Volume 62, Issue 3 Page 905

Stanford Law Review

THE NEW RULE 12(B)(6): *TWOMBLY*, *IQBAL*, AND THE PARADOX OF PLEADING

Rakesh N. Kilaru

COMMENT

THE NEW RULE 12(B)(6): *TWOMBLY*, *IQBAL*, AND THE PARADOX OF PLEADING

Rakesh N. Kilaru*

INTRODUCTION

In the aftermath of the Supreme Court's 2007 opinion in *Bell Atlantic v. Twombly*,[1] judges and civil procedure scholars throughout the country divided on the opinion's significance. In just twenty-four pages, *Twombly* uprooted the *Conley v. Gibson* standard for evaluating motions to dismiss a lawsuit under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under *Conley*, a court could dismiss a complaint only if it "appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief."[2] That standard had governed motions to dismiss for fifty years, and

* J.D. Candidate, Stanford Law School, 2010; B.A., Columbia University, 2006. Prospective Law Clerk to the Honorable J. Harvie Wilkinson III, United States Court of Appeals for the Fourth Circuit, 2010-11. I am extremely grateful to Toby Heytens, Pamela Karlan, and Norman Spaulding for helping me develop this topic; to Janet Alexander, Samantha Bateman, Peter Conti-Brown, and Jordan Segall for their thoughtful comments and guidance; to the staff of the *Stanford Law Review* for editorial polish; and to my family for their unwavering support. Mistakes are mine.

1. 550 U.S. 544 (2007).
2. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

embodied the liberal notice-pleading regime envisioned by the framers of the Federal Rules of Civil Procedure.[3] But no more. Faced with a suit alleging that almost every major telephone company had engaged in anticompetitive conduct amounting to an antitrust conspiracy, the Court introduced a new system of "plausibility" pleading designed to curb discovery abuse and weed out frivolous lawsuits.[4] Now, plaintiffs had to include in their complaints "enough factual matter" to "nudge[] their claims across the line from conceivable to plausible . . . ."[5]

In responding to the opinion, some judges agreed with Justice Stevens's view in dissent that *Twombly* "rewr[o]te the Nation's civil procedure textbooks and call[ed] into doubt the pleading rules of most of its States,"[6] whereas others viewed *Twombly* fundamentally as an antitrust case and assumed that the case's effects would begin and end there.[7] At the same time, scholars fractured over the opinion's normative desirability; some viewed the opinion as a necessary bulwark against abusive practices by plaintiffs' attorneys,[8] whereas

---

3. To Charles E. Clark, the "principal draftsman" of the Federal Rules of Civil Procedure, *see Twombly*, 550 U.S. at 575 (Stevens, J., dissenting), liberal pleading rules were necessary to eliminate the common practice of dismissing complaints on purely technical grounds, and to minimize the information asymmetries between plaintiffs and defendants by lowering the bar to discovery. *See* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 976-77 (1937) (explaining the underlying theories of the new federal rules and noting that "the weapons of discovery . . . have . . . new devices, with more appropriate penalties to aid in matters of *proof*").

4. *See Twombly*, 550 U.S. at 548-50.

5. *Id.* at 556, 570.

6. *Id.* at 579 (Stevens, J., dissenting); *see* ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008) (concluding that *Twombly* gives Rule 12(b)(6) "more heft"); Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (holding that post-*Twombly*, a plaintiff must give the court reason to believe that she has "a reasonable likelihood of mustering factual support for [her] claims"); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) (arguing that *Twombly* represents a sea change in the application and interpretation of Rule 8(a)(2)).

7. *See, e.g.*, Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008) ("*Twombly* leaves the long-standing fundamentals of notice pleading intact."); Airborne Beepers & Video, Inc. v. AT & T Mobility L.L.C., 499 F.3d 663, 667 (7th Cir. 2007) ("*Twombly* did not signal a switch to fact-pleading."); *see also* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 878 (2009) ("[T]he Court's plausibility standard marks only a modest departure from notice pleading."); Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. 117 (2007), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf (contending that *Twombly* can be confined to the narrow context of antitrust decisions); Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 FED. RULES DECISIONS 604, 632 (2007).

