Louisiana Law Review

Volume 73 | Number 2
Winter 2013

Elementary Pleading

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ABSTRACT

This Article is a sequel to *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, which suggested that *Twombly* required "direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory."[1] This standard—referred to here as *elementary pleading*—has been cited thousands of times since *Twombly*. After *Ashcroft v. Iqbal*, the elementary pleading standard fits within a three-part framework that requires the court and litigants to identify the elements of the plaintiff's claim, to identify and disregard conclusory allegations, and, finally, to assess the well-pleaded allegations to determine whether they constitute a "plausible claim for relief."

Even after *Iqbal*, however, this framework should not require much more than well-pleaded "factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law."[2] Moreover, in assessing pleadings, lower courts should adhere rather strictly to the Supreme Court's description of *conclusory* allegations as only those that are wholly unsupported recitations of elements of the claim and employ their "judicial experience and common sense" in a manner that will not only put cases out of court, but keep them in, too.

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* Associate Professor of Law, Faulkner University, Jones School of Law. J.D., 1993, University of Virginia; B.S., 1988, Auburn University. I am grateful to Faulkner University, Jones School of Law, for a research grant to support this Article. I am also grateful to the participants in the panel discussion on pleading at the 2010 Conference on Civil Litigation, sponsored by the Judicial Conference Advisory Committee on Civil Rules. Their insights are enormously helpful.

1. Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 22 (2008) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); *In re* Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981)).

2. *Id.* at 22.

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INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*,[3] the Supreme Court caused quite a stir by "retiring"[4] its long-held understanding of notice

3. 550 U.S. 544 (2007).

4. *See id.* at 563 (stating that *Conley v. Gibson*'s famous "'accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" 355 U.S. 41, 45–46 (1957), had "earned its retirement").

pleading and by introducing the concept of "plausibility" in federal pleading.[5] Afterwards, I observed that *Twombly* itself offered a suggestion for elucidating the otherwise amorphous notion of "plausibility."[6] The Court in *Twombly* quoted an appellate decision asserting that, "'[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.'"[7] Tracing this phrase to its origin in the former Fifth Circuit's decision in *In re Plywood Antitrust Litigation*,[8] I noted that this

> standard does much to harmonize the Federal Rules' goal of dispensing with pleading technicalities while still requiring enough general factual information about a pleader's claim to make the notice in "notice pleading" meaningful. . . . [P]erhaps most importantly, it gives lawyers, litigants, and courts a standard they can actually use when drafting or assessing the sufficiency of pleadings.[9]

Experience seems to have borne out my prediction about the utility of this standard. Since *Twombly*, federal courts have cited the *Plywood Antitrust* standard some 47 times in the courts of appeals and over 2,800 times in the district courts.[10]

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5. *Id.* at 556–60, 564, 566, 569–70.

6. Campbell, *supra* note 1.

7. 550 U.S. at 562 (alteration in original) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (quoting *In re* Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981)))).

8. 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981).

9. Campbell, *supra* note 1, at 2.

10. Westlaw search on February 14, 2013, of the CTA and DCT databases using the following search expression: "allegations /s elements /s 'viable legal theory' & da(after 5/21/2007)." The circuit making greatest use—by far—of the standard is the Sixth Circuit, with 29 court of appeals decisions (15 reported, 14 unreported) and 1,733 district court decisions. Westlaw search on February 14, 2013, of the CTA6, CTA6R, CTA6U, and DCT6 databases using same search expression. Next is the Eleventh Circuit, with ten court of appeals decisions (four reported, six unreported) and 234 district court decisions. Westlaw search on February 14, 2013, of the CTA11, CTA11R, CTA11U, and DCT11 databases using same search expression. Third in terms of appellate decisions is the Tenth Circuit, with four court of appeals decisions (one reported, three unreported) and 57 district court decisions. Westlaw search on February 14, 2013, of the CTA10 and DCT10 databases using same search expression. Third in terms of district court decisions is the Third Circuit, with 231 district court decisions and two unreported court of appeals decisions. Westlaw search on February 14, 2013, of the CTA3, and DCT3 databases using same search expression.

Two years after *Twombly*, however, the Supreme Court returned to federal pleading standards in *Ashcroft v. Iqbal*.[11] If *Twombly* caused a stir, *Iqbal* created a firestorm. There have been thousands of lower court decisions,[12] hundreds of law review articles,[13] symposia,[14] and even congressional hearings[15] on what some are calling a "crisis"[16] in federal pleading.

After *Iqbal*, I continue to believe that the *Plywood Antitrust* standard embodies an appropriate approach to pleading in the age of "plausibility." It remains an exemplary yardstick for measuring the sufficiency of federal complaints and sound practical guidance for attorneys and litigants faced with drafting (and challenging) those complaints in the era of *Twombly* and *Iqbal*. Later Supreme Court cases have reinforced this belief.[17]

In this Article, I refer to the *Plywood Antitrust* approach to pleading and related concepts as *elementary pleading*. I use the term *elementary* precisely for its double meaning. The term focuses on the *elements* of a plaintiff's substantive claim, while also reminding that federal pleading is supposed to be fairly

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11. 556 U.S. 662 (2009).

12. There have been over 75,000 case citations of *Twombly* and over 52,000 of *Iqbal* as of February 14, 2013, according to Westlaw's Keycite service.

13. There have been over 1,200 law review citations of *Twombly* and over 800 of *Iqbal* as of February 14, 2013, according to Westlaw's Keycite service.

14. *See, e.g.*, Symposium, *Access to Justice: Investor Suits in the Era of the Roberts Court*, 75 LAW & CONTEMP. PROBS. 1 (2012); JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf; Symposium, *2010 Civil Litigation Review Conference*, 60 DUKE L.J. 537 (2010); Symposium, *Reflections on* Iqbal*: Discerning Its Rule, Grappling with Its Implications*, 114 PENN ST. L. REV. 1143 (2010); Symposium, *Pondering* Iqbal, 14 LEWIS & CLARK L. REV. 1 (2010); Symposium, *The Future of Pleading in the Federal System: Debating the Impact of* Bell Atlantic v. Twombly, 82 ST. JOHN'S L. REV. 849 (2008).

15. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009).

16. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010).

17. *See* Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1322–23 (2011), discussed *infra* notes 253–261 and accompanying text; Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011), discussed *infra* notes 264–265 and accompanying text.

simple[18]—as in "Elementary, my dear Watson."[19] I also use the term to embody a moderate understanding of *Twombly* and *Iqbal*—one that views these cases as a reformation, not a revolution, in pleading and one that seeks to interpret them in the context of the original purpose of the Federal Rules of Civil Procedure to simplify and clarify procedure. The result is a three-step process for evaluating the sufficiency of a pleading that incorporates elements of *Twombly*, *Iqbal*, and *Plywood Antitrust*.

The concept of *elementary pleading* is no panacea for the many concerns raised in the wake of *Twombly* and *Iqbal*. Hopefully, however, it provides judges and lawyers with a strategy for managing "plausibility" under these decisions—a way forward that preserves what is helpful in the Supreme Court's pleading reformation, while ameliorating the potential for mischief.

I. THE SUPREME COURT'S PLEADING REFORMATION

A. Bell Atlantic Corp. v. Twombly[20]

In *Bell Atlantic Corp. v. Twombly*,[21] an antitrust class action, the plaintiffs alleged that the "Baby Bells"[22] were violating section

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18. *See* CONCISE OXFORD ENGLISH DICTIONARY 462 (12th ed. 2011) (defining *elementary* as *simple*). *Simple* and *simplified* were terms that Judge Clark often used to describe pleading under the Federal Rules of Civil Procedure. *See, e.g.*, CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 241 (2d ed. 1947) (discussing "The Simplified Pleading of Modern Federal Practice"); Charles E. Clark, *Federal Procedural Reform and States' Rights; To a More Perfect Union*, 40 TEX. L. REV. 211, 214 (1961) (mentioning "the simple allegations of the pleadings proper" among "the accomplishments made by the rules"); Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 52 (1957) (quoting Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 976 (2d Cir. 1945)); Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154 (1948) ("The cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants . . . ."); Charles E. Clark, *Simplified Pleading*, *in* THE JUDICIAL ADMINISTRATION MONOGRAPHS, SERIES A (COLLECTED) 100, 100 (1942) (referring to "a simple system of direct allegation, so successful a feature of the Federal Rules of Civil Procedure"), *reprinted in* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1943); Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 552 (1939) ("a very simple, concise system of allegation and defense"); *see also* FED. R. CIV. P. 8(d)(1) ("Each allegation must be simple, concise, and direct.").

19. *But see* Christopher Roden, *Explanatory Notes*, *in* ARTHUR CONAN DOYLE, THE MEMOIRS OF SHERLOCK HOLMES 274, 303–04 (Owen Dudley Edwards & Christopher Roden eds., Oxford Univ. Press 2009) (1893) (noting that this "much quoted apocryphal phrase . . . never appeared in the stories").

20. For a more detailed review of *Twombly*, see Campbell, *supra* note 1, at 3–9.

1 of the Sherman Act[23] in two ways. First, the plaintiffs alleged that the Baby Bells had "'engaged in parallel conduct' in their respective service areas to inhibit the growth of upstart" competitors, having been "naturally led . . . to form a conspiracy" by "'compelling common motivatio[n].'"[24] Second, the plaintiffs alleged that the Baby Bells had entered into "agreements . . . to refrain from competing against one another."[25]

The Supreme Court began its analysis with a concise statement of the substantive question under section 1 of the Sherman Act. Because section 1 only penalizes restraints of trade that are the product of "'contract, combination, or conspiracy,'" the critical issue was "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'"[26] Twombly had alleged "parallel conduct"[27] on the part of the Baby Bells, but the Court noted that "parallel conduct or interdependence, without more" is essentially ambiguous—It could be the result of unlawful conspiracy, on the one hand, or the result of lawful, unilateral business conduct in response to common market conditions, on the other.[28] "Even 'conscious parallelism' . . . is 'not in itself unlawful'" under Supreme Court precedent.[29] Thus, parallel conduct may be circumstantial evidence of an unlawful agreement, but it is not always enough—by itself—to establish that unlawful agreement.[30]

The Court then turned to "the antecedent question of what a plaintiff must plead in order to state a claim under section 1 of the

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21. 550 U.S. 544 (2007).

22. I.e., BellSouth Corp., Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (the successor to Bell Atlantic Corp.). *Id.* at 550 n.1. In *Twombly*, the Baby Bells were also referred to as Incumbent Local Exchange Carriers (ILECs). *Id.* at 549.

23. 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act forbids any agreement or conspiracy in restraint of interstate or foreign trade.

24. *Twombly*, 550 U.S. at 550–51 (quoting Consolidated Amended Class Action Complaint ¶¶ 47 & 50, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220(GEL)), 2003 WL 25629874).

25. *Id.* at 551.

26. *Id.* at 553 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775 (1984); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).

27. In the antitrust context, *parallel conduct* refers to "[b]usinesses acting similarly in their pricing or influence in a shared market." THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 66 (Compact ed. 2011).

28. *Id.* at 554.

29. *Id.* at 553–54 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)).

30. *Id.* (citing *Theatre Enters.*, 346 U.S. at 540–41).

Sherman Act."[31] The Court began with *Conley v. Gibson*,[32] noting that Federal Rule of Civil Procedure 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[33] The Court acknowledged that the Rules do not require a complaint to contain "detailed factual allegations" but then observed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[34] The Court concluded that "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[35]

Rejecting any suggestion "that the Federal Rules somehow dispensed with the pleading of facts altogether,"[36] the Court noted that "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."[37] "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing . . . 'grounds' on which the claim rests."[38]

The Court then applied "these general standards" to a claim under section 1 of the Sherman Act, "hold[ing] that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[39] The Court characterized this requirement as "[a]sking for plausible grounds to infer an agreement," but stressed that it did "not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[40] According to the Court, because "lawful parallel conduct fails to bespeak unlawful

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31. *Id.* at 554–55.

32. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

33. *Twombly*, 550 U.S. at 555 (quoting FED. R. CIV. P. 8(a)(2); *Conley*, 355 U.S. at 47).

34. *Id.* (citations omitted).

35. *Id.* at 555–56 (footnote omitted) (citations omitted).

36. *Id.* at 555 n.3 (responding to Justice Stevens's dissent at 580).

37. *Id.* In response, Justice Stevens acknowledged that "[w]hether and to what extent that 'showing' requires allegations of fact will depend on the particulars of the claim." *Id.* at 580 n.6 (Stevens, J., dissenting).

38. *Id.* at 555 n.3 (majority opinion).

39. *Id.* at 556.

40. *Id.*

agreement . . . an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[41]

The Court thought that requiring "allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[42] In the antitrust context, an allegation of conscious parallel conduct, "without that further circumstance pointing toward a meeting of the minds" to suggest an unlawful conspiracy or agreement, leaves the defendant's conduct in "neutral territory," and "stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"[43]

Plainly troubling the Court in *Twombly* was the cost of allowing the case to proceed into discovery.[44] According to the Court, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."[45] The Court cited the size of the putative class and the number of defendants as making the "potential expense . . . obvious enough in the present case."[46] The Court concluded that it was

> [p]robably . . . only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a § 1 claim.[47]

Plaintiffs' principal attack on "the plausibility standard at the pleading stage" was "its ostensible conflict with"[48] *Conley v. Gibson*'s "no set of facts" standard.[49] The Court noted that this language could "be read in isolation as saying that any statement

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41. *Id.*

42. *Id.* at 557.

43. *Id.* Professor Spencer described the Court's analysis as creating "three *zones of pleading*." *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 448–50 (2008).

44. *Twombly*, 550 U.S. at 557–58.

45. *Id.* at 558 (citation omitted).

46. *Id.* at 559.

