[324] In terms of procedural accuracy, to avoid summary judgment plaintiff therefore needed to show that a reasonable jury *could* find that exposure to the defendant's asbestos better explained his cancer than any explanation that favored the defendant (for example, expo-

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[318] *See infra* notes 319–329 and accompanying text.

[319] 477 U.S. at 252. The opinion also explained that courts must draw legitimate and justifiable inferences in favor of the nonmoving party and that they must not judge the credibility of witnesses. *See id.*

[320] Of course, sometimes the jury would still render the decision dictated by the proof rules, or a later procedural device (JMOL) could align the outcome with the proof rules. When the possible procedural error is avoided, however, any potential efficiency gained by summary judgment would be lost.

[321] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323–25 (1986) ("[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.").

[322] *See id.*

[323] *See id.*

[324] *See id.*

sure to someone else's asbestos or a different cause).[325] On remand, the appellate court concluded that the plaintiff had sufficient evidence in the record to withstand the defendant's motion.[326] In other words, it concluded that a reasonable jury could find the plaintiff's explanation to be the best available explanation.

By focusing explicitly on competing explanations, *Matsushita* also accords with the theory of procedural accuracy. At trial, the plaintiff would have been required to prove by a preponderance of the evidence that the defendants conspired to fix prices.[327] Thus, the plaintiff would have been required to prove that its explanation of the evidence and events was better than the available explanations that favored defendants. Accordingly, to avoid summary judgment, the plaintiff would have had to show that a reasonable jury could have found its explanation to be better than those that favored defendants. But, because the alleged conspiracy made "no economic sense" and the plaintiff lacked any evidence of a conspiracy (other than similar prices),[328] no reasonable jury could have found conspiracy to be a better explanation of the defendants' actions than explanations that favored defendants, such as independent action. Given the lack of other evidence, a reasonable jury would have concluded that independent action was at least as plausible as a conspiracy. Because conspiracy was not the best available explanation, a finding for the plaintiff would have been unreasonable.

The examples from the beginning of this Part further illuminate the standard.[329] In the first example (negligence), the defendant is entitled to summary judgment when a reasonable jury *could not* find the defendant's negligence to be the best available explanation of the events and the evidence in the record. The plaintiff is entitled to summary judgment if a reasonable jury *must* find it to be the best explanation. In the second example (employment discrimination), summary judgment for the defendant is warranted when a reasonable jury *could not* find sex discrimination to be the best available explanation for the plaintiff's discharge and the evidence in the record. Summary judgment for the plaintiff is warranted when a reasonable jury *must* find it

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[325] Defendants must satisfy an initial burden either by pointing out the absence of plaintiff evidence, such that a reasonable jury could not find for the plaintiff, or by submitting additional evidence showing a reasonable jury could not find for the plaintiff. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 377 (2007).

[326] *See* Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 40 (D.C. Cir. 1987).

[327] *See Matsushita*, 475 U.S. at 585–93.

[328] *See id.* at 587–93.

[329] *See supra* notes 232–234 and accompanying text.

to be the best explanation. In the third example (antitrust), summary judgment for the defendant ought to be granted when a reasonable jury *could not* find conspiracy to be the best available explanation of the events and evidence in the record. Summary judgment ought to be granted for the plaintiff when a reasonable jury *must* so find. Finally, in the fourth example (municipal liability), the defendant is entitled to summary judgment when a reasonable jury *could not* find that a policy or custom to arrest Muslim artists because of religion or national origin is the best available explanation of the events and evidence in the record. The plaintiffs are entitled to summary judgment when a reasonable jury *must* so find.

2. Counterarguments to the Summary Judgment Standard

As with pleadings, the standard for summary judgment provided by the theory of procedural accuracy may be challenged on descriptive or normative grounds. For the reasons discussed above, however, the standard provides a descriptive fit with the summary judgment framework established by Rule 56 and the trilogy of *Anderson, Celotex,* and *Matsushita.*[330] Given this fit,[331] it is assumed that the more serious counterarguments are normative—for example, that the standard articulated is weaker or stronger than it ought to be.[332]

a. *The Procedural Accuracy Standard Is Too Weak Normatively*

First, one might argue that the procedural accuracy standard is too weak normatively. The standard is too weak, arguably, because it relies on a comparison of the explanations that support each side and not on an examination of the strength of the plaintiff's case in isolation. According to this view, there will be situations in which the plaintiff's explanation is better than the defendant's, but the plaintiff's case is still so weak (or the explanation so bad) that it should not go to trial.[333] More-

[330] *See supra* notes 318–328 and accompanying text.