8. *See, e.g.*, Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007). Epstein argues that *Twombly* reached the right result, but for the wrong reasons; the Court should

others saw it as going too far in assisting defendants.[9] Almost immediately, *Twombly* became one of the most frequently cited cases in pleadings,[10] even as judges split on how to apply its many strands.[11] In the midst of all this confusion, perhaps only one thing was settled: *Twombly*'s reach was still unclear.

As judges and scholars waited for a new opinion clarifying *Twombly*, an unlikely case slipped to the front of the line: *Ashcroft v. Iqbal*.[12] After 9/11, the government detained numerous Muslims and Arab-Americans, and one of those detainees, Javaid Iqbal, brought suit upon release.[13] Iqbal alleged that he had been detained on account of his race, religion, or national origin in violation of the First and Fifth Amendments, and that the Federal Bureau of Investigation (FBI) had subjected him to harsh conditions of confinement with "no legitimate penological interest."[14] The wrinkle in Iqbal's *Bivens* suit,[15] however, was that he was not just suing the individuals who had detained and allegedly abused him. Instead, Iqbal's suit also named former Attorney General

---

have instead held that summary judgment is often appropriate at the close of pleadings, "especially against plaintiffs whose claims are based solely on easily accessible public information which already have been rebutted by the same kinds of public evidence." *Id.* at 62.

9. *See, e.g.*, Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877 (2008) (arguing that though certain classes of cases might warrant particularized pleading, that decision should be made by amendments to the Federal Rules, and not by judges).

10. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV (forthcoming May 2010) (calling *Twombly* one of the most "frequently cited Supreme Court decisions of all time" and noting that it had been cited in 14,645 federal decisions as of June 30, 2009); Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of* Bell Atlantic Corp. v. Twombly, 61 ARK. L. REV. 763, 772 (2009) (observing that *Twombly* had been cited over ten thousand times as of November 2008); *see also* Smith v. Duffey, 576 F.3d 336, 339-40 (7th Cir. 2009) (Posner, J.) (remarking that *Twombly* is "fast becoming the citation du jour in Rule 12(b)(6) cases").

11. *See, e.g.*, *Fame Jeans*, 525 F.3d at 15 ("Many courts have disagreed about the import of *Twombly*. We conclude that *Twombly* leaves the longstanding fundamentals of notice pleading intact." (footnote omitted)); *Advest*, 512 F.3d at 58 ("In order to survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief.'" (quoting *Twombly*, 550 U.S. at 559)); *Airborne Beepers*, 499 F.3d at 667 ("[A]t some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); *Schneider*, 493 F.3d at 1177 ("[T]he complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."); *see also* BARBARA ALLEN BABCOCK, TONI M. MASSARO & NORMAN W. SPAULDING, CIVIL PROCEDURE: CASES AND PROBLEMS 330-31 (4th ed. 2009) (collecting cases).

12. 129 S. Ct. 1937 (2009).

13. *Id.* at 1943. For a quick and more humorous précis of the case, see Dahlia Lithwick, *The Attorney General Is a* Very *Busy Man*, SLATE, Dec. 10, 2008, http://www.slate.com/id/2206441/pagenum/all/.

14. *Iqbal*, 129 S. Ct. at 1951.

15. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

John Ashcroft and former FBI director Robert Mueller as defendants, alleging that Ashcroft was the "principal architect" of the unconstitutional detention policy, and that Mueller was "instrumental" in its adoption and execution.[16]

Initially, it was unclear that *Iqbal* was even a contender to shed light on *Twombly*. The district court, hearing the case in 2005, had applied the *Conley* standard in denying in part the defendants' motions to dismiss.[17] The court of appeals faced the case post-*Twombly* and struggled with the import of that decision, ultimately concluding that *Twombly* imposed a "flexible 'plausibility standard'" obliging a pleader to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[18] Nevertheless, many believed that the Court had agreed to hear the case for a completely different reason: to set forth a new form of qualified immunity for high-level officials.[19] Indeed, the topic of qualified immunity occupied much of oral argument,[20] so much so that one noted Court-watcher declared that Court was "edging toward embracing a new form of legal immunity."[21] Several months later, however, the Court took an alternate approach. Applying *Twombly*, the Court concluded that Iqbal's complaint simply failed to state a claim, and dismissed his suit outright.[22] The heir to *Twombly* had arrived, and with it, a similar result.

At first glance, *Iqbal* is different from *Twombly* in one obvious way: Justice Souter, the author of *Twombly*, penned the dissent in *Iqbal*, arguing that the majority misapplied *Twombly*'s articulation of the Rule 8 standard.[23] But this Comment will argue that the opposite is true: *Iqbal* extends and codifies the rule and rationale of *Twombly*. In so doing, *Iqbal*, like *Twombly*, gives district court judges the most powerful case management tool of all—a broader authority to simply dismiss a case outright. And by taking the view that dismissal may well be the better part of prudence, both cases mark out a new era of pleading practice far less charitable to plaintiffs and rewrite several Court precedents on pleading and practice in the civil rights context.

The rest of this Comment proceeds as follows. In Part I, I discuss the notion of "plausibility"—created by *Twombly* and refined by *Iqbal*—and explain how both cases apply the concept consistently. Part II clarifies the lay

16. *Iqbal*, 129 S. Ct. at 1944.

17. *See* Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *11, *35 (E.D.N.Y. Sept. 27, 2005).

18. *See* Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007).

19. Posting of Lyle Denniston to SCOTUSblog, Analysis: Special Legal Immunity for Handling Crises?, http://www.scotusblog.com/wp/analysis-special-legal-immunity-for-handling-crises/ (Dec. 10, 2008, 12:49 EST).

20. *See, e.g.*, Transcript of Oral Argument at 3-5, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

21. Denniston, *supra* note 19.

22. *Iqbal*, 129 S. Ct. at 1952-54.

23. *Compare* Bell Atlantic v. Twombly, 550 U.S. 544 (2007) (Souter, J., Opinion of the Court) *with Iqbal*, 129 S. Ct. at 1954 (Souter, J., dissenting).

of the land post-*Iqbal*. While *Twombly* and *Iqbal* join the Court's prior precedents expressly disavowing heightened pleading standards, their practical effect is to create precisely such a standard. Part III discusses the effects of *Iqbal* in civil rights cases. I conclude that *Iqbal* undermines the result of *Crawford-El v. Britton*[24] and the reasoning of *Pullman-Standard v. Swint*,[25] two of the Court's opinions on motive-based civil rights torts. At the same time, *Iqbal* presents civil rights plaintiffs with a classic Catch-22: it denies them access to discovery because their complaints are not yet supported by enough facts.[26] The upshot is that *Iqbal* does not just raise the bar for complaints in general. It also erects a formidable—perhaps insurmountable—barrier to civil rights lawsuits in particular.

I. FROM *TWOMBLY* TO *IQBAL*: GETTING TO IMPLAUSIBILITY

A. Twombly *and the Two Types of Implausibility*

The most controversial aspect of *Twombly* was the Court's decision to "retire[]"[27] *Conley v. Gibson*'s "no set of facts" language.[28] Under *Conley*, courts at the 12(b)(6) stage merely took a quick look at the complaint to determine if it "appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief."[29] In the Court's eyes, this standard presented an open invitation to plaintiffs filing frivolous lawsuits by permitting "a wholly conclusory statement of claim" to survive 12(b)(6) "whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery."[30] Plaintiffs could thus withstand a motion to dismiss without "any showing of a 'reasonably founded hope'" of making a case.[31] As Justice Souter whimsically noted, "Mr. Micawber's optimism would be enough."[32]

In the place of that overly permissive system, Justice Souter introduced a new, two-step method. Rather than merely taking a quick look at the complaint,

---

24. 523 U.S. 574 (1998).