47. *Id.* (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)). The Court rejected the dissent's suggestion that groundless claims could "be weeded out early in the discovery process through 'careful case management.'" *Id.* (citing *id.* at 573 (Stevens, J., dissenting)).

48. *Id.* at 560–61.

49. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *quoted in Twombly*, 550 U.S. at 561.

revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings" and concluded that the Second Circuit had "read *Conley* in some such way . . . ."[50] Criticizing such an approach, the Court observed that, "[o]n such a focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[51] The Court thought that such an "approach to pleading would dispense with any showing of a '"reasonably founded hope"' that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough."[52]

The Court then noted that, "[s]eeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard."[53] The Court found "no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough."[54] Accordingly, the Court ruled that, "after puzzling the profession for 50 years, this famous observation has earned its retirement."[55] It suggested that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[56] The Court thus characterized the "no set of facts" language as a description of "the breadth of opportunity to prove what an adequate complaint claims, *not the minimum standard of adequate pleading to govern a complaint's survival*."[57]

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50. *Twombly*, 550 U.S. at 561.

51. *Id.*

52. *Id.* at 562 (quoting *Dura Pharms.*, 544 U.S. at 347). On Mr. Micawber (and his optimism), see CHARLES DICKENS, DAVID COPPERFIELD 158, 397 (Nina Burgis ed., Oxford Univ. Press 2008) (1850).

53. *Twombly*, 550 U.S. at 562 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976); McGregor v. Indus. Excess Landfill, Inc. 856 F.2d 39, 42–43 (6th Cir. 1988); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–65 (1986)).

54. *Id.*

55. *Id.* at 563.

56. *Id.*

57. *Id.* (emphasis added).

Having thus "interred"[58] *Conley*'s "no set of facts" language, the Court applied its "plausibility" requirement to the amended complaint filed by the *Twombly* plaintiffs. Not surprisingly, the Court found it wanting.[59] The Court thought "that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[60] It noted that, "[a]part from identifying a seven-year span in which the § 1 violations were supposed to have occurred . . . the pleadings mentioned no specific time, place or person involved in the alleged conspiracies."[61] According to the Court:

> This lack of notice contrasts sharply with the model form for pleading negligence, Form 9 [now revised as Form 11] . . . . Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four [Baby Bells] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.[62]

Finally, the Court rejected the plaintiffs' contention that its plausibility analysis was inconsistent with its unanimous decision in *Swierkiewicz v. Sorema N.A.*[63] and any suggestion that its opinion embraced "heightened pleading."[64] According to the Court, it did "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[65] The Court reversed the Second Circuit and remanded for further proceedings.[66]

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58. *Id.* at 577 (Stevens, J., dissenting).

59. *Id.* at 564–70 (majority opinion).

60. *Id.* at 566. As the Court put it elsewhere, "the complaint does not set forth a single fact in a context that suggests an agreement." *Id.* at 561–62.

61. *Id.* at 565 n.10.

62. *Id.* (citing *id.* at 576 (Stevens, J., dissenting)). *See* FED. R. CIV. P., Form 9, Complaint for Negligence, 28 U.S.C. app. at 285 (2006) (amended 2007 & renumbered FED. R. CIV. P., Form 11).

63. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 507 (2006).

64. Twombly, 550 U.S. at 569–70. *See also* Campbell, *supra* note 1, at 7–8.

65. Twombly, 550 U.S. at 570.

66. *Id.* The Second Circuit, in turn, affirmed the district court in an unpublished order and issued its mandate. *See* Docket Sheet at 11–12, Twombly v. Bell Atl. Corp., No. 03-9213 (2d Cir. Feb. 3 & 24, 2009).

Justice Stevens, joined by Justice Ginsburg (except as to Part IV), wrote a lengthy dissent.[67] The dissenters regarded the decision in *Twombly* as a fundamental departure from the philosophy of notice pleading embodied in the Federal Rules of Civil Procedure. "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."[68]

The dissent noted that the plaintiffs had expressly alleged agreement or conspiracy on the part of the Baby Bells three times in their complaint,[69] and the dissent accused the Court of "circumvent[ing] this obvious obstacle to dismissal by pretending that it does not exist."[70] Moreover, Justice Stevens could not agree with the Court that an agreement by the Baby Bells not to compete with each other and to hinder competition was not "plausible."[71] He suggested that an appropriate resolution would be "careful case management, including strict control of discovery" but not dismissal before the defendants had even been required to deny the plaintiffs' allegations of conspiracy to restrain trade.[72]

B. Ashcroft v. Iqbal

Two years after *Twombly*, the Supreme Court decided *Ashcroft v. Iqbal*,[73] the next step in its pleading reformation. Following the terrorist attacks of September 11, 2001, agents of the Federal Bureau of Investigation (FBI) and Immigration and Naturalization Service (INS) arrested Javaid Iqbal, an Arab Muslim from Pakistan, "on charges of fraud in relation to identification documents and conspiracy to defraud the United States."[74] Iqbal "pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan."[75]

Iqbal then filed a *Bivens*[76] action against 34 federal officials and 19 "John Doe" corrections officers concerning his detention.[77]

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67. *Twombly*, 550 U.S. at 570–97 (Stevens, J., dissenting). Justice Stevens's dissent is four pages longer than the Court's opinion.
68. *Id.* at 575.
69. *Id.* at 589.
70. *Id.*
71. *Id.* at 591.
72. *Id.* at 573.
73. 556 U.S. 662 (2009).
74. *Id.* at 667.
75. *Id.* at 668.
76. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
77. *Iqbal*, 556 U.S. at 668.

The defendants included the corrections officers, their supervisors, and the wardens at the Metropolitan Detention Center (MDC) in Brooklyn, New York, where Iqbal was held, all the way up the chains of command of the FBI and Federal Bureau of Prisons (BOP) to the Director of the FBI, Robert Mueller, and the former Attorney General, John Ashcroft.[78]

The 54-page, 272-paragraph complaint contained 21 causes of action concerning Iqbal's treatment while confined in the Administrative Maximum Special Housing Unit (ADMAX SHU) at the MDC.[79] Iqbal did not challenge his arrest or his confinement in MDC's general population, however.[80]

No one disputed that the allegations against Iqbal's jailors stated viable claims for relief.[81] As the Court noted:

> The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists."[82]

When the case reached the Supreme Court, however, Ashcroft and Mueller were the only petitioners before the Court.[83] The other defendants who had appealed to the Second Circuit[84] did not petition the Supreme Court to review the Court of Appeals'

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78. *Id. See also* First Amended Complaint, ¶¶ 10–44, Elmaghraby v. Ashcroft, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005). The FBI and the BOP both report to the Attorney General. *See* 28 U.S.C. § 531 (2006) (FBI); 18 U.S.C. § 4041 (2006) (BOP).

79. *Iqbal*, 556 U.S. at 668.

80. *Id.*

81. *See id.* at 666 (Iqbal's "account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors.").

82. *Id.* at 668 (citations omitted) (citing First Amended Complaint, *supra* note 78, ¶¶ 113, 143–45, 154).

83. *Id.* at 666 ("Ashcroft and Mueller are the petitioners in the case now before us.").

84. The district court denied in part the defendants' motions to dismiss on the ground of qualified immunity. Elmaghraby v. Ashcroft, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff'd in part & rev'd in part sub nom.* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009). In addition to Ashcroft and Mueller, a group of FBI defendants, BOP defendants, and Dennis Hasty, former MDC warden, also filed separate appeals to the Second Circuit. *See* Iqbal v. Hasty, 490 F.3d at 147.

decision as to them.[85] In addition, most of the MDC defendants, and the United States, did not appeal at all.[86]

1. Opinion for the Court

Because Ashcroft and Mueller were the only defendants before the Court still challenging the adequacy of Iqbal's complaint against them and pressing the defense of qualified immunity asserted in their motion to dismiss, the Court stated that "[t]he allegations against petitioners are the only ones relevant here."[87] The Court identified five specific allegations in Iqbal's complaint supporting his contention that Ashcroft and Mueller "designated [Iqbal] a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution":[88]

(1) "[T]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11";[89]
(2) "The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001";[90]
(3) Ashcroft and Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'";[91]
(4) Ashcroft was the "'principal architect' of the policy";[92] and

85. *See Iqbal*, 556 U.S. at 666 ("[T]he allegations and pleadings with respect to these [other governmental] actors are not before us here."); *id.* at 668 ("The allegations against petitioners are the only ones relevant here.").

86. *See Hasty*, 490 F.3d at 147 ("Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States."). The United States settled with Iqbal's coplaintiff, Ehad Elmaghraby, for $300,000 after the district court denied the motion to dismiss. *Id.*

87. *Iqbal*, 556 U.S. at 668.

88. *Id.* at 668–69.

89. First Amended Complaint, *supra* note 78, ¶ 47, *quoted in Iqbal*, 556 U.S. at 669.

90. First Amended Complaint, *supra* note 78, ¶ 69, *quoted in Iqbal*, 556 U.S. at 669.

91. *Iqbal*, 556 U.S. at 669 (quoting First Amended Complaint, *supra* note 78, ¶ 96).

92. *Id.* (quoting First Amended Complaint, *supra* note 78, ¶ 10).

(5) Mueller was "'instrumental in [its] adoption, promulgation, and implementation.'"[93]

Ashcroft and Mueller moved to dismiss Iqbal's "complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct."[94] "Accepting all of the allegations in [Iqbal's] complaint as true,"[95] the district court denied the motion to dismiss, holding "that 'it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against'" Ashcroft and Mueller.[96]

The Supreme Court decided *Twombly* while Ashcroft and Mueller's appeal was pending, so it fell to the Second Circuit to address the impact of *Twombly* on Iqbal's complaint.[97] The Second Circuit acknowledged the retirement of *Conley*'s no-set-of-facts test and "concluded that *Twombly* called for a 'flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.'"[98] Finding that Iqbal's claim did not require such "amplification," the Second Circuit Court of Appeals upheld Iqbal's complaint as sufficient under *Twombly*.[99]

The Supreme Court reversed the Second Circuit's decision.[100] Noting that it had "found it necessary" in *Twombly* "first to discuss the antitrust principles implicated by the complaint," the Court began its analysis of Iqbal's complaint "by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of

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93. *Id.* (quoting First Amended Complaint, *supra* note 78, ¶ 11).

94. *Id.* The FBI defendants, BOP defendants, the MDC warden, and an MDC medical assistant likewise moved to dismiss. Iqbal v. Hasty, 490 F.3d 143, 150 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009). The FBI defendants, BOP defendants, and Hasty (the former MDC warden) appealed the district court's order denying their motions to dismiss. *Id.* at 147. Zenk (the MDC warden at the time suit was filed) and the MDC medical assistant did not appeal. *Id.* at 150 n.4.

95. *Iqbal*, 556 U.S. at 669.

96. *Id.* (quoting Elmaghraby v. Ashcroft, No. 04 CV 1409, 2005 WL 2375202, at *29 (E.D.N.Y. Sept. 27, 2005), *aff'd in part & rev'd in part sub nom.* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

97. *Id.* at 669.

98. *Id.* at 670 (quoting *Hasty*, 490 F.3d at 157–58).

99. *Id.* (citing *Hasty*, 490 F.3d at 174).

100. *Id.* at 675–87. In Part II of its opinion, the Court also affirmed the Second Circuit's and its own subject matter jurisdiction to hear Ashcroft and Mueller's appeal under the collateral order doctrine. *Id.* at 671–75. *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

qualified immunity."[101] The Court concluded that "[b]ecause vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[102] In the context of alleged discrimination in violation of the First and Fifth Amendments, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose," i.e., "'"because of", not merely "in spite of," [the action's] adverse effects upon an identifiable group.'"[103] Accordingly, the Court concluded that Iqbal "must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[104]

Turning to Iqbal's complaint, the Court explained that *Twombly* was based on "two working principles": "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss."[105] The Court acknowledged that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[106] Textually grounding its holdings in *Twombly* and *Iqbal* in Rule 8(a)(2)'s requirement that a complaint contain a statement "*showing* that the pleader is entitled to relief,"[107] the Court observed that, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'"[108]

The Court then offered a "two-pronged approach"[109] for courts to follow in deciding motions to dismiss: (1) "[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth";[110] and (2) "When there are well-pleaded factual allegations, a court should assume their

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101. *Iqbal*, 556 U.S. at 675.
102. *Id.* at 676.
103. *Id.* at 676–77 (quoting Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
104. *Id.* at 677.
105. *Id.* at 678–79.
106. *Id.* at 679.
107. FED. R. CIV. P. 8(a)(2) (emphasis added).
108. *Iqbal*, 556 U.S. at 679.
109. *Id.*
110. *Id.*

veracity and then determine whether they plausibly give rise to an entitlement to relief."[111]

After illustrating the use of this "two-pronged approach" in *Twombly*,[112] the Court turned to Iqbal's complaint and, as in *Twombly*, found it wanting.[113]

The first prong, as noted above, was "identifying the allegations in the complaint that are not entitled to the assumption of truth."[114] Looking at the five allegations it had identified earlier, the Court singled out what I have numbered above as allegations (3), (4), and (5)[115] as "conclusory and not entitled to be assumed true."[116] This left what I have numbered above as allegations (1) and (2)[117] as the only factual allegations remaining against Ashcroft and Mueller.[118]

With the most critical allegations against Ashcroft and Mueller disregarded as "conclusory," the Court's second step was to determine whether the remaining allegations—that the FBI "arrested and detained thousands of Arab Muslim men" and held them "in highly restrictive conditions of confinement until they were 'cleared'"—stated a plausible *Bivens* claim.[119] The Court concluded that, "[t]aken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. *But*