[331] As a descriptive matter, one might argue that my standard places too much of a burden on defendants and is thus inconsistent with *Celotex,* in which the Court held that defendants need not provide evidence disproving plaintiffs' allegations. But nothing in my proposed standard *requires* defendants to provide either evidence or an alternative explanation of plaintiffs' evidence at summary judgment (even though the standard is phrased comparatively). What defendants' obligations *ought* to be at summary judgment are considered in the normative discussion below.

[332] *See infra* notes 333–349 and accompanying text.

[333] *See* Craig R. Callen, *Cognitive Science and the Sufficiency of "Sufficiency of the Evidence" Tests,* 65 Tul. L. Rev. 1113, 1121 (1991).

over, according to this view, the comparison standard puts too high a burden on the defendant, who ought to be able to sit back and do nothing until the plaintiff has provided a sufficiently good case to warrant a trial.[334]

A stronger standard, however, faces two problems that make it less desirable on normative grounds than the one I propose. First, if we *could* somehow measure the strength of the plaintiff's case in isolation and thus require more than that a reasonable jury could find the plaintiff's explanation to be better than those favoring the defendant, this would necessarily shift more of the risk of error onto plaintiffs. A comparative standard better fits with the normative goals of allocating the risk of error roughly equally among the parties and maximizing material accuracy. Parties each share a risk that the best available explanation will favor their opponent, and, if better explanations are more likely to be true than worse ones, the comparative standard will provide results that are more likely to be materially accurate. A non-comparative standard will allocate the risk of error onto plaintiffs even when their explanations are more likely to be accurate, and it will provide decisions that are less likely to be materially accurate. The second, more serious problem with a stronger, non-comparative standard is that it simply cannot be carried out in most cases.[335] The nature of legal proof is inherently comparative,[336] and, so long as the plaintiff has some evidence on each element of a claim, it is impossible to conclude how likely the claim is without comparing it to an alternative explanation, with or without competing evidence.[337]

b. *The Procedural Accuracy Standard Is Too Strong*

One may also argue that the procedural accuracy standard is stronger than it ought to be. A recent article by Professor Suja Thomas

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[334] *See* Currie, *supra* note 105, at 72–79.

[335] A non-comparative standard will work only when a plaintiff has no evidence at all on an element. When there is some evidence, we cannot tell whether it is sufficient without some comparison with the defendant's case.

[336] This is so regardless of whether one adopts a probabilistic or explanatory conception of proof. *See* WALTON, *supra* note 212, at 277 n.6 ("To say a statement is improbable means that it is unlikely that it is true . . . . This notion is based . . . on placing the statement as one in a set of statements that are independent of each other and that together exhaust a set of outcomes.").

[337] For cases recognizing this aspect, see Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 437 (2002); Anderson v. Griffin, 397 F.3d 515, 517–24 (7th Cir. 2005); United States v. Beard, 354 F.3d 691, 693 (7th Cir. 2004); United States v. Newell, 239 F.3d 917, 920 (7th Cir. 2001).

makes such a suggestion.[338] Professor Thomas argues that the "reasonable jury" standard is a "legal fiction," that the questions that arise under it are "incapable of determination," and that the "only analysis that judges perform [in applying it] is an improper one based on the judge's own view of the facts."[339] This is a serious challenge to the procedural accuracy standard because if the reasonable jury question cannot be answered without devolving into the judge's own determination of the underlying proof question, then *a fortiori* the procedural accuracy standard of what a reasonable jury could conclude about competing explanations also devolves into this improper determination.[340] But why does Professor Thomas think the reasonable jury determination is impossible? Her argument depends on the idea that "under the current standard, judges are not supposed to decide what they think about the sufficiency of the evidence,"[341] but any determination will necessarily involve "the judges' own views of the sufficiency of the evidence in a case."[342]

There is an ambiguity lurking here, and clarifying it will reveal that an independent reasonable jury determination is (1) possible, (2) one that judges are capable of performing, and (3) indeed, familiar. Professor Thomas is correct that judges should not decide whether the evidence is "sufficient" in the sense that it actually proves the disputed issue by a preponderance of the evidence, but a judge can decide whether the evidence is "sufficient" in the sense that a reasonable jury could conclude the evidence proves the issue by a preponderance of the evidence.[343] The latter determination is not only proper but is required to apply the standard correctly. An analytical separation of these two questions is possible, and is a mental feat that judges are quite capable of performing.[344]

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[338] *See* Thomas, *supra* note 11, at 784.