25. 456 U.S. 273 (1982).

26. I thank Pamela Karlan and Toby Heytens for their help in framing Part III.

27. *Twombly*, 550 U.S. at 563 ("[*Conley*'s] famous observation has earned its retirement.").

28. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

29. *Id.*

30. *Twombly*, 550 U.S. at 561 (brackets omitted) (quoting *Conley*, 355 U.S. at 45).

31. *Id.* at 562 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

32. *Id.* Mr. (Wilkins) Micawber is a character in *David Copperfield*, famous for his relentless optimism in the face of poor fortune. *See* CHARLES DICKENS, DAVID COPPERFIELD (Penguin Classics 2004) (1850).

district courts should first carefully examine the complaint to smoke out any "merely legal conclusions resting on the prior [factual] allegations."[33] Once that step is complete, district courts should weigh the remaining facts and determine if they are sufficient to "nudge [the] claims across the line from conceivable to plausible."[34] So long as plaintiffs cross that threshold, their suits may proceed.[35]

At bottom, however, the big question in *Twombly* was what it means for allegations to be "plausible." Indeed, the term could refer to at least two different concepts: factual plausibility and legal plausibility.[36] Under a factual plausibility test, courts would simply ask whether the conduct alleged was likely to have occurred at all. For example, a court testing Twombly's complaint for factual plausibility would ask whether an antitrust conspiracy actually existed. By contrast, courts reviewing for legal plausibility would inquire whether the facts alleged in the complaint describe illegal conduct. Thus, a court reviewing Twombly's complaint would determine if the alleged conduct amounted to an illegal agreement.

Ultimately, the Court settled on legal plausibility. As the Court made clear, *Twombly* did not unsettle the well-established practice of taking all facts in the complaint as true, however "doubtful in fact."[37] Skepticism about whether the alleged conduct had actually occurred could therefore not justify dismissal of a complaint. Instead, the Court instructed lower courts to ask whether the facts alleged in the complaint actually constitute illegal conduct.[38] Applied to *Twombly*'s complaint, the legal plausibility standard mandated dismissal; after discounting Twombly's conclusory allegation of conspiracy, the remaining allegations of "parallel conduct" were as consistent with conspiracy as with rational economic behavior.[39]

But while *Twombly* resolved the definition of plausibility, it ultimately left two other questions unresolved. The first was how to decide which allegations should be dismissed as "legal conclusions." The second and more fundamental question was exactly *how* plausible a complaint had to be to survive 12(b)(6). That is, while *Twombly* rendered dispositive the line between "conceivable" and "plausible," it did not specify the exact location of that line.[40] Faced with these two questions, lower courts grew somewhat confused—which ultimately led to *Iqbal*.[41]

---

33. *Twombly*, 550 U.S. at 564.

34. *Id.* at 570.

35. *Id.*

36. These terms are mine, though the Court alludes to the concepts, as seen *infra* in the text accompanying notes 37-38.

37. *Twombly*, 550 U.S. at 555.

38. *See id.* at 564-70.

39. *See id.*

40. *Id.* at 570.

41. Indeed, the fact that *Iqbal* followed so closely on the heels of *Twombly* illustrates

B. Iqbal*: Plausibility as Process*

As soon as *Twombly* came down, lower courts divided on how to construe it. *Iqbal*, which was pending in the Second Circuit when the Court decided *Twombly*,[42] offered one of the very first interpretations. Recognizing that *Twombly* had retired the "no-set-of-facts test" applied by the district court, the Second Circuit 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*."[43] In short, the Second Circuit viewed *Twombly* as adopting a sliding scale approach, requiring more facts in some contexts than in others.