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111. *Id.*
112. *Id.* at 679–80.
113. *Id.* at 680–84.
114. *Id.* at 680.
115. *See supra* text accompanying notes 91–93.
116. *Iqbal*, 556 U.S. at 681.
117. *See supra* text accompanying notes 89–90.
118. For clarity, here are the five allegations again, with those that survived step one of the *Iqbal* two-pronged approach in ordinary text, and those that did not survive in text that has been stricken through:

(1) "[T]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11";
(2) "The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001";
~~(3) Ashcroft and Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'";~~
~~(4) Ashcroft was the "'principal architect' of the policy"; and~~
~~(5) Mueller was "'instrumental in [its] adoption, promulgation, and implementation.'"~~

See supra text accompanying notes 89–93 (footnotes omitted).
119. *Iqbal*, 556 U.S. at 681–84.

given more likely explanations, they do not plausibly establish this purpose."[120] According to the Court, "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."[121] The Court concluded that, "[a]s between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination [Iqbal] asks us to infer, discrimination is not a plausible conclusion."[122]

The Court then noted that Iqbal's *arrest* was not really at issue anyway.[123] Iqbal did not challenge his arrest or his initial detention; it was the policy of holding detainees classified as "of high interest" in the restrictive ADMAX SHU that Iqbal alleged as a constitutional violation.[124] The Court observed that Iqbal's

> only factual allegation against [Ashcroft and Mueller] accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that [Ashcroft and Mueller] purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.[125]

Finally, the Court rejected all of Iqbal's attempts to cabin or distinguish *Twombly*.[126] Iqbal argued that *Twombly* should be limited to its antitrust context.[127] The Court slammed the door on this suggestion, noting that *Twombly* "was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' . . . *Twombly* expounded the pleading

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120. *Id.* at 681 (emphasis added).
121. *Id.* at 682.
122. *Id.* (citation omitted).
123. *Id.*
124. *Id.* (quoting First Amended Complaint, *supra* note 78, ¶ 69).
125. *Id.* at 683 (citation omitted). The Court noted that Iqbal did allege that other officials "may have labeled him a person of 'of high interest' for impermissible reasons." *Id.* at 682–83.
126. *Id.* at 684–87.
127. *Id.* at 684.

standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[128]

The Court likewise rejected Iqbal's suggestion that what it called "the careful-case-management approach" would address its concerns about allowing an implausible complaint to proceed to discovery.[129] The Court thought its rejection of that "approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"[130]

Iqbal also unsuccessfully argued that Federal Rule of Civil Procedure 9(b) "expressly allow[ed] him to allege . . . discriminatory intent 'generally' . . . ."[131] Conceding that Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally,"[132] the Court observed that "'generally' is a relative term."[133] As used in Rule 9(b), *generally* simply means that a pleader does not have to allege "conditions of a person's mind" with the particularity required for allegations of fraud and deceit; it does not, however, authorize conclusory allegations that do not satisfy Rule 8.[134]

Holding that Iqbal's "complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination" against Ashcroft and Mueller, the Court reversed the Second Circuit.[135] The Court remanded the case to the Court of Appeals to decide whether to send the case back to the district court so that Iqbal could seek leave to amend his complaint.[136]

2. Twombly*'s Author Dissents*

Like *Twombly*, the decision in *Iqbal* drew a strongly worded dissent—but this time from the author of *Twombly*, Justice Souter, joined by another member of the *Twombly* majority, Justice

128. *Id.* (citations omitted) (quoting FED. R. CIV. P. 1).
129. *Id.* at 684–86.
130. *Id.* at 685 (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).
131. *Id.* at 686.
132. FED. R. CIV. P. 9(b).
133. *Iqbal*, 556 U.S. at 686.
134. *Id.* at 686–87.
135. *Id.* at 687.
136. *Id.*

Breyer, and the *Twombly* dissenters.[137] The strong 7–2 majority in *Twombly* narrowed to a bare 5–4 majority in *Iqbal*, with the Court now split along the conventional conservative–liberal fault lines of the Roberts Court circa 2009.

Justice Souter devoted the first half of his dissent to the Court's treatment of supervisory liability in *Bivens* actions. According to Justice Souter, the decision in *Iqbal* "does away with supervisory liability under *Bivens*,"[138] a point beyond the scope of this Article's focus on pleading under Rule 8(a)(2).[139] The second half of his dissent, however, explained that the majority had misapplied the *Twombly* pleading standard[140] and thus warrants examination here.

In addition to the five factual allegations identified by the Court,[141] the dissenters included two more factual allegations as relevant to determining the plausibility of Iqbal's claim

(6) "that many of" the Arab Muslim men detained after 9/11 "were designated by high-ranking FBI officials as being '"of high interest"'"[142]; and
(7) "that in many cases, including Iqbal's, this designation was made 'because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity.'"[143]

To the dissenters, these allegations, together with the five already discussed by the majority, meant (if true) that "Ashcroft

137. *Id.* at 687–99 (Souter, J., dissenting). Justice Breyer also wrote a separate, brief dissenting opinion expressing confidence in the adequacy of "alternative case-management tools" to prevent unwarranted interference with government officials. *Id.* at 699–700 (Breyer, J., dissenting).

138. *Id.* at 688 (Souter, J., dissenting).

139. Whether *Iqbal* in fact "does away with supervisory liability," or merely tightens the standards for imposing such liability, is the subject of debate among lower courts and commentators. *See* Dodds v. Richardson, 614 F.3d 1185, 1197–1201 (10th Cir. 2010) (concluding that some forms of supervisory liability survive *Iqbal*); *see also* 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:100 (4th ed. 2012), *available at* Westlaw CIVLIBLIT § 3:100; MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 7.19[C] (4th ed. 2010).

140. *Iqbal*, 556 U.S. at 688 (Souter, J., dissenting) ("The majority then misapplies the pleading standard under *Bell Atlantic Corp.* v. *Twombly* to conclude that the complaint fails to state a claim.") (citation omitted). *See also id.* at 694–99.

141. *See supra* text accompanying notes 89–93.

142. *Iqbal*, 556 U.S. at 695 (Souter, J., dissenting) (quoting First Amended Complaint, *supra* note 78, ¶¶ 48, 50).

143. *Id.* (quoting First Amended Complaint, *supra* note 78, ¶ 49).

and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it."[144]

Justice Souter criticized Ashcroft and Mueller's argument that Iqbal's claims were "implausible because . . . high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.'"[145] This, according to Justice Souter, represented "a fundamental misunderstanding of the enquiry that *Twombly* demands."[146] The Court should have accepted the allegations as true at the motion to dismiss stage. The only exception to that principle, according to the dissenters, was for "allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[147]

The proper analysis, according to the dissent, was to assume that the facts were true and then to determine whether those facts stated a plausible ground for relief.[148] Notably, the dissent did not see this as an area of disagreement with the majority.[149] The disagreement, then, came with the "conclusory" filtering process employed by the Court.

The dissenters did not agree that the allegations identified and disregarded by the Court[150] were conclusory.[151] "The fallacy of the majority's position . . . lies in looking at the relevant assertions in isolation."[152] Justice Souter then pointed to the additional allegations that he had identified in the complaint[153] as "specific allegations that . . . [two mid-level FBI officials] implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin."[154] When the plaintiff's allegations were "[v]iewed in light

144. *Id.*

145. *Id.* (quoting Brief for Petitioners at 28, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4063957).

146. *Id.* at 695–96.

147. *Id.* at 696.

148. *Id.*

149. *Id.* at 697 ("I do not understand the majority to disagree with this understanding of 'plausibility' under *Twombly*.").

150. These are the allegations that I have numbered as (3), (4), and (5) above for ease of reference. *See supra* text accompanying notes 89–93 and *supra* note 118.

151. *Iqbal*, 556 U.S. at 697–98 (Souter, J. dissenting).

152. *Id.* at 698.

153. These are the allegations that I have numbered as (6) and (7) above. *See supra* notes 142–143.

154. *Iqbal*, 556 U.S. at 698 (Souter, J., dissenting).

of these subsidiary allegations, the allegations singled out by the majority as 'conclusory' are no such thing."[155]

In short, according to the dissent, Iqbal did not allege that Ashcroft and Mueller were involved in some "undefined" or "amorphous discrimination" or "ill-defined constitutional violation."[156] Instead, Iqbal alleged that "'they knew of, condoned, and willfully and maliciously agreed to subject' him to a particular, discrete, discriminatory policy detailed in the complaint."[157] "Taking the complaint as a whole, it gives Ashcroft and Mueller '"fair notice of what the . . . claim is and the grounds upon which it rests."'"[158]

The dissent also did not understand how the majority could disregard the allegations that it did as conclusory in light of the allegations that it credited as nonconclusory.[159] To the dissent, there was simply "no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination."[160]

II. REACTION TO AND RESEARCH ON *TWOMBLY* AND *IQBAL*

A. Academic and Congressional Reaction

Scholarly reaction to *Twombly* and *Iqbal* has generally been quite negative. Professor Stephen Burbank criticized the decisions as "atrocities."[161] Professors Kevin Clermont and Stephen Yeazell argue that "they have destabilized the entire system of civil litigation."[162] Professor Adam Steinman suggests that "federal pleading standards are in crisis."[163] Professor Arthur Miller associates *Twombly* and *Iqbal* with a series of "procedural developments"—in summary judgment practice, expert testimony, securities litigation, discovery, and arbitration—whose "cumulative effect . . . may well have come at the expense of

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 698–99 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
159. *Id.* at 699.
160. *Id.*
161. Tony Mauro, *Plaintiffs Groups Mount Effort to Undo 'Iqbal'*, NAT'L L.J. (Sept. 21, 2009), http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202433933286 (quoting Professor Stephen B. Burbank).
162. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010).
163. Steinman, *supra* note 16, at 1295.

access to the federal courts and the ability of citizens to obtain an adjudication of their claims' merits."[164]

Much of the criticism of *Twombly* and *Iqbal* has focused on three related issues: (1) what scholars and some cases refer to as *information asymmetry*—the situation in which facts needed to plead adequately remain under a defendant's control and thus inaccessible without discovery;[165] (2) the vesting of excessive

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164. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 14 (2010).

165. *See, e.g.*, *id.* at 45 ("This problem of information asymmetry—which generally is a much more formidable concern for plaintiffs than for defendants—presents itself in many litigation contexts." (footnote omitted)); Rosalie Berger Levinson, *The Many Faces of* Iqbal, 43 URB. LAW. 529, 534 (2011) ("Because civil rights cases often turn upon the defendant's state of mind, and because of the well-recognized informational asymmetry between plaintiffs and defendants, it is not surprising that civil rights litigants have been the big losers in the post-*Iqbal* world." (footnote omitted)); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 123 (2011) ("Particular attention has been paid to the impact of the *Iqbal* and *Twombly* rules on civil rights litigation, where informational asymmetry is often at its highest point but where federal courts and federal law have played an important historical role in developing and adjudicating substantive rights."); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 56, 72–88 (2010) (proposing "'pre-discovery discovery'" as solution to information asymmetry); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 52 (2010) ("Certain claims, especially those hinging on the defendant's state of mind or secretive conduct, are particularly susceptible to that kind of 'information asymmetry.'"); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 195 n.59 (2010) ("[I]t is plaintiffs facing such information asymmetry who will be burdened most significantly by the fact skepticism endorsed in *Iqbal*."); Kevin M. Clermont, *Three Myths About* Twombly–Iqbal, 45 WAKE FOREST L. REV. 1337, 1367 (2010) ("A subset of these new dismissals, and of decisions not to sue, will entail meritorious suits being defeated because of informational asymmetry."); Allan R. Stein, *Confining* Iqbal, 45 TULSA L. REV. 277, 282 (2009) ("As others have pointed out, requiring an offer of proof in the complaint can be a particularly onerous requirement in the many cases in which there are information asymmetries."); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 114 (2009) ("Defendants often have sole custody of relevant information critical to the plaintiff's claim. If the operative pleading standard required plaintiff to allege facts that she cannot reasonably be expected to know at the case's inception, this informational asymmetry would in turn prevent proper functioning of the litigation market."); 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, 1260–67 (2008) ("[I]t is appropriate to be wary of any heightened pleading standard that does not adequately take into account the problem of information asymmetry."); Spencer, *supra* note 43, at 459 & n.153 (*Twombly*'s "standard will be more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage."); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L.

discretion in trial judges, thus permitting dismissal of "disfavored" claims, e.g., discrimination and civil rights claims;[166] and (3) the resulting restriction of access to justice and private enforcement of substantive policy.[167] Professor Burbank suggested that "[p]erhaps

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REV. IN BRIEF 135, 139 (2007) ("This 'information asymmetry,' . . . undermines the Court's suspicions that the pleading standard only will bar cases that have no 'reasonably founded hope' of 'reveal[ing] relevant evidence' in discovery."); Randal C. Picker, Twombly*,* Leegin*, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 165 ("[I]nformation asymmetry poses a dilemma if we intend to rely on private enforcement of antitrust statutes."); *see also* Gee v. Pacheco, 627 F.3d 1178, 1185 (10th Cir. 2010) ("One of the chief concerns of critics is that plaintiffs will need discovery before they can satisfy plausibility requirements when there is asymmetry of information, with the defendants having all the evidence.").