[339] *Id; see also id.* at 777–78 ("The false factual premise underlying the reasonable jury standard is that a court can actually apply the standard. A court cannot do this.").

[340] It would be "improper" in part because it would interfere with the parties' Seventh Amendment right to a jury trial. It would also be improper normatively for the reasons discussed in Part II. *See supra* notes 132–228 and accompanying text.

[341] *See* Thomas, *supra* note 11, at 778 (relying on *Anderson* for this claim).

[342] *Id.* at 772.

[343] There is a similar ambiguity in Professor Thomas's analysis regarding the "weighing of evidence" and drawing "inferences." The judge may not weigh evidence and draw inferences to determine whether the claim has been proven, but the judge may evaluate whether a reasonable jury could weigh the evidence and draw certain inferences and then conclude whether the claim has been proven.

[344] It is, of course, a different question whether they actually will do so in a given case. *See, e.g.*, *Scott*, 550 U.S. at 386; *see supra* note 119.

An example illustrates the difference. Suppose a witness provides corroborating testimony of the plaintiff's version of events, and this testimony is the plaintiff's evidence on a necessary element of the claim. If the judge concludes that this witness is not believable, the judge would, if able to decide the case, conclude that the plaintiff has failed to prove the necessary element by a preponderance of the evidence. But, because judges are not supposed to weigh credibility in deciding the reasonable jury question, the judge should conclude that a reasonable jury could believe the witness and thus that the jury could find the element proven by a preponderance of the evidence. Thus, the judge should deny a motion for summary judgment against the plaintiff even though this result diverges from how she would decide the factual question.

This distinction is not only possible and one that judges are capable of making, it is a familiar one they perform all the time in the evidence context. The admissibility of evidence often depends on proof of certain preliminary facts, such as whether a witness has personal knowledge,[345] whether an exhibit is authentic,[346] and general issues of conditional relevance.[347] Judges decide these questions under the standard of whether there is evidence "sufficient to support a finding," which examines whether a reasonable jury could find these preliminary facts proven by a preponderance of the evidence.[348] Clearly, this determination may diverge from judges' own views about whether the preliminary facts are proven.[349]

Professor Thomas's concern regarding the unconstrained nature of reasonable jury determinations is warranted. Due to the absence of criteria for applying the standard, judges are not prevented from substituting their own judgments about how they would decide the case. But it does not follow that a viable reasonable jury standard would not be possible or would not function to facilitate important procedural values and normative goals, if there were better guidance and constraint. In-

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[345] *See* FED. R. EVID. 602.

[346] *See id.* 901.

[347] *See id.* 104(b).

[348] Huddleston v. United States, 485 U.S. 681, 690 (1988).

[349] When judges decide preliminary evidentiary questions themselves it is under the distinct (higher) standard of FEDERAL RULE OF EVIDENCE 104(a). *See* FED. R. EVID. 104(a). Professor Thomas also argues that the fact that judges disagree with each other about whether a reasonable jury could find for the plaintiff shows that the judges are substituting their own views of the facts. *See* Thomas, *supra* note 11, at 772–73. But this does not follow. Two judges could agree on how they would decide the case, but disagree about how to answer a second-order question about whether a reasonable jury could disagree with their shared answer to the first-order question.

deed, the standard provided by the theory of procedural accuracy applies just these criteria in order to align decisions with normatively desirable procedural values and goals.

C. *Judgment as a Matter of Law*

JMOL may be entered against a party at trial or after a verdict when "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[350] As with summary judgment, the decision of what a reasonable jury could decide depends on the substantive law, the burden of proof, and the decision rule. Courts also must draw reasonable inferences in favor of the nonmoving party and must not judge the credibility of witnesses.[351] The primary difference from summary judgment is that the "reasonable jury" determination depends on the evidence admitted at trial.