During oral argument, however, the Court itself seemed unsure of how to apply *Twombly*. Justice Souter attempted to distinguish *Twombly* in colloquies with the Solicitor General,[44] while Justice Ginsburg accused the government of reading *Twombly* too broadly.[45] Perhaps Justice Breyer summed up the confusion best, asking simply, "[H]ow does this work in an ordinary case?"[46] Indeed, the Court even seemed divided about whether Iqbal's complaint was factually or legally implausible—whether his allegations were untrue, or whether his pleadings were deficient.[47]

Ultimately, though, the Court reached consensus on what *Twombly* meant. They just divided on how to apply it. To begin with, both the majority and the dissent agreed that the factual, "it didn't happen" type of implausibility generally could not support 12(b)(6) relief, and would not in *Iqbal*. Justice Kennedy made clear that the Court did not reject any of Iqbal's claims on the ground that they were "extravagantly fanciful,"[48] or "unrealistic or nonsensical."[49] Justice Souter put it more firmly: "no matter how skeptical the court may be, . . . 'Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.'"[50] Of course, for every rule, there are exceptions; as Justice Souter noted, the "exception to this rule lies with 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

---

how fundamental the Rule 12(b)(6) standard is to the functioning of the federal courts.

42. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009).

43. *Id.* (quoting Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).

44. *See* Transcript of Oral Argument at 10, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

45. *See id.* at 11-12.

46. *Id.* at 13.

47. *See, e.g.*, *id.* at 14-16. Justice Breyer asked whether it was possible to obtain dismissal when there is "no basis for thinking that" the facts in a hypothetical suit actually occurred. Immediately after, Justice Souter alluded to the distinction drawn in *Twombly* between factual and legal implausibility. *Id.* at 14-15.

48. *Iqbal*, 129 S. Ct. at 1951.

49. *Id.*

50. *Id.* at 1959 (Souter, J., dissenting) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)).

experiences in time travel."[51] Iqbal's allegations, however, did not rise to that level. So the majority and the dissent—the former implicitly, the latter explicitly—rejected the defendants' argument that Iqbal's complaint failed to state a claim because "such high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.'"[52] The majority and the dissent also agreed on how a complaint should be read and evaluated after *Twombly*: courts should discount any purely conclusory allegations and then weigh the remaining facts for "plausibility."[53]

The disagreement, then, came in how to apply these two polestars to the actual case. To Justice Kennedy, Iqbal's complaint was riddled with "bare assertions" entitled to no weight in the 12(b)(6) calculus.[54] The majority thus dismissed Iqbal's allegations that Ashcroft and Mueller "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"; "that Ashcroft was the principal architect of this invidious policy"; "and that Mueller was instrumental in adopting and executing" the policy.[55] According to Justice Kennedy, such allegations were "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[56] They were therefore not entitled to facts-most-favorable treatment—not because they were "too chimerical," but because they were too "conclusory."[57]

Absent these "conclusions," the only facts remaining pertained to the undisputed conduct of Ashcroft and Mueller—that they ordered the arrest and detention of many Arabs and Muslims, and that they subjected those detained to harsh treatment.[58] Of course, absent the "conclusions," these facts were, as Justice Kennedy observed, consistent with both an unconstitutionally

---

51. *Id.*

52. *Id.* (quoting Brief for Petitioner at 28, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015)) (noting that this position "besp[oke] a fundamental misunderstanding of the enquiry that *Twombly* demands").

53. *Id.* at 1950 (Kennedy, J., Opinion for the Court) ("In keeping with these principles 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. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *id.* at 1959 (Souter, J., dissenting) ("Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible."). This universal approach stands in contrast to the lower court's sliding-scale approach. *See* Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007).

54. *Iqbal*, 129 S. Ct. at 1951 (Kennedy, J., Opinion for the Court).