166. *See, e.g.*, Benjamin P. Cooper, Iqbal*'s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 941 (2011) ("[A] significant criticism of *Iqbal* is that it is subjective and gives judges too much discretion . . . ."); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 30 (2011) ("*Iqbal* provides [district judges] with new discretion to decide whether claims of discrimination are plausible, and these judges exercise this new discretion with a minimal amount of oversight . . . ."); J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibilty: Examining the Impact of* Twombly *and* Iqbal *on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 781 (2011) ("In effect, *Twombly* and *Iqbal* have enabled lower courts to use their discretion for the purposes of efficiently dealing with overcrowded dockets at the expense of judicial access, particularly with discrimination and civil rights claims."); Judith Resnick, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 665 (2011) ("[T]he Court gave a good deal of discretion to district judges to assess the 'plausibility' of plaintiffs' complaints and if not plausible, to grant motions to dismiss."); David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 120 (2010) ("[C]ommentators maintain that *Iqbal*'s admonition to analyze the plausibility of the plaintiff's claim in light of 'judicial experience and common sense' confers unwarranted discretion on judges—particularly district judges—to determine which cases proceed to discovery and, ultimately, decision on the merits." (citation omitted)); Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1461 (2010) ("If background does influence judicial outcomes, then the composition of our federal judiciary takes on heightened importance in discrimination cases, particularly where—as under *Iqbal*—the resolution of vital issues is left to subjective judicial discretion."); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 159 (2010) ("At bottom, *Iqbal* is about increased judicial discretion to inquire into and parse the details of complaints, almost certainly producing more 12(b)(6) dismissals, as well as wide variance from case to case, even within the same court.").

167. Miller, *supra* note 164, at 10 (*Twombly* and *Iqbal* "mark[] a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and

the most troublesome possible consequence of *Twombly* is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive prefiling investigation or because of informational asymmetries."[168] Professor Miller asserted that "plausibility pleading . . . has granted virtually unbridled discretion to district court judges" and "has sparked a concern that some judges will allow their own views on various substantive matters to intrude on their decisionmaking."[169] As Dean Erwin Chemerinsky observed, "what is striking about [*Iqbal*] is how it will close the courthouse door to many people with meritorious claims.[170]

The alarm in academia was echoed, at least initially, in Congress. Members introduced bills in both the Senate and the House of Representatives to legislatively overturn *Twombly* and *Iqbal*.[171] The judiciary committees of both houses held hearings.[172] The legislation died in committee at the end of the 111th Congress, however, and has not been reintroduced in the 112th or 113th.

B. Reaction Among the Bench and Bar

Reaction to *Twombly* and *Iqbal* among lawyers largely mirrored that in academia. Plaintiff's counsel generally seemed disturbed and, occasionally, outraged.[173] Appropriating the *Twombly* Court's reference to Dickens, one lawyer suggested that

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concentrated wealth."); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 850 (2010) ("Court access has become a matter of intense concern today in the wake of" *Twombly* and *Iqbal*.); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009).

168. Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 561.

169. Miller, *supra* note 164, at 22 (citing Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852–53 (2008)).

170. Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285, 291 (2010).

171. *See* Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong.; Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong.; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong.

172. *See Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 15; *Access to Justice Denied:* Ashcroft v. Iqbal, *supra* note 15.

173. *See, e.g.*, Ashby Jones, *Sick of* Iqbal*: Plaintiffs' Bar Pushing Back on Big Ruling*, WSJ L. BLOG (Sept. 21, 2009, 10:51 AM), http://blogs.wsj.com/law/2009/09/21/sick-of-iqbal-plaintiffs-bar-pushing-back-on-big-ruling/.

the decisions "herald[ed] a return to the kind of legal practice Dickens condemned in *Bleak House*."[174]

Defense counsel, on the other hand, were often elated.[175] "One hopes that trial judges, long overworked but fearful of reversal by the circuit court, will now be unshackled, free to dismiss the large number of meritless cases that clog dockets and cost defendants untold losses in time and money," wrote one copyright expert.[176] A Chicago district judge humorously characterized the general response of defense counsel as "Pavlovian. You know, the bell has rung and defense counsel salivates. They say, 'Wow! Here is our chance to dump a lot of cases.'"[177]

The reaction among judges was more cautious, however. In 2009, the late United States District Judge Mark R. Kravitz, then-chairman of the Advisory Committee on Civil Rules, told *The National Law Journal* that "his sense is that judges are 'taking a fairly nuanced view of *Iqbal*' and that it is not yet 'a blockbuster that gets rid of any case that is filed.'"[178]

The following year, at the 2010 Conference on Civil Litigation, Senior U.S. Circuit Judge Jon O. Newman observed:

> I think there has been an enormous overreaction to both *Twombly* and *Iqbal*, as there always is when a decision comes down from the Court. We judges, and the professors, too, tend to latch on to phrases and run with them. Whereas, when we were in law school, we were always told it's the holding that matters. Here, I think it's the holding that matters.
>
> I don't think either case is a revolution. . . .[179]

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174. Mauro, *supra* note 161 (quoting John Vail, Vice President, Center for Constitutional Litigation) (internal quotation marks omitted). *See also* CHARLES DICKENS, BLEAK HOUSE 14 (Stephen Gill ed., Oxford Univ. Press 2008) (1853) ("Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means.").

175. *See, e.g.*, Ashby Jones, *Why Defense Lawyers Are Lovin' the* Iqbal *Decision*, WSJ L. BLOG (May 19, 2009, 1:07 PM), http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/.

176. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 19:2 (2012), *available at* Westlaw PATRYCOPY § 19:2.

177. Transcript of Proceedings 11, Madison v. City of Chicago, No. 09 C 3629 (N.D. Ill. Aug. 10, 2009) (comments of Senior U.S. District Judge Milton I. Shadur) (on file with author). Judge Shadur went on to say that he thought this interpretation by defense counsel "seriously overreads, and the [Seventh Circuit] Court of Appeals has confirmed that it overreads, those two cases. You have to realize the environment in which those cases were decided." *Id.*

178. Mauro, *supra* note 161.

179. Webcast: 2010 Conference on Civil Litigation, sponsored by the Judicial Conference Advisory Committee on Civil Rules, Panel 3: Pleadings and

Judge Newman later explained the holdings in *Twombly* and *Iqbal* in terms of the massive and complex antitrust context of the Baby Bells in *Twombly* and the supervisory liability and qualified immunity context of *Iqbal*.[180] He then pointed to the Supreme Court's express approval of *Swierkiewicz v. Sorema N.A.*[181] and Form 11, the form "Complaint for Negligence," concluding that, "if that form still lives, and *Swierkiewicz* still lives, Rome is not burning."[182]

In a widely circulated hearing transcript from 2009, Senior U.S. District Judge Milton I. Shadur struck a similar chord:

> [Y]ou don't have to be a nuclear physicist to recognize that *Twombly* and *Iqbal* don't operate as a kind of universal "get out of jail free" card. That seems to be the approach . . . of too many defense counsel, just as though those decisions had somehow blotted out what had been two unanimous Supreme Court decisions, the first written by that noted liberal, Chief Justice Rehnquist, in . . . *Leatherman* against *Tarrant County*, and then the latter one written by the even better known flaming liberal, . . . Justice Thomas, in *Swierkiewicz* against *Sorema*.
>
> As you might guess, this whole business of what effect to give to *Twombly* and *Iqbal* has been a topic of discussion among judges here. And I won't pretend to be able to report

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Dispositive Motions: Fact Based Pleading, *Twombly*, *Iqbal*, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process at 7:17–:49 (May 10, 2010), http://realserver.law.duke.edu/ramgen/spring10/lawschool/05102010c.rm (comments of Judge Jon O. Newman). (The webcast is in RealMedia format and can be viewed using freely available RealPlayer software.). Judge Newman wrote the Second Circuit decision reversed in *Iqbal*. *See* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see also* Webcast *supra* at 10:33–:36 ("when we got reversed 5–4, as I predicted we would").

180. Webcast, *supra* note 179, at 9:35–11:37, 26:30–27:45.

181. 534 U.S. 506 (2006).

182. Webcast, *supra* note 179, at 11:46–12:37. Judge Newman also pointed to *Erickson v. Pardus*, 551 U.S. 89 (2009) (per curiam), noting: "I think there are judges in this country who will run with it." Webcast, *supra* note 179, at 58:15–:47. I have suggested that *Erickson* was "intended to signal that the Court does not mean for *Bell Atlantic* to overthrow 'the liberal pleading standards set forth by Rule 8(a)(2).'" Campbell, *supra* note 1, at 29 (quoting *Erickson*, 551 U.S. at 94).

> everyone's view, but I will tell you the general sense is what I have just conveyed.[183]

Some have criticized such cautious attitudes about the full impact of *Twombly* and *Iqbal* as unduly "optimistic,"[184] asserting that "[w]e now have to adjust to the broad meaning of the Court's holdings, even if some holdouts refuse to do so."[185] As I detail below, however, I believe these judges are on to something.[186]

C. Empirical Studies on the Effects of Twombly *and* Iqbal

Not surprisingly, *Twombly* and *Iqbal* have triggered a wave of empirical studies attempting to quantify what, if any, impact the cases are having on civil litigation. So far, the results are conflicting and inconclusive. Moreover, although empirical data may one day help us understand the impact of *Twombly* and *Iqbal*, data alone will not answer the normative question of whether the Court "got it right" in those cases.

1. The Studies

The first empirical analysis of dismissal rates was a student note published in 2008, a year after *Twombly* and a year before *Iqbal*.[187] It thus says nothing about the impact of *Iqbal*, but it concluded that *Twombly*'s impact was limited. Apart from civil rights cases, it concluded that *Twombly*'s "new linguistic veneer . . . on Rule 8(a) and 12(b)(6) appears to have had *almost* no substantive impact."[188] In the field of civil rights, however, the dismissal rate had "spiked in the four months since *Twombly*."[189]

The next study, published in 2009 but based on pre-*Iqbal* data, focused on the impact of *Twombly* in employment discrimination

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183. Transcript of Proceedings 2–3, Madison v. City of Chicago, No. 09 C 3629 (N.D. Ill. Aug. 10, 2009) (on file with author) (emphasis added).

184. Kevin M. Clermont, *supra* note 165, at 1363.

185. *Id.* at 1365 (footnotes omitted). As examples of such "holdouts," Professor Clermont cited Judge Shadur, quoting a portion of the excerpt quoted above, and Judge Richard Posner's suggestion that *Twombly* and *Iqbal* might not apply in *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009). Clermont, *supra* note 165, at 1365 n.134.

186. *See infra* Part III.D.

187. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

188. *Id.* at 1815.

189. *Id.*

cases.[190] Professor Joseph Seiner's study concluded that the rate of complete dismissals in Title VII[191] cases rose from 54.5% in cases citing *Conley* in the year prior to *Twombly*, to 57.1% in cases citing *Twombly* in the year following the *Twombly* decision.[192] When partial dismissals were included with complete dismissals, the rate of grants rose from 75.4% to 77.6%.[193] While observing that "these increases can be described as modest over the course of the year," Professor Seiner noted that they had "been increasing in recent months."[194]

Professor Seiner applied a similar methodology to cases alleging employment discrimination under the Americans with Disabilities Act of 1990 (ADA)[195] in a study published in 2010.[196] This study concluded that the rate of complete dismissals in ADA employment discrimination cases rose from 54.2% in cases citing *Conley* in the year prior to *Twombly*, to 64.6% in cases citing *Twombly* in the year following *Twombly*.[197] When partial dismissals were added to the complete dismissals, the rate of grants rose from 64.4% to 78.5%.[198] Professor Seiner concluded that "[c]onsistent with other areas of civil rights law, courts are granting a higher percentage of motions to dismiss in the disability context after *Bell Atlantic* when those courts rely on this new decision."[199] He noted that "[u]nlike Title VII claims, however, courts do not appear to be using the *Bell Atlantic* plausibility standard to rigidly dismiss cases brought under the ADA" and that examination of the lower courts' decisions revealed "confusion . . . over the proper pleading standard to apply, and conflict over the level of specificity needed to allege a disability claim."[200]

In another 2010 study that examined dismissal rates generally, Professor Patricia Hatamyar Moore concluded "that the rate at which [12(b)(6)] motions were granted increased from *Conley* to

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190. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).

191. *See* 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. V 2011).

192. Seiner, *supra* note 190, at 1029.

193. *Id.* at 1029–30 (comparing whole and partial dismissals relying on *Conley* in the year before *Twombly* and cases relying on *Twombly* in the year following *Twombly*).

194. *Id.* at 1030.

195. 42 U.S.C. §§ 12111–12117 (2006 & Supp. V 2011) (employment title of the ADA).

196. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010).

197. *Id.* at 118.

198. *Id.*

199. *Id.* at 125–26.

200. *Id.* at 126.

Twombly to *Iqbal*, although grants with leave to amend accounted for much of the increase."[201] Her regression analysis "indicate[d] that under *Twombly*, the odds that a 12(b)(6) motion would be granted with leave to amend, rather than denied, were 1.81 times greater than under *Conley*."[202] Those odds "were over four times greater than under *Conley*" after *Iqbal*.[203] Professor Moore drew attention to "constitutional civil rights cases," where "motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%)."[204]

In March 2011, the Federal Judicial Center (FJC) released the results of a study comparing dismissal rates before *Twombly* with dismissal rates after *Iqbal*, which was commissioned by the Judicial Conference Advisory Committee on Civil Rules.[205] In this, the most important and comprehensive empirical study of the impact of *Twombly* and *Iqbal* to date,[206] the FJC researchers found:

- There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim . . . .
- In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions

201. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010).

202. *Id.*

203. *Id.*

204. *Id.*

205. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

206. The FJC study is particularly notable because it was based on Rule 12(b)(6) motions and decisions in 23 district courts "and included an assessment of the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw." *Id.* at vii. *See also id.* at 2 (suggesting that Westlaw "is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets"); *id.* at 37 n.47 (noting "that the presence of 12(b)(6) orders in the Westlaw database varied greatly across federal districts" and "interpret[ing] these differences in publication rates and differences in grant rates as indicating a need for caution in basing conclusions regarding court practices on studies of orders appearing in the Westlaw federal court databases"). *But see* Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 608 (2012) (reporting, in response to the FJC study, that her follow-up research "indicates that district court orders ruling on 12(b)(6) motions in Westlaw *are* fairly representative of the universe of all such district court orders").