Given the similar standards, the procedural accuracy considerations apply similarly in both contexts to align outcomes with the proof rules. The requirements for moving and nonmoving parties (with and without the burden of proof) in the JMOL context follow the same comparative-explanatory framework used for summary judgment.[352] The same analysis also applies to the four hypothetical examples. Lastly, the counterarguments and responses regarding summary judgment also apply to JMOL.[353]

There is one area in which the JMOL standard has caused considerable confusion: employment discrimination.[354] The discussion below further illuminates the requirements of procedural accuracy and focuses on two recent U.S. Supreme Court opinions: *St. Mary's Honor Center v. Hicks,* a 1993 race discrimination claim,[355] and *Reeves v. Sanderson Plumbing Products, Inc.*, a 2000 age discrimination claim.[356]

In *St. Mary's*, the plaintiff alleged that he was demoted and discharged from his job as a correctional officer because of race.[357] Plain-

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[350] FED. R. CIV. P. 50(a)(1). Such judgments should be granted only after the party "has been fully heard" on the issue. *See id.*

[351] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

[352] *See supra* notes 318–329 and accompanying text.

[353] *See supra* notes 330–339 and accompanying text.

[354] *See* Clermont & Schwab, *supra* note 34, at 429; Zimmer, *supra* note 34, at 577.

[355] 509 U.S. 502, 504 (1993).

[356] 530 U.S. at 137; *see* Zimmer, *supra* note 34, at 577 ("[T]he Supreme Court spent much of its opinion [in *Reeves*] applying the rules as to motions for summary judgment and judgment as a matter of law to the facts of this particular case rather than announcing any new rules about how this should work.").

[357] *See* 509 U.S. at 504–05.

tiff attempted to prove his discrimination claim through the structure established in the 1973 U.S. Supreme Court case, *McDonnell Douglas Corp. v. Green*.[358] The defendants in *St. Mary's* conceded that the plaintiff proved a prima facie case of discrimination.[359] The defendants responded with evidence of a "legitimate, nondiscriminatory" reason for firing him: several rules violations.[360] During a bench trial, the district court had considered whether the plaintiff proved discrimination based on the evidence as a whole.[361] It found that the defendants' stated reasons for firing the plaintiff were not the real reasons because other coworkers were not disciplined for more serious violations and the plaintiff was the only supervisor disciplined for actions of his subordinates.[362] Nevertheless, it concluded that the plaintiff failed to prove by a preponderance of the evidence that he was discharged because of race.[363]

Before the Supreme Court, the plaintiff argued that when a defendant's explanation is found to be false, the plaintiff is entitled to JMOL.[364] The plaintiff contended that if a defendant offers a false explanation, it ought to be treated as if they had offered no explanation at all.[365] The Court disagreed.[366] The majority explained that the combination of a prima facie case and disbelieving a defendant's explanation might "permit" a reasonable fact-finder to find discrimination, but this conclusion is not required and may not even be the only reasonable conclusion.[367] A reasonable fact-finder might also find the plaintiff failed to prove discrimination. The Court's analysis thus provided one

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[358] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–07 (1973). Under this proof structure, the plaintiff must prove a prima facie case of discrimination by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *See St. Mary's*, 509 U.S. at 506. Then, the defendant must produce a race-neutral explanation for its actions. *See id.* When the defendant provides an explanation, the jury will determine, based on the evidence as a whole, whether the plaintiff has proven discrimination by a preponderance of the evidence. *See id.*

[359] 509 U.S. at 506.

[360] *Id.* at 507.

[361] *See id.* at 508.

[362] *See id.*

[363] *Id.*

[364] *Id.* at 509.

[365] *See St. Mary's*, 509 U.S. at 509–11.

[366] *See id.*

[367] *Id.* at 511. The Court further explained: "[W]hat is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands." *Id.* at 515.

example of a conclusion that would not necessarily be unreasonable: finding no discrimination while disbelieving the defendant's explanation. But, the Court did not provide a general standard for determining when conclusions are reasonable or unreasonable based on the evidence.