55. *Id.* (internal quotations omitted).

56. *Id.* (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007)).

57. *Id.*

58. *See id.*

discriminatory policy and a legal policy aimed at preserving the security of the nation.[59] Thus, the case was on all fours with *Twombly*, where there were two ways to interpret the facts alleged—one benign, and one invidious.[60] Because Iqbal could not tie Ashcroft and Mueller to a purposeful act of discrimination on the basis of race or national origin, he could not state a claim. Instead, all his complaint "plausibly suggest[ed was] 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."[61]

In dissent, Justice Souter noted that he would agree with the majority's conclusion, were its premises sound: "I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination."[62] The problem was in the premises. To Justice Souter, the three allegations by the majority were *not* merely conclusory legal allegations. Instead, viewed in light of the "subsidiary allegations" made elsewhere in the complaint, "the allegations singled out by the majority as 'conclusory' are no such thing."[63] Viewing the complaint as a whole—and the "legal conclusions" in light of the other factual allegations, the complaint gave "Ashcroft and Mueller 'fair notice of what the . . . claim is and the grounds upon which it rests.'"[64] Moreover, Justice Souter noted that the majority's treatment of certain allegations as conclusory was inconsistent with its treatment of other allegations as non-conclusory. For example, there was "no principled basis" for the majority's dismissal of the allegations of motive, supervision, and instrumentality, given its acceptance of the allegation that Ashcroft and Mueller "cleared" the policy in question.[65]

The majority and dissent thus differed most fundamentally on the scope of the lens used to evaluate the complaint. For Justice Souter, the wide-angle perspective was best; the complaint should be viewed holistically and consistently. To Justice Kennedy, each allegation must stand or fall on its own, with legal conclusions receiving no weight at all. Ultimately, then, the question of whether "plausibility" is a higher or lower standard of review than that under the *Conley* regime was, if not a red herring, at least secondary to the more contentious question of whether an allegation is "factual" or "legal." Put differently, the key dispute in *Iqbal* was not about what "plausibility" meant, or about the level of factual specificity needed to satisfy the plausibility standard. The dispute was fundamentally one about process—about how to decide what

59. *See id.* at 1951-52.
60. *See id.* at 1952.
61. *Id.*
62. *Id.* at 1960 (Souter, J., dissenting).
63. *Id.* at 1961.
64. *Id.*
65. *Id.*

goes into "plausibility" in the first place.

C. *Common Results, Uncommon Author*

Justice Souter's shift from majority to dissent at least raises the possibility that *Iqbal* is, in some material way, a departure from *Twombly*. On close examination, however, *Iqbal* applies *Twombly*'s methodology quite faithfully. Both cases discount certain allegations as mere "legal conclusions," weigh the remaining facts for plausibility, and determine that the respective complaints come up short. To the extent there is a difference between the cases, it is in Justice Souter's approach. His shift illustrates that the line between his majority in *Twombly* and his dissent in *Iqbal* is fine indeed.

The cardinal sin of the *Iqbal* majority, according to Justice Souter, was that it did not look at the complaint as a whole, but instead dismissed individual allegations as "conclusory" without considering their relationship to the rest of the complaint.[66] Of course, one could level the same charge at Justice Souter in *Twombly*—indeed, Justice Stevens did. In dissent, Justice Stevens noted that the problem with the majority's approach was that it dismissed the keystone allegation of conspiracy as a legal conclusion without looking at the broader context of the complaint.[67] According to Justice Stevens, the complaint, read holistically, clearly alleged a conspiracy.[68] That is what made the majority's conclusion that the allegations of agreement were "merely legal conclusions" so "mind boggling";[69] it was one thing to dismiss an allegation as "merely legal," but another thing entirely to do so out of context.[70]

This dichotomy between facts and law, "the stuff of a bygone era" to Justice Stevens, was precisely the basis for dismissing Iqbal's complaint.[71] Like the majority in *Twombly*, the *Iqbal* Court split out allegations that were "conclusory" and thus entitled to no weight in the Rule 8 analysis.[72] Like the majority in *Twombly*, the *Iqbal* Court then viewed the remaining facts as being

66. *See id.* at 1960 ("The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation.").