> to dismiss without leave to amend in civil rights cases and employment discrimination cases . . . .
> - Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market . . . . There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then.
> - There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case . . . .[207]

The Advisory Committee on Civil Rules cited the FJC study in its May 2011 Report to the Standing Committee on Rules of Practice and Procedure, noting that "lower-court decisions may suggest that not much has changed in actual practice" after *Iqbal*.[208] The Advisory Committee concluded that "[t]he FJC study . . . combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards. The courts are still sorting things out."[209]

In July 2011, Professor William Hubbard released a working paper that seemed to echo the FJC study, at least as to *Twombly*.[210] He found "fairly precise zeros for the effects of *Twombly* on both the grant rate of motions to dismiss and the overall rate of dismissals among filed cases" and "conclude[d] that *Twombly* has had no effect even accounting for the possibility that the selection of disputes changed in response to the case."[211] While acknowledging the possibility of undetected effects after

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207. CECIL ET AL., *supra* note 205, at vii.

208. MARK R. KRAVITZ, CHAIR, ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 2, 2011) [hereinafter MAY 2011 REPORT], *in* AGENDA MATERIALS FROM THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 142, 215 (June 2–3, 2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda %20Books/Standing/ST2011-06.pdf.

209. *Id.* at 216 (adding that "[t]here is reason to hope that the common-law process of responding to and refining the Supreme Court's invitation to reconsider pleading practices will arrive at good practices").

210. William H.J. Hubbard, *The Problem of Measuring Legal Change, with Application to* Bell Atlantic v. Twombly 1 (Univ. of Chi. Law & Econ., Olin Working Paper No. 575, 2011), *available at* http://ssrn.com/abstract=1883831.

211. *Id.* at 29–30.

December 31, 2008, due to limited data and the possibility of an undetected "impact in a small subset of cases," Professor Hubbard "strongly reject[ed] the view th[at] *Twombly* constitutes a major change in how district courts have applied the law of pleading."[212]

The Federal Judicial Center published a brief, follow-up study in November 2011, assessing the impact of opportunities to amend complaints on its earlier findings.[213] This study

> confirm[ed] the overall pattern of results presented in our March 2011 report. In brief, we found that an opportunity to amend a complaint reduces the extent to which movants prevail by approximately ten percentage points. Our conclusions remain the same. We found a statistically significant increase in motions granted only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated by such motions.[214]

Professor Lonny Hoffman published an assessment of the FJC study, urging caution in interpreting its results.[215] He summarized the "headline" of the March 2011 FJC study as suggesting that "*Twombly* and *Iqbal* were not having much effect on dismissal practices or outcomes, after all."[216] Focusing on the meaning of statistical significance, Professor Hoffman noted that, according to the FJC study,

> [a]fter *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss as compared with the period before *Twombly*, a marked increase in the rate of Rule 12(b)(6) motion activity from the steady filing rate observed over the last several decades. As for dismissal orders, the FJC found that in every case category that was examined there were more orders granting dismissal after *Iqbal* than there were before *Twombly*, both with and without prejudice. Most

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212. *Id.* at 30–31.

213. JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(b)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011) [hereinafter FJC UPDATE], http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf.

214. *Id.* at 1.

215. Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011).

216. *Id.* at 6.

> importantly, in every case category examined it was more likely that a motion to dismiss would be granted.[217]

In a little-noticed 2011 study of dismissal rates of employment discrimination claims based on race brought by black plaintiffs, Victor Quintanilla reported substantially higher dismissal rates after *Iqbal*.[218] Quintanilla reported that "[t]he dismissal rate increased from 20.5% pre-*Twombly* to 54.6% post-*Iqbal* for Black plaintiffs' claims of race discrimination—a 2.66 times increase. . . . For Black pro se plaintiffs' claims, the dismissal rate increased from 32.0% before *Twombly* to 67.3% under *Iqbal*, representing a 2.10 times increase."[219] Quintanilla also suggested that "White and Black judges apply *Iqbal* differently: White judges dismissed Black plaintiffs' claims of race discrimination at a higher rate (57.5%) than did Black judges (33.3%)."[220]

In 2012, Professor Moore published an update to her 2010 study, taking into account more post-*Iqbal* cases and responding to the 2011 FJC study.[221] Her more recent study suggested that *Iqbal* seemed to be having an even greater impact than her original analysis revealed:

> For example, my last study found no statistically significant effect of either *Twombly* or *Iqbal* on the granting of 12(b)(6) motions *without* leave to amend. The updated results indicate that the relative risk of a 12(b)(6) motion being granted *without* leave to amend, compared to being denied, was expected to be 1.75 times greater under *Iqbal* than under *Conley*, holding all other variables constant, and this increase is statistically significant. Further, my former study found that neither *Twombly* nor *Iqbal* had a statistically significant effect on whether a case was entirely dismissed upon the granting of a 12(b)(6) motion without leave to amend. In this updated study, the odds of the case being entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend were 1.71 times greater under *Iqbal* than under *Conley*. Finally, the updated study continues to indicate that constitutional civil rights cases in particular were dismissed at a higher rate post-*Iqbal* than pre-*Twombly*.[222]

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217. *Id.* at 7.
218. Quintanilla, *supra* note 166, at 5.
219. *Id.*
220. *Id.*
221. Moore, *supra* note 206, at 605.
222. *Id.* at 605 (citations omitted).

A 2012 study by Professor Raymond Brescia analyzed the impact of *Twombly* and *Iqbal* in employment and housing discrimination cases.[223] He found that "motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, and far more cases are being dismissed after the release of that decision than before."[224] He also found, however, that "dismissal rates 'with prejudice' do not seem to rise much at all, after either *Twombly* or *Iqbal*."[225]

Another 2012 study by Dr. Jonah Gelbach[226]—one that attracted a bit of media attention[227]—sought to control for selection effects in assessing the impact of *Twombly* and *Iqbal*. The results of this study

> suggest that switching pleading standards affected plaintiffs negatively in a sizable share of those cases that faced MTDs in the *Iqbal* period. For employment discrimination and civil rights cases, switching from *Conley* to *Twombly*/*Iqbal* negatively affected plaintiffs in at least 15.4% and at least 18.1% of cases, respectively, that faced MTDs in the *Iqbal* period. Among cases not involving civil rights, employment discrimination, or financial instruments, *Twombly*/*Iqbal* negatively affected at least 21.5% of plaintiffs facing MTDs in the *Iqbal* study period. These results tell us that *Twombly*/*Iqbal* negatively affected a sizable share of those plaintiffs who actually faced MTDs in the post-*Iqbal* period that the FJC studies.[228]

Finally, Professor Scott Dodson's study of dismissal rates, published in late 2012, sought to assess dismissal rates of civil claims, rather than entire civil cases, and to assess whether the dismissals were based on factual or legal insufficiency.[229] He found that the overall dismissal rate of civil claims (as a function of the number of motions to dismiss filed) increased "from 73.3%

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223. Raymond A. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012).

224. *Id.* at 241.

225. *Id.* at 240.

226. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012).

227. Alison Frankel, Twombly, Iqbal *Rulings Have 'Substantial Impact': Study*, ALISON FRANKEL'S ON THE CASE (Nov. 28, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=33303.

228. Gelbach, *supra* note 226, at 2277–78 (footnotes omitted).

229. Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012).

pre-*Twombly* to 77.2% post-*Iqbal*," and the rate "in each category increased after *Iqbal*, in most cases significantly."[230] He thus described the increase in dismissal rates as "modest—only a single digit—but statistically significant."[231] Moreover, "the rationale for dismissals is more heavily weighted toward factual insufficiency after *Iqbal*."[232]

His results support those of earlier studies finding "single-digit but significant or near-significant increases in the overall dismissal rate of cases after *Iqbal*" and "suggest that studies finding non-significant increases, such as the FJC's study, just didn't have enough data points to generate significance."[233] He concluded that "*Twombly* and *Iqbal* have changed pleading standards,"[234] "affecting both the strategy employed by movants and the rationale for deciding motions to dismiss."[235]

2. Assessing the Empirical Evidence

As this brief review shows, the results of the empirical studies to date are mixed and inconclusive. They range from a finding of "no statistically significant increase in plaintiffs excluded by [Federal Rule of Civil Procedure 12(b)(6)] motions or in cases terminated by such motions,"[236] to a finding that *Twombly* and *Iqbal* "negatively affected" over a fifth of plaintiffs in some categories of cases,[237] to a finding that dismissal rates in employment discrimination cases brought by African-American plaintiffs more than doubled.[238]

Part of the discordance is due to differing methodologies and definitions. The FJC researchers looked for statistically significant changes and focused on party-excluding or case-terminating dismissals,[239] while Dr. Gelbach defined "negatively affected" more broadly, for example.[240] The findings are further limited by the difficulty in estimating the impact of "party selection." As the Rules Committee put it, "[i]t is not possible to identify cases that

230. *Id.* at 132.
231. *Id.* at 134.
232. *Id.* Professor Dodson also found that "[p]erhaps surprisingly, the rate of dismissal for legal insufficiency as a function of motions has *decreased* after *Iqbal* for most categories." *Id.* at 132.
233. *Id.* at 134.
234. *Id.* at 133–34.
235. *Id.* at 128.
236. FJC UPDATE, *supra* note 213, at 1.
237. Gelbach, *supra* note 226, at 2278.
238. Quintanilla, *supra* note 166, at 5.
239. FJC UPDATE, *supra* note 213, at 1.
240. *See* Gelbach, *supra* note 226, at 2276–77.

would have been filed under earlier understandings of pleading standards but were not filed for fear of heightened pleading standards,"[241] although some studies are now attempting to account for party selection.[242] Another frequent limitation is the absence of an assessment of the merit of the cases affected.[243]

Ultimately, however, Professor Hoffman is correct that "perhaps the most important lesson to take away . . . is that empirical study cannot resolve all of the policy questions that *Twombly* and *Iqbal* raise."[244] In short, empirical study is unlikely to answer whether the Court "got it right" in *Twombly* and *Iqbal*.[245]

Given the lack of any indication of a willingness to overturn *Twombly* and *Iqbal* from the Court, Congress, or the Rules Committee,[246] moreover, I agree with Professor Hartnett that a more productive strategy is to determine if the cases can properly be interpreted in ways that avoid some of the parade of horribles suggested in the literature.[247] This was one of the purposes of my first article on *Twombly*. I saw in the *Plywood Antitrust* standard quoted parenthetically in *Twombly* a suggestion that pleading was being reformed, not revolutionized. I continue that line of thought below.

III. "ELEMENTARY PLEADING" AFTER *IQBAL*

A. A Three-Step Process for Evaluating the Sufficiency of a Claim for Relief

Iqbal's emphasis on identifying and disregarding conclusory allegations underscored an aspect of *Twombly* that had gone, if not

241. MAY 2011 REPORT, *supra* note 208, at 216.

242. *See* Gelbach, *supra* note 226.

243. *See, e.g.*, Dodson, *supra* note 229, at 135 ("Also, the dismissal effect studied here reveals nothing about the merit of the cases affected."). *But see id.* at 135 n.62 (noting Reinert, *supra* note 165, as "an attempt to study this feature").

244. Hoffman, *supra* note 215, at 36.

245. In any event, even if empirical study conclusively and consistently showed dramatically increased dismissal rates, defenders would simply assert that the data confirmed that dismissal rates were much too low before *Twombly* and *Iqbal*.

246. *See* Edward A. Hartnett, *Taming* Twombly*: An Update After* Matrixx, 75 LAW & CONTEMP. PROBS. 37, 37–38 (2012).

247. *See id.* at 37 ("For better or worse, my approach to *Twombly* and *Iqbal* has been one of accommodation rather than battle, seeking, in the common law tradition, to assimilate these decisions into the body of law of which they are a part." (footnotes omitted)); *id.* at 38 ("As far as I can see, accommodation is the only game in town."); Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010).

unnoticed, then certainly underappreciated. The Court's two-pronged approach systemized the filtering process for "conclusory" allegations, assuring that lower courts would not miss it in the future. The emphasis on the two-pronged approach is potentially misleading, however, because the Court fit those two prongs into a larger framework that actually has *three* steps—not two.[248]

Briefly stated, those steps are: (1) Identify the elements of the pleader's substantive claim;[249] (2) identify, and disregard, conclusory factual allegations in the complaint;[250] and (3) analyze the remaining (well-pleaded) factual allegations to determine whether they constitute a "plausible claim for relief" in light of the elements of the pleader's substantive claim,[251] i.e., whether the complaint's remaining allegations "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory."[252] As this summary suggests, "elementary pleading" will find its place in steps one and three of this framework.

The Court's decision in *Matrixx Initiatives, Inc. v. Siracusano*[253] confirms that a three-step framework is at work in the Court's approach to pleadings after *Iqbal*. *Matrixx* was a securities fraud class action in which the defendant challenged the sufficiency of the plaintiffs' complaint. Justice Sotomayor began her analysis, for a unanimous court, by noting the elements of the plaintiffs' claim under § 10(b) of the Securities Exchange Act[254]

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248. *See* Santiago v. Warminster Twp., 629 F.3d 121, 130 & n.7 (3d Cir. 2010) (noting that "we view *Iqbal* as outlining three steps"); 1 NAHMOD, *supra* note 139, §§ 1:44 & 3:102 (citing *Santiago*, 629 F.3d 121); 35B C.J.S. *Federal Civil Procedure* § 834 (Supp. 2012) (citing *Santiago*, 629 F.3d 121); Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After* Twombly *and* Iqbal, 44 CREIGHTON L. REV. 141, 155 (2010); Stephen R. Brown, *Reconstructing Pleading:* Twombly*,* Iqbal*, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1283–84 (2010); *see also* JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 452–53 (2011).

249. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54) ("Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.").

250. *Iqbal*, 556 U.S. at 678–81.

251. *Id.* at 679, 681–84.

252. *Twombly*, 550 U.S. at 562 (internal quotation marks omitted).

253. 131 S. Ct. 1309 (2011).

254. 15 U.S.C. § 78j(b) (Supp. V 2011).

and SEC Rule 10b–5.[255] Because Matrixx challenged only two of the six required elements—material misrepresentation or omission and scienter[256]—the Court focused on those two elements. The Court had already recited the allegations in the plaintiff's amended complaint,[257] citing *Iqbal* as support for the conclusion that the lower courts had "properly assumed" the truth of those allegations.[258] The Court's citation to *Iqbal* thus implied that the plaintiffs' allegations were not conclusory.[259] The Court then "compared the allegations to the elements"[260] and concluded that the plaintiffs' "allegations suffice[d] to 'raise a reasonable expectation that discovery [would] reveal evidence' satisfying the materiality requirement, and to 'allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"[261]

With a three-step framework emerging from *Iqbal* and *Matrixx*, courts and litigants have some additional guidance for future pleading practice. An examination of each of these steps follows.

B. Identifying the Elements

In *Twombly*, *Iqbal*, and *Matrixx*, a necessary first step in the pleading analysis was to identify "the elements a plaintiff must plead to state a claim."[262] In these cases, the Court looked to its prior cases to provide those elements. Obviously, caselaw is the most reliable source for identifying the elements of a claim, but it is hardly the only one. In practice, treatises, jury instructions, and statutory text are all valuable sources for defining the elements of a claim.

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255. 17 C.F.R. § 240.10b–5 (2011). *See also Matrixx*, 131 S. Ct. at 1317–18 (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008)).

256. *Matrixx*, 131 S. Ct. at 1318.

257. *Id.* at 1314–16.

258. *Id.* at 1314 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009)).

259. *Id.*

260. John M. Barkett, Skinner, Matrixx, *Souter, and Posner:* Twombly *and* Iqbal *Revisited*, 12 SEDONA CONF. J. 69, 82 (2011). *See also Matrixx*, 131 S. Ct. at 1318–23.

261. *Matrixx*, 131 S. Ct. at 1323 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007); *Iqbal*, 556 U.S. at 678). The Court similarly concluded that the plaintiffs had pleaded scienter adequately under the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)(2)(A) (Supp. V 2011). *See also Matrixx*, 131 S. Ct. at 1323–25.

262. *Iqbal*, 556 U.S. at 675 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007)); *Matrixx*, 131 S. Ct. at 1317–18.

Moreover, although the pleader will properly identify the claim for the court in most cases, the court is not restricted to the claim that a party thinks it has. Any "*viable* legal theory" will suffice—whether properly identified by the pleader or not. As I noted after *Twombly*, "the pleader does not have to choose a particular legal theory, and may even have in mind the *wrong* legal theory—as long as the court can discern '*some* viable legal theory' that would entitle the pleader to relief."[263]

The Supreme Court's decision in *Skinner v. Switzer* confirms this.[264] In *Skinner*, the Court observed that "under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory."[265] Thus, a plaintiff's failure to correctly identify the legal basis for his claim should not be fatal. If a plaintiff thinks that he has a claim for breach of contract and has pleaded such, when in fact the plaintiff has a tort claim, the court should treat the claim as a tort claim and proceed to determine whether plaintiff has, however inartfully, stated a tort claim upon which relief can be granted.

C. "Conclusory" Confusion

Iqbal's second step—identifying and ignoring conclusory allegations—presented a new ambiguity on top of the already ambiguous plausibility standard. The emphasis on disregarding conclusory allegations in *Iqbal* casts the *Twombly* analysis in a new light. In *Twombly*, the Court had refused to credit an allegation of conspiracy supported only by parallel conduct in the context of the Baby Bells, but this point did not receive nearly the attention that it did in *Iqbal*.

In *Iqbal*, the conclusory step became as important as the third, plausibility, step of the analysis. As Professor Clermont has pointed out, this "new nonconclusoriness" is not really a revival of the fact–law distinction of code pleading.[266] Rather, it "has a very different aim, which entails knocking out certain allegations in preparation for measuring the complaint's plausibility."[267] In effect, step two of the *Iqbal* analysis becomes an "editing

263. Campbell, *supra* note 1, at 28.
264. 131 S. Ct. 1289 (2011).
265. *Id.* at 1296 (adding "Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument").
266. Clermont, *supra* note 165, at 1350–55.
267. *Id.* at 1353.

process."[268] The reason that this step becomes so critical, then, is obvious: The fewer allegations that a court must presume true, the less likely it is that the remaining allegations will state a plausible claim.

Understanding what is meant by *conclusory* in *Iqbal* thus becomes essential in applying the plausibility analysis. Dictionaries are of limited assistance, in part because *conclusory* is a rather late arrival among lexicographers, at least in its modern legal sense. The term first appeared in dictionaries in its current legal sense in the 1980s and 1990s.[269]

The current edition of *Black's Law Dictionary* defines *conclusory* as follows: "[e]xpressing a factual inference without stating the underlying facts on which the inference is based."[270] *Garner's Dictionary of Legal Usage* defines *conclusory* similarly, as "expressing a factual inference without expressing the fundamental facts on which the inference is based."[271] It then suggests that it "often describes evidence that is not specific enough to be competent to prove what it addresses."[272] Garner traces the modern usage of *conclusory* in this sense to a New York state case from 1923[273] and asserts that it had been used in over 21,000 cases by 1988.[274]

Although these definitions capture the basic meaning of *conclusory*, a couple of observations are in order. First, the use of

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268. *Id.* at 1352 n.81. The nature of the "editing process" is exemplified in *supra* note 118 and accompanying text.

269. *See* Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. (forthcoming 2013) (Draft at 53–63), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1037&context=donald_kochan.

270. BLACK'S LAW DICTIONARY 329 (9th ed. 2009). On the evolution of the term *conclusory*, see Kochan, *supra* note 269, at 3 (suggesting that "'conclusory' means, in its broadest sense, something approaching a very general idea of 'a statement or inference without support' of one kind or another").

271. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 192 (3d ed. 2011). The similarity is hardly surprising; the author of *Garner's Dictionary of Legal Usage* is the editor-in-chief of the current edition of *Black's Law Dictionary*. *Id.* at ii.

272. *Id.* at 192.

273. *Id.*; Ringler v. Jetter, 201 N.Y.S. 525, 525 (N.Y. App. Div. 1923) ("[T]he motion [is] granted, to the extent of directing the service of an amended complaint, omitting paragraphs 16, 17, and 30, and all conclusory matter of the nature pointed out herein.").

274. GARNER, *supra* note 271, at 192.

conclusory is not restricted to factual inferences. Courts also regularly criticize legal arguments as *conclusory*.[275]

Second, from the sheer number of times *conclusory* appears alongside *unsupported* in doublets, triplets, and other synonym-strings,[276] it seems that in most uses, *conclusory* is synonymous with *unsupported*[277]—or perhaps *inadequately supported*.[278] This suggests that courts can properly interpret *conclusory*, as used in

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275. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733 (2007) (plurality opinion) ("[T]his conclusory argument cannot sustain the plans."); Lindsey v. Normet, 405 U.S. 56, 64 n.8 (1972) (quoting Brief for Appellants at 58–59, *Lindsey*, 405 U.S. 56 (No. 70-5045), 1971 WL 133283 at *4) ("Appellants make a conclusory argument that allowing a landlord to allege that the tenant is guilty of 'unlawful holding by force' is impermissible on grounds of vagueness."); United States v. Tracy, 989 F.2d 1279, 1286 (1st Cir. 1993) ("Tracy raises a host of other conclusory contentions for which Tracy has provided virtually no argument and no citation to authorities."); Nagy v. George, 286 F. App'x 135, 137 (5th Cir. 2008) ("In this case, Nagy's conclusory argument . . . fails to meet the requirements of Rule 28."); Tripoli Mgmt., LLC v. Waste Connections of Kan., Inc., No. 10-1062-SAC, 2011 WL 2897334, at *11 (D. Kan. July 18, 2011) ("The parties offer only the most conclusory arguments on the meaning of ¶ 4.03 and cite no authorities on the meaning and interpretation of a changed conditions clause."); Ithier-Comas v. Acevedo-Vila, No. 06-1428(JAG), 2006 WL 1663546, at *1 (D.P.R. June 9, 2006) ("[P]laintiffs only provide conclusory allegations and do not elaborate an argument supported by authorities."); C.B. Mills v. Hawranik, No. 91 C 5797, 1992 WL 37123, at *5 (N.D. Ill. Feb. 19, 1992) ("[I]f either of the parties has resorted to conclusory statements, it is the defendants, who rely on cursory arguments that are unsupported by legal authorities.").

276. On "doublets, triplets, and other synonym-strings," see GARNER, *supra* note 271, at 294–97.

277. *See, e.g.*, Nahno-Lopez v. Houser, 625 F.3d 1279, 1281 (10th Cir. 2010) ("Though styled as 'undisputed facts,' all other statements were merely reassertions of original pleadings or conclusory, unsupported allegations."); Conley v. Nat'l Mines Corp., 595 F.3d 297, 303 (6th Cir. 2010) ("[A] conclusory, unsupported opinion . . . is insufficient to support the determination that Mr. Conley's legal pneumoconiosis hastened his death."). A Westlaw search reveals over 3,300 cases in which *conclusory* and *unsupported* appear adjacent to each other. Westlaw search conducted on February 14, 2013, of the ALLCASES database, searching for "unsupported, conclusory" or "conclusory, unsupported." A search for *conclusory* and *unsupported* in the same sentence returns the maximum 10,000 cases. Westlaw search conducted on February 14, 2013, of the ALLCASES database.

278. *See, e.g.*, Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (stating that "an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings"); Compass Bank v. Veytia, No. EP-11-CV-228-PRM, 2011 WL 6130900, at *4 (W.D. Tex. Dec. 8, 2011) (finding affidavits "insufficient to raise a genuine dispute of material fact because they are conclusory and inadequately supported"). A Westlaw search reveals over 800 cases in which *conclusory* and *inadequately supported* appear in the same sentence. Westlaw search conducted on February 14, 2013, of the ALLCASES database.

Iqbal, to mean that courts should identify and disregard only *unsupported* allegations.

In *Twombly*, the Court observed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief '" under *Conley* and Rule 8(a)(2), respectively, "requires more than labels and conclusions, *and a formulaic recitation of the elements of a cause of action will not do*."[279] In *Iqbal*, the Court underscored this point:

> [T]he pleading standard Rule 8 announces . . . demands more than an *unadorned*, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a *formulaic recitation* of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "*naked assertion[s]*" devoid of "further factual enhancement."[280]

The Court emphasized that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice*."[281] Thus, the *Iqbal* Court characterized *Twombly* as "not[ing] that the plaintiffs' assertion of an unlawful agreement was a '"legal conclusion"' and, as such, was not entitled to the assumption of truth."[282]

The *Iqbal* Court characterized the allegations of Ashcroft and Mueller's knowledge, agreement, purpose, and involvement[283] as "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . ."[284] Accordingly, those allegations were "conclusory and not entitled to be assumed true."[285]

Lower courts should carefully adhere to the Supreme Court's language in determining whether an allegation may be branded *conclusory*.[286] Only a "formulaic recitation" or "threadbare recital"

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279. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (emphasis added) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957); FED. R. CIV. P. 8(a)(2)).

280. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Twombly*, 550 U.S. at 555, 557).

281. *Id.* (emphasis added) (citing *Twombly*, 550 U.S. at 555 (Courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'")).

282. *Id.* at 680 (quoting *Twombly*, 550 U.S. at 555).

283. *See supra* text accompanying notes 91–93 (allegations (3), (4), and (5)).

284. *Iqbal*, 556 U.S. at 681 (quoting *Twombly*, 550 U.S. at 555).

285. *Id.*

286. *See also* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 625 (2011) (noting that *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), "suggested a way to mitigate the troublesome effect [of *Iqbal* on pro se complaints]: restrain courts' discretion to disregard

of the elements of a claim, "'naked assertion[s]' devoid of 'further factual enhancement,'" and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" should be labeled *conclusory* and not assumed to be true under *Iqbal*. By limiting the *conclusory* brand to "formulaic" and "threadbare" recitations of the elements of a claim—recitations that are factually "unadorned" and "naked"—lower courts can keep the *conclusory* second step of *Iqbal* from running amok.[287] In definitional terms, then, federal courts would be best served by taking *conclusory* to mean *unsupported*, or something very close to it.[288]

In practical terms, then, the *conclusory* label should be restricted to allegations that repeat an element of the claim *without saying what happened* that makes the pleader believe that the element is satisfied.[289] A "what-happened" approach is consistent

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allegations they deem conclusory"). Unfortunately, Professor Reinert's research suggests that "[m]any lower courts . . . have taken *Iqbal* beyond the Court's stated definition." Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 10 (2012). *See also id.* at 10–15 (describing cases).

287. Professor Edward A. Hartnett has likewise suggested that

> [a] conclusory allegation is one that asserts "the final and ultimate conclusion which the court is to make in deciding the case for him," *that is, one that alleges an element of a claim*. Such an allegation is not itself assumed to be true, but must be supported by the pleader going a "step further back" and alleging the basis from which this conclusion follows.

Hartnett, *supra* note 247, at 491 (emphasis added) (footnotes omitted) (quoting CLARK, *supra* note 18, § 38, at 234).