The theory of procedural accuracy provides this standard. A plaintiff is entitled to JMOL only when a reasonable jury must find the plaintiff's explanation to be better than those that favor the defendant. Such a finding was not mandated in *St. Mary's* because a reasonable fact-finder could conclude that (1) defendant's explanation is false, and (2) plaintiff's explanation is not better than other explanations that favor the defendant, such as that the plaintiff was fired for a reason other than discrimination. Fact-finders are free to reject explanations offered by parties and to develop alternative explanations. They ought to find for whomever these alternative explanations favor when such explanations are better than the parties' explanations.[368]

The theory of procedural accuracy explains the outcome in *Reeves*, a similar U.S. Supreme Court discrimination case decided in 2000.[369] The plaintiff in *Reeves* brought an age discrimination lawsuit after his employer of forty years discharged him from his job as a supervisor in the employer's manufacturing plant.[370] The case proceeded to trial, and a jury returned a verdict for the plaintiff.[371] The defendant argued that plaintiff's evidence was insufficient and that the defendant was entitled to JMOL.[372] The primary issue before the Court was whether a plaintiff's proof of a *prima facie* case plus evidence discrediting the defendant's alternative explanation is sufficient for a reasonable jury to find discrimination.[373] The Court rejected the defendant's argument that it will *always* be insufficient.[374] The Court explained that sometimes it will be sufficient to support a reasonable finding of discrimination, and sometimes it will not be.[375] In this case, the Court concluded there was sufficient evidence to support the jury's verdict.[376] Procedural accuracy explains

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[368] Additionally, fact-finders ought to find against the party with the burden of proof if they conclude this party's explanation is equally as good as a third one that favors the other side.

[369] *See* 530 U.S. at 137.

[370] *See id.* at 137–38.

[371] *Id.* at 139.

[372] *See id.* at 148–49.

[373] *See id.* at 137.

[374] *See id.* at 148–49.

[375] *See Reeves*, 530 U.S. at 148.

[376] *See id.* at 151–53.

Reeves. The decision was correct because in accepting the plaintiff's *prima facie* case and rejecting the defendant's explanation, a reasonable jury could find age to be the best available explanation for the discharge.[377]

Conclusion

The procedural devices of pleadings, summary judgment, and JMOL rely on unclear standards, and this lack of clarity creates normative problems throughout the system of civil litigation. The unclear standards include whether a complaint is "plausible" and whether a "reasonable jury" could find for a party at trial. The normative problems include a lack of guidance and constraint on judicial determinations and unprincipled applications of these devices to terminate potentially meritorious lawsuits.

This Article argues that the theory of procedural accuracy explains, clarifies, and provides content to these standards (to resolve the descriptive problems), and it provides guidance and constraint for principled applications (to resolve normative problems). Descriptively, each device depends for its content on the underlying evidentiary proof rules that would apply at trial, and, thus, understanding what these rules require provides insight into the standards for each device. Relying on an explanatory conception of these rules, the standards for the procedural devices are explained in terms of competing explanations of the evidence and events giving rise to litigation. Normatively, each device serves the procedural values that underlie the system of civil litigation by aligning outcomes with the requirements of the proof rules. These rules are designed to foster materially accurate outcomes and to fairly allocate the risk of adjudicative error among the parties. The procedural devices foster these goals by aligning outcomes with the rules. In addition to serving the important values of accuracy and the risk of error, the proposed standards fit in a justifiable manner with other important procedural values including efficiency, participation, jury-trial rights, substantive rights, deterrence, and guidance regarding the substantive law.

Lastly, the relationship between this Article's descriptive and normative claims is explained. They are conceptually independent. In other words, one may accept the descriptive claims while rejecting the normative claims, and vice versa. Nonetheless, the theory of procedural accuracy provides the best explanation on both sets of issues. This then

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[377] This assumes that there is *not* other evidence in the record that shows some other non-discriminatory explanation is better, or at least as good as, plaintiff's explanation.

generates a number of subsequent questions beyond the scope of this Article. For example, descriptively, more refined analysis will be needed on how to apply the standards and the underlying explanatory criteria to particular substantive areas of law; normatively, further analysis will be needed on how the alignment function and the values it fosters relate in detail to the other specific procedural values that help to comprise the complex web of normative considerations underlying the litigation system as a whole. These are topics for another day.