67. Bell Atlantic v. Twombly, 550 U.S. 544, 589-92 (2007) (Stevens, J., dissenting).

68. *See id.* at 571-72 ("In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act.").

69. *Id.* at 589.

70. *See id.* at 591-93.

71. *Id.* at 589-90 ("The Court's dichotomy between factual allegations and 'legal conclusions' is the stuff of a bygone era. That distinction was a defining feature of code pleading, but was conspicuously abolished when the Federal Rules were enacted in 1938." (citations omitted)); *see also* 5 THE LATE CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218, at 267 (3d ed. 2009) ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties."); Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259 (1926) (chronicling historical shift to pure fact pleading).

72. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

consistent with legal and illegal conduct, and concluded that Iqbal's complaint did not state a claim.[73] And like the majority in *Twombly*, the *Iqbal* Court made its initial decisions about which allegations were "conclusory" by viewing the allegations severally rather than jointly.[74]

This is, of course, not to discount the distinctions between the allegation of conspiracy in *Twombly* and the allegations of motive and supervision in *Iqbal*. The conspiracy allegation was the whole case in *Twombly*; the existence of an antitrust violation depended entirely on the conspiracy, and all of the facts in the complaint built up to that one allegation.[75] By contrast, the allegations dismissed in *Iqbal* were individual elements of a larger claim; more building blocks than gravamen.[76] Another point of contrast is the relative need for heightened scrutiny of complaints; just as one can argue that discovery abuse is most prevalent in big antitrust cases like *Twombly*,[77] so too can one argue that by permitting qualified immunity defenses, civil rights cases like *Iqbal* explicitly recognize litigation as something itself to be avoided.[78]

---

73. *See id.* at 1951-52.

74. *See id.*; *see also id.* at 1960 (Souter, J., dissenting).

75. *See Twombly*, 550 U.S. at 553; *see also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) ("[Section 1 of the Sherman Act] does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy . . . ."); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954) (stating that "[t]he crucial question" in Section 1 cases is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express").

76. *Iqbal*, 129 S. Ct. at 1948-49 (Kennedy, J., Opinion for the Court) ("It follows that, to state a claim based on a violation of a clearly established right, respondent 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."); *id.* at 1951 (dismissing separate allegations of supervision, implementation, and unconstitutional motive).

77. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30 (2004) ("Antitrust litigation can, however, involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money. . . ."); William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898-99 (2003) ("[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases."); *see also* Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 (1989) ("That discovery is war comes as no surprise. That discovery is nuclear war, as John Setear suggests, is. Discovery more often calls to mind the trench warfare of World War I, the war of attrition." (footnote omitted)).

78. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 816-17 (1982) (adopting an objective reasonableness test for qualified immunity, in part because "it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. . . . the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"); Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring) ("[W]ith increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their

But these appear to be the only lines on which to distinguish *Twombly* from *Iqbal*, and they are somewhat delphic. While Justice Souter may not have intended for *Twombly* to throw open the door to the full fact-versus-law distinction applied in *Iqbal*, there was little language in *Twombly* evincing such restraint.[79] Indeed, it is a short step from stating that the "few stray statements" in *Twombly*'s complaint "speak[ing] directly of agreement . . . are merely legal conclusions resting on the prior allegations"[80] to holding that Iqbal's allegations of motive and supervision are "conclusory and not entitled to be assumed true."[81] And the power of labels in this context is absolute; under *Twombly*, and now *Iqbal*, once something is deemed a naked legal conclusion, it is entitled to no weight in the pleading calculus. Of course, such "legal conclusions" are often exactly what makes the complaint allege a claim in the first place—and are often all a plaintiff can plead before gaining access to discovery. In the next Part, I discuss this dilemma, and what it means for pleading going forward.

II. AFTER *IQBAL*: HEIGHTENED PLEADING AND THE TYRANNY OF LABELS

On a practical level, *Twombly* and *Iqbal* establish a clear practice and procedure for evaluating a complaint. First, district judges must pore through the complaint for any allegations that appear "conclusory"—allegations that are "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[82] In other words, judges should keep an eye out for allegations containing little more than elements of the legal claim at issue.[83] Then, judges should weigh the remaining facts against the prevailing legal standard and determine if the claim crosses over the still-somewhat-muddy threshold of "plausibility."[84]

The results of this process in the Court—dismissal of two complaints that would almost certainly have survived the *Conley* standard—raise the possibility

---

personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas . . . . Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. . . . The effect of this development upon the willingness of individuals to serve their country is obvious.").

79. *See, e.g.*, *Twombly*, 550 U.S. at 563 ("[The *Conley* standard] 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.").

80. *Id.* at 564.

81. *Iqbal*, 129 S. Ct. at 1951.

82. *Id.* at 1949-50.

83. This shift is one worth dwelling on for a moment, for it effectively reverts to the type of code-pleading scheme that the Federal Rules of Civil Procedure *abolished*. *See, e.g.*, *Twombly*, 550 U.S. at 589-90 (Stevens, J., dissenting).

84. *Iqbal*, 129 S. Ct. at 1950-51.

that *Twombly* and *Iqbal* have created a heightened pleading standard. Time and time again, however, the Court has rejected such standards; defendants keep asking, and the Court keeps saying no.[85] *Twombly* and *Iqbal* held this line; in *Twombly*, Justice Souter was careful to note that the Court was not applying "any 'heightened' pleading standard," but merely holding that the complaint "failed *in toto* to render plaintiffs' entitlement to relief plausible."[86] And *Iqbal* avoided using the term "heightened pleading" altogether, instead observing that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,'" but instead "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[87]

In one sense, it is true that the Court has always rejected heightened pleading standards—the ghoul stalking its Rule 8 jurisprudence.[88] Every time defendants have asked for a more detailed level of pleading in a specific category of cases, the Court has rejected their request, often unanimously. For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[89] the Court unanimously declined to adopt heightened pleading in suits against a municipality under 42 U.S.C. §1983. More recently, the Court rejected a similar request in the employment discrimination context—by the same margin—in *Swierkiewicz v. Sorema N.A.*[90] In both cases, the rationale was the same: Rule 9(b) imposes the only heightened pleading standard permissible under the Federal Rules,[91] and only Congress (or the

85. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"); Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[T]he Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.").

86. *Twombly*, 540 U.S. at 569 n.14. Justice Souter relegated this observation to a footnote, perhaps to minimize further the specter of heightened pleading.

87. *Iqbal*, 129 S. Ct. at 1949.

88. An allusion to Justice Scalia's dissent in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.* decrying the Court's use of the *Lemon* test. 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

89. 507 U.S. at 168-69.

90. 534 U.S. at 512.

91. Even Rule 9(b), which imposes heightened pleading in cases involving fraud or mistake, permits "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged *generally*." FED. R. CIV. P. 9(b) (emphasis added). This approach stands in stark

Rules Committee) can expand that rule.[92]

In another sense, however, both *Twombly* and *Iqbal* do—and if their language is to be respected, must—impose a heightened pleading standard. While neither case raises the pleading requirement for one group of cases relative to others, both raise the pleading requirement across the board, at least relative to the *Conley* standard. Compared to Form 11 (an embodiment of *Conley*) both Twombly's and Iqbal's complaints state a claim.[93] And while the Court labels those complaints as legally, rather than factually, deficient, the fact remains that more facts would have saved them both.[94] Put differently, if Iqbal had evidence of discrete instances where Ashcroft and Mueller displayed