288. Interpreting *conclusory*—in the context of *Twombly*, *Iqbal*, and pleading—as entirely *unsupported* rather than *inadequately supported* also avoids line-drawing problems. Attempting to determine what degree of inadequacy would render an allegation *conclusory* (and thus to be disregarded in the *Iqbal* analysis) could leave courts in a position akin to the code pleading courts attempting to distinguish facts from legal conclusions and evidence. Only when an allegation adds virtually nothing to an element of the substantive claim should it be tagged as *conclusory*. Even then, it should only be fatal when "judicial experience and common sense" suggest that the missing information is information that the pleader can reasonably be expected to have. *See infra* notes 341, 346–357 and accompanying text.

289. *See infra* notes 351–356 and accompanying text. *Cf.* Steinman, *supra* note 16, at 1339 (advancing a "transactional understanding" of *conclusory* that requires "identify[ing] a tangible, real-world act or event"); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 14 (2009) (referring to "observed or experienced *objective facts*" (emphasis added)); Brown, *Reconstructing Pleading*, *supra* note 248, at 1288 ("An allegation in a complaint is conclusory when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible."); Clermont, *supra* note 165, at 1351 ("The probable end result is that courts will look mainly at what the plaintiff appears to be alleging to have actually happened (before

with the Advisory Committee's understanding of the requirements of Rule 8(a)(2), as explained in its 1955 Report rejecting suggestions to change the rule.[290]

An example of this what-happened approach may be found in the First Circuit's decision in *Ocasio-Hernández v. Fortuño-Burset*.[291] In *Ocasio-Hernández*, the plaintiffs were 14 "maintenance and domestic workers, all members of Puerto Rico's Popular Democratic Party (PDP), [who] brought suit in federal district court alleging that they were unconstitutionally terminated from their public employment at the governor's mansion, La Fortaleza, shortly after the election of" a new governor from Puerto Rico's rival New Progressive Party (NPP).[292] At a conference before *Iqbal*, "the district court informed the plaintiffs that their complaint satisfied the federal notice pleading standard, and it advised the defendants not to file a Rule 12(b)(6) motion to dismiss the complaint."[293] Immediately after *Iqbal*, however, the district court held an emergency hearing "to hear arguments on whether the recently issued *Iqbal* decision required the complaint to be dismissed due to insufficient factual allegations," and the defendants moved to dismiss under *Iqbal*.[294] The district court denied the motion without prejudice and allowed the plaintiffs to amend their complaint, which the defendants again moved to dismiss under *Iqbal*.[295]

The district court, relying on *Iqbal*, dismissed the amended complaint, but not without noting the impact of *Iqbal*:

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taking those allegations as true and asking whether they generate a plausible inference of liability).").

290. In its response to various criticisms of Rule 8(a)(2), in 1955 the Advisory Committee suggested that the criticisms were based on an incorrect "view that the rule does not require the averment of any information as to *what has actually happened*." ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18 (Oct. 1955) (emphasis added), *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. F (Supp. 2012) *and in* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8 app. 01[3] (3d ed. 2012). The Committee refuted that view, noting "[t]hat Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented" and that the Rule "requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and it entitled to it." *Id.* at 18–19.

291. 640 F.3d 1 (1st Cir. 2011).

292. *Id.* at 4.

293. *Id.* at 6.

294. *Id.*

295. *Id.*

> The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision construing Rules 8(a)(2) and 12(b)(6). The original complaint, filed before *Iqbal* was decided by the Supreme Court, as well as the Amended Complaint, clearly met the pre-*Iqbal* pleading standard under Rule 8. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation, did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-*Iqbal* standard.[296]

On appeal, the First Circuit vacated the dismissal of the plaintiffs' First Amendment political discrimination claim and their supplemental claims under Puerto Rico law.[297] Following a lengthy examination of both *Twombly* and *Iqbal*, the First Circuit explained that "[a]lthough evaluating the plausibility of a legal claim 'requires the reviewing court to draw on its judicial experience and common sense,' *the court may not disregard properly pled factual allegations*, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'"[298] The Court of Appeals further observed that a court was also not permitted to "attempt to forecast a plaintiff's likelihood of success on the merits . . . . The relevant inquiry focuses on the reasonableness of the

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296. Ocasio-Hernández v. Fortuño-Burset, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. Aug. 4, 2009) (citations omitted). The court also noted:

> As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations. If the evidence was lacking, a case would then be summarily disposed of. This no longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is, thus, available. Counsel will also likely only raise local law claims to avoid removal to federal court where *Iqbal* will sound the death knell. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.

Id.

297. *Ocasio-Hernández*, 640 F.3d at 19. The plaintiffs did not appeal the dismissal of their other federal claims. *See id.* at 6 n.2.

298. *Id.* at 12 (emphasis added) (citation omitted) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint."[299]

The Court of Appeals noted that the district court had disregarded as conclusory the plaintiffs' allegation that they had been replaced by affiliates of the rival political party (the NPP) because the plaintiffs did not identify who replaced them or when. The district court "also disregarded as 'generic, blanket statements' numerous allegations that the defendants and their subordinates had questioned the plaintiffs about the circumstances of their hires in order to discern their political affiliations" because "the complaint 'contain[ed] no specific account of these conversations.'"[300] The district court further observed that the questioning of plaintiffs did "'not lead to the conclusion that [the defendants] did so in order to ascertain [the plaintiffs'] political affiliation, or that they in fact gained that information.'"[301] The district court had "reasoned similarly with respect to allegations about disparaging remarks made by" the administrator of the governor's mansion about the previous administration and "overtly politicized conduct" by the administrator's aide.[302]

The First Circuit concluded that the district court had "erred by not affording the plaintiffs' allegations the presumption of truth to which they were entitled,"[303] i.e., by disregarding those allegations as conclusory. The Court of Appeals explained that "the Supreme Court's concerns about conclusory allegations expressed in *Twombly* and *Iqbal* focused on allegations of ultimate legal conclusions and on unadorned recitations of a cause-of-action's elements couched as factual assertions."[304] Thus, the plaintiffs' "[a]llegations of discrete factual events such as the defendants questioning the plaintiffs and replacing the plaintiffs with new employees are not 'conclusory' in the relevant sense."[305]

Moreover, "factual allegations in a complaint do not need to contain the level of specificity sought by the district court."[306] The Court of Appeals concluded that "[t]he plaintiffs' allegations were sufficiently detailed to provide the defendants 'fair notice of what the . . . claim is and the grounds upon which it rests'" and, thus, "should not have been disregarded."[307]

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299. *Id.* at 13.
300. *Id.* at 14.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

The district court's decision in *Ocasio-Hernández* exemplifies some of the "enormous overreaction," especially early on, to *Iqbal* noted by Judge Newman.[308] The First Circuit's vacatur, on the other hand, represents some of the tempering that is occurring as time passes and as courts reread *Twombly* and *Iqbal* and interpret them in light of their (rather extreme) factual settings. Other circuits should follow the First Circuit's lead.

D. Assessing Plausibility

As noted above, I agree with those who have characterized *Twombly* and *Iqbal* as neither a "revolution"[309] nor a "get out of jail free card" for defendants.[310] It is not, as Judge Posner suggested shortly after *Iqbal*, that *Twombly* and *Iqbal* do not "govern" in all civil cases, however.[311] Rather, as he later acknowledged, it is that they apply differently in different kinds of cases.[312]

1. What a "Plausible" Claim Needs

In suggesting the use of an elementary pleading standard requiring a complaint to "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory,"[313] I have proposed that this should require "factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law—but freed from the technicalities of common law and code pleading."[314]

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308. *See supra* note 179 and accompanying text.

309. *See supra* note 179 and accompanying text (comments of Judge Newman).

310. Transcript of Proceedings 2, Madison v. City of Chicago, No. 09 C 3629 (N.D. Ill. Aug. 10, 2009) (comments of Senior U.S. District Judge Milton I. Shadur) (on file with author).

311. *See* Smith v. Duffey, 576 F.3d 336, 339–40 (7th Cir. 2009).

312. *See* Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009).

313. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (internal quotation marks omitted). *See also* Campbell, *supra* note 1, at 2.

314. Campbell, *supra* note 1, at 22–23. By *plain language*, I only mean that pleadings should contain "ordinarily understandable language." CLARK, *supra* note 18, § 38, at 227 & n.54 (noting the codes' use of "plain and concise statement" and "ordinary and concise language" as a "leavening admonition that ordinarily understandable language must be used"). *See also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1217, at 246–47 (3d ed. 2004) (associating "short and plain" with "the emphasis placed on clarity and brevity by the federal pleading rules" and "simplicity, flexibility, and the absence of legalistic technicality").

One of the advantages of this "formulation . . . is that it directs attention to 'allegations' on 'the material elements necessary to sustain recovery' without reference to either the 'facts' or the 'cause of action' that so plagued code pleading."[315] Thus, elementary pleading properly encourages courts to focus on Rule 8(a)(2)'s textual standard requiring a "statement . . . *showing* that the pleader is entitled to relief"—with entitlement to relief being "measured by the elements necessary to recover"—but "without returning to the technicalities of code pleading."[316]

An early district court decision, *Daves v. Hawaiian Dredging Co.*,[317] provides a succinct explanation of the basic principle of elementary pleading:

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t* and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.[318]

Under this understanding of Rule 8(a)(2), a "claim" is like the old "cause of action" of code pleading, but shorn of technicalities.

Professor Steinman bases his *plain pleading* paradigm on the use of *plain* in Rule 8(a)(2). *See* Steinman, *supra* note 16, at 1328–41. His paradigm has much to commend it, and I certainly agree with his emphasis on "identify[ing] a tangible, real-world act or event." *Id.* at 1339. *Cf.* Spencer, *supra* note 289, at 14 (referring to "observed or experienced *objective facts*") (emphasis added); Brown, *Reconstructing Pleading*, *supra* note 248, at 1288 ("An allegation in a complaint is conclusory when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible."). *Plain pleading* seems to employ *plain* in a different sense from that in which it is used in Rule 8(a)(2), however. As Judge Clark and WRIGHT & MILLER indicate, *supra*, *plain* in Rule 8(a)(2) suggests "clarity," the use of language that is "ordinarily understandable," and "the absence of legalistic technicality" in pleading.

I also fear that undue emphasis on the word *plain* distracts attention from the real textual anchor in Rule 8(a)(2) for the decisions in *Twombly* and *Iqbal*—the "showing" of the pleader's entitlement to some kind of relief from the court. Without "identify[ing] a tangible, real-world act or event" that could justify relief from the court, it is difficult to see how the pleader could discharge its obligation of "showing" its entitlement to relief as required by Rule 8(a)(2). Thus, as the title (*A "Plausible" Showing*) of my earlier article suggests, I prefer to keep attention sharply focused on the pleader's *showing* under Rule 8(a)(2).

315. Campbell, *supra* note 1, at 23.

316. *Id.*

317. 114 F. Supp. 643 (D. Haw. 1953).

318. *Id.* at 645.

"A general factual statement identifying some legal entitlement to relief would suffice."[319]

This elementary pleading standard is also consistent with Judge Clark's suggestion that "notice should be given of all the operative facts going to make up the plaintiff's cause of action, *except, of course, those which are presumed or may properly come from the other side*."[320] Judge Clark's suggestion that some facts may be "presumed" finds expression in the elementary pleading standard's reference to "inferential allegations."[321]

2. Toward a Sliding Scale of Plausibility

In stressing the importance of "inferential allegations," I have suggested that "the pleader need not support its claim with a 'specific fact' for each element or identify each element of its claim 'with precision,' but there must be enough alleged for the court reasonably to infer allegations on the material elements necessary to recover under a viable legal theory."[322] I based this conclusion on the continued reliance on what is now Form 11 in *Twombly* and the Supreme Court's decision in *Erickson v. Pardus*.[323]

Vacating the dismissal of a pro se prisoner's complaint alleging prison officials' deliberate indifference to his serious medical needs, the Supreme Court in *Erickson* stressed that, under Rule 8(a)(2), "[s]pecific facts are not necessary."[324] Instead, only "fair notice of what the . . . claim is and the grounds upon which it rests"[325] is required, and the court must accept the complaint's factual allegations as true.[326] "Coming only two weeks after" *Twombly*, I interpreted *Erickson* as "signal[ing] that the Court does not mean for [*Twombly*] to overthrow 'the liberal pleading standards set forth by Rule 8(a)(2).'"[327]

Acknowledging the tension between the way that the Court easily credited the allegations in the complaint in *Erickson* and the rather parsimonious view taken of the complaint in *Twombly*, I suggested "that the type, complexity, size, and context of a case

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319. Campbell, *supra* note 1, at 20.
320. CLARK, *supra* note 18, § 38, at 240 (emphasis added).
321. *In re* Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981).
322. Campbell, *supra* note 1, at 28.
323. 551 U.S. 89 (2007) (per curiam).
324. *Id.* at 93.
325. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
326. *Id.* at 93–94 (citing Twombly, 550 U.S. at 555–56).
327. Campbell, *supra* note 1, at 29 (quoting Erickson, 551 U.S. at 94).

will influence how courts evaluate 'plausibility' under Rule 8(a)(2)."[328] *Iqbal* bears this out.

Among the factors driving the Court's decision in *Iqbal* were: (1) that the claim was a *Bivens* action subject to a vigorously asserted defense of qualified immunity;[329] and (2) that the complaint alleged misconduct against two of the highest officials in the federal government based almost entirely on the conduct of prison guards.[330] It is also worth noting that the stakes were, in one sense at least, lower in *Iqbal* than in *Twombly*. In *Twombly*, a dismissal for inadequate pleading (if not cured through amendment) would end the case. In *Iqbal*, on the other hand, the plaintiff's case did not live or die with the decision as to dismissal of the claims against Ashcroft and Mueller. Even with those claims dismissed, Iqbal's claims against the corrections officials and their supervisors would proceed, and Iqbal could obtain relief on his claims, if warranted.[331] Moreover, with the claims against the lower-level officials already in discovery, Iqbal had the opportunity to locate evidence in discovery implicating Ashcroft and Mueller more directly and amend to add them back into the case.

One way to think about the differential operation of *Twombly* and *Iqbal*'s plausibility analysis across the range of cases is to think of a "sliding scale" fee arrangement. Many legal and medical professionals use such arrangements, in which "prices are determined by a person's ability to pay."[332] In short, under a "sliding scale" fee arrangement, the poorer the client, the lower the fee; the "richer" the client, the higher the fee (up to the regular fee).

In a similar fashion, the simpler the case, the less stringent the *Twombly–Iqbal* plausibility analysis tends to be—as in *Erickson*'s simple deliberate indifference case.[333] In contrast, the more complex

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328. *Id.*

329. *See* Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009); *see also* Webcast, *supra* note 179, at 9:35–11:37; 26:30–27:45 (comments of Judge Newman).

330. *See* Webcast, *supra* note 179, at 9:35–11:37; 26:30–27:45 (comments of Judge Newman).

331. *See* Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009) ("Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here."); *id.* at 684 ("It is important to note . . . that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. . . . Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.").

332. BLACK'S LAW DICTIONARY, *supra* note 270, at 1515.

333. *See also* Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 658 (2011) (suggesting that *Iqbal* leaves open "the possibility that, in some

or "special" the context of a case, the more stringent the plausibility analysis becomes—as in *Iqbal*'s action against the Attorney General and FBI Director.[334]

A "sliding scale" approach to pleading seems to undermine the principle of transsubstantivity.[335] It may be, as Professor Miller suggests, that plausibility will become "transsubstantive in name only."[336] In other words, Rule 8(a)(2)'s single, transsubstantive pleading standard requiring "a short and plain statement of the claim showing that the pleader is entitled to relief" is beginning to look very different depending upon context. The federal courts may be heading toward a pleading regime where simple cases receive an easy, good-enough-for-government-work plausibility analysis, complex cases receive an exhaustive and demanding plausibility analysis, and most cases fall somewhere in between.[337] The problem for lawyers will be that they will repeatedly litigate the in-between cases, trying to position them closer to one end of the spectrum or the other.

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unspecified contexts, lower courts can ignore the *Twombly*/*Iqbal* 'two-pronged' pleading test, and allow complaints containing even 'conclusory' allegations to survive a motion to dismiss").

334. *See* Cooney, 583 F.3d at 971 ("[T]he height of the pleading requirement is relative to circumstances. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases.").

335. Miller, *supra* note 164, at 90–94 (suggesting that "[w]ith *Twombly* and *Iqbal*, it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules").

336. *Id.* at 91.

337. Professor Miller notes that "[a] system that accepts a three-page complaint for a negligence claim and effectively requires a one-hundred-page complaint for an antitrust suit hardly can be described as applying a uniform pleading standard, even if the articulated formula is the same." *Id.* at 92. As he also notes, however, there have been so many incursions on the principle of transsubstantivity throughout the Rules over the years that "the substance behind the catechism of transsubstantivity actually may have been discarded in all but name long before *Twombly* and *Iqbal*." *Id. See also id.* at 92–94.

3. "Common Sense" or "Uncommon Nonsense"?[338]

The Supreme Court may have alluded to what I term the *sliding scale* nature of the plausibility analysis when it observed that "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."[339] This sentence in *Iqbal* has drawn particular criticism in the literature, with many charging that it vests too much discretion in district court judges.[340]

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338. *See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 93 (Peter Hunt ed., Oxford Univ. Press 2009) (1865, 1871) ("'Well, *I* never heard it before,' said the Mock Turtle; 'but it sounds uncommon nonsense.'"); G.K. Chesterton, *The Threat of Novelty*, ILLUSTRATED LONDON NEWS, July 9, 1921, *reprinted in* 32 THE COLLECTED WORKS OF G.K. CHESTERTON 199, 201–02 (1989) ("[A]n enlightened world has abandoned the mediaeval conception of common sense in favour of a modern conception which may more properly be called uncommon nonsense."); JOHN MORTIMER, *Rumpole and the Right to Silence*, *in* RUMPOLE À LA CARTE 80, 106 (1990) ("'To use that word before it's been proved isn't common sense. It is uncommon nonsense,' I insisted, at which Ollie became testy.").

339. Ashcroft v. Iqbal, 556 U.S. 662, 663–64 (2009) (citing Bell Atl. v. Twombly, 550 U.S. 544, 556 (2007)).

340. *See* Miller, *supra* note 164, at 129–30 (asking, in a hypothetically updated version of *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), "Would judicial discretion be so broad as to empower a district judge to brand the claim implausible and to dismiss on the basis of his judicial experience and common sense, even though the critical information about the government's behavior and motivation was in the sole possession of the defendant?"); Noll, *supra* note 166, at 120 ("[C]ommentators maintain that *Iqbal*'s admonition to analyze the plausibility of the plaintiff's claim in light of 'judicial experience and common sense' confers unwarranted discretion on judges—particularly district judges—to determine which cases proceed to discovery and, ultimately, decision on the merits."); Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (quoting Professor Stephen Burbank as stating that *Iqbal* "'is a blank check for federal judges to get rid of cases they disfavor'"); *see also* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 8:4 (2009) (suggesting that "the plausibility requirement—with its delegation of broad discretion to federal district court judges—will often leave plaintiffs in the uncomfortable position of having to rely on judicial experience and common sense to meet plausibility threshold"); Goutam U. Jois, Pearson*,* Iqbal*, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 937 (2010) (stating that *Iqbal* "expands district courts' discretion in another, important direction: it instructs courts to make this decision based on their 'judicial experience and common sense.' The problem, of course, is that this kind of a determination is so open-ended as to be almost unreviewable." (footnote omitted)); Trisha Chokshi, Note & Comment, *A Pleading Problem: Seventh Circuit Decision in* Swanson v. Citibank *Illustrates the Unstable State of Federal Pleading Standards in the Post-*Iqbal *Era*, 32 N. ILL. U. L. REV. 103, 128 (2011) (asserting that the plausibility "standard is

The problem with interpreting "experience and common sense," of course, is that the phrase is cryptic. Nowhere does the Court explain what it means, and there are (at least) two very different ways to interpret it. As it turns out, there is some truth in both interpretations.

One interpretation reads the command "to draw on . . . experience and common sense" as a license for a judge to say, in effect, "I've seen a thousand cases just like this, and they never succeed"—and on that basis dismiss a complaint as implausible. A second, very different interpretation, on the other hand, reads "experience and common sense" to mean that courts should not be too strict in applying the plausibility standard in all cases. Under this second interpretation, the Court was signaling that a lower court's "experience and common sense" would tell it to be more forgiving in its application of the plausibility standard when it would be unreasonable to expect the plaintiff to provide more in its pleading—for example, when the defendant holds all of the information necessary for the plaintiff to make more detailed allegations or when the allegations involve the defendant's mental state.[341]

Many commentators' concerns are motivated by some version of the first interpretation, and something like that interpretation seems afoot when the Court disregards a plaintiff's theory of liability based on "more likely explanations."[342] As Professor Harnett suggests, in situations where the judge's common sense suggests such alternative "more likely explanations," the pleader will need "to present information and argument designed to dislodge [the] judge's baseline assumptions about what is natural."[343]

There is a serious problem with taking the first interpretation too far, however. In *Twombly*, the Court expressly stated that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that

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driven nearly entirely by subjective experiences and the discretion of the presiding judge").

341. *See* Alex Reinert, *The Impact of* Ashcroft v. Iqbal *on Pleading*, 43 URB. LAW. 559, 565, 573 (2011) (noting that "courts have seemed somewhat willing to forgive thin pleadings when the extent of informational asymmetry between the parties is high" and that "some . . . have been particularly wary of dismissing claims where a key issue is the subjective state of mind of the defendant" and collecting cases).

342. *Iqbal*, 556 U.S. at 681. *See also id.* at 682.

343. Hartnett, *supra* note 247, at 474–75.

a recovery is very remote and unlikely.'"[344] The Court similarly noted that "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."[345] Thus, *Twombly* points away from the first interpretation—twice. This suggests that disregarding the plaintiff's theory of liability in favor of "more likely explanations" should be reserved for a rather narrow swathe of cases.

In addition, some lower courts seem to have followed the second interpretation of *common sense* and have continued to allow plaintiffs greater leeway in situations where the defendant holds necessary information. Professor Reinert observed that "[t]o some extent . . . courts have agreed that the presence of informational asymmetry should mitigate the harshness of the rules from *Iqbal* and *Twombly* . . . ."[346] Thus, one district court noted that "[c]ourts typically afford plaintiffs greater latitude and require less specificity where" there are allegations that "relate to matters particularly within the defendants' knowledge."[347] The Second Circuit similarly concluded that the "plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible."[348]

While acknowledging that some courts have found that information asymmetry should "mitigate the harshness" of *Twombly* and *Iqbal*, Professor Reinert also observed that "few courts have tried to explain why that should be so."[349] I would explain "why that should be so" using *Iqbal*'s reference to "judicial experience and common sense."[350] That reference seems intended to allow lower courts to tailor their application of *Twombly* and *Iqbal*'s plausibility standard to the circumstances of the cases

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344. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

345. *Id.* at 564 n.8.

346. Reinert, *supra* note 286, at 22.

347. Trustees of the Auto. Mechs.' Indus. Welfare & Pension Funds Local 701 v. Elmhurst Lincoln Mercury, 677 F. Supp. 2d 1053, 1056 (N.D. Ill. 2010). *See also* GLANNON, *supra* note 248, at 456.

348. Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (citations omitted) (internal quotation marks omitted) (citing Boykin v. KeyCorp, 521 F.3d 202, 215 (2d Cir. 2008)).

349. *See* Reinert, *supra* note 286, at 22.

350. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

before them, taking information asymmetry, among other things, into consideration.

At the 2010 Conference on Civil Litigation at Duke University, Judge Kravitz explained *common sense* in a somewhat similar vein, but using the counterexample of a plaintiff who had information but would not disclose it:

> So, I'm a male or female, and I've been subjected to a hostile work environment, but I don't give you any other facts. I've been subjected to it, so I know what happened, but I'm not going to tell you anything more, other than it's a hostile work environment. I would say, on common sense and good judgment, that claim is not plausible as pleaded, because the plaintiff knows what the facts are, and the plaintiff isn't telling anyone. And, just from a notice point of view, to the defendant, not even telling the defendant what happened that supposedly is the hostile work environment.[351]

Critical to Judge Kravitz's example was the notion that the plaintiff had information that he or she would not disclose. Thus, "common sense would say, wait a minute, you know what happened to you. Tell us, so that we know, is it just that somebody . . . winked at you, or that somebody accosted you? And then we can decide whether that's a hostile work environment or not."[352] He then distinguished his example involving "what happened" from situations involving what is in a person's mind.[353] Judge Newman similarly distinguished between cases that did or did not involve state of mind: "So, if it's scienter in a securities case, or intent in an employment case, that's quite a different animal than the case where the only question is, 'What happened?'"[354]

In response to Judge Kravitz's suggestion that courts could "demand a little bit more" in situations concerning what happened (rather than mental state),[355] Professor Miller juxtaposed another hypothetical involving information asymmetry:

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351. Webcast, *supra* note 179, at 53:25–54:15.

352. *Id.* at 54:50–55:12.

353. *Id.* at 55:20–56:15.

354. *Id.* at 50:30–:55. Judge Newman was specifically addressing how much discovery to allow, but Judge Kravitz extended the distinction to pleading as well: "And, so, I think, going back to Judge Newman's point—when you get to what happened, as opposed to what's in people's mind[s], I think you can demand a little bit more." *Id.* at 55:59–56:15.

355. *Id.*

> As opposed to a hypothetical in which the plaintiff says, "I'm black, and I've been fired. And I believe this was a discriminatory firing. And there's no way, on God's green earth, I can establish that because all the employment records are buried deep in the bowels of my former employer."[356]

As this discussion and the cases cited above suggest, "judicial experience and common sense"[357] ought to cut *both* ways when it comes to deciding how much to demand in a pleading. Thus, "judicial experience and common sense" can—and should—be invoked to keep cases *in* court, not just out. Situations involving information asymmetry or mental state are prime candidates for such an exercise of judicial wisdom.

CONCLUSION

Since *Twombly*, the elementary pleading standard quoted in *Twombly* and first articulated in *Plywood Antitrust*—requiring "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory"[358]—has been used in thousands of cases.[359] After *Iqbal*, this elementary pleading standard fits within a three-part framework that requires courts, and thus litigants, to identify the elements of the plaintiff's claim, to identify and disregard conclusory allegations, and, finally, to assess the well-pleaded allegations to determine whether they constitute a "plausible claim for relief."

Federal pleading is not rocket science, however, nor should it be. So, even after *Iqbal*, this framework should not require much more than well-pleaded "factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law."[360] Moreover, in assessing pleadings after *Iqbal*, lower courts should adhere rather strictly to the Supreme Court's description of *conclusory* allegations as only those that are wholly unsupported recitations of elements of the claim and should employ their "judicial experience and common sense" in a manner that will not only put cases out of court, but keep them *in*, too.

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356. *Id.* at 56:15–:35.

357. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

358. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (internal quotation marks omitted) (alteration in original). *See also supra* note 7 (tracing history of the standard to its origin in *Plywood Antitrust*).

359. *See supra* note 10 and accompanying text.

360. Campbell, *supra* note 1, at 22. For the situation where a plaintiff will need to present more to satisfy the judge, see *supra* note 343 and accompanying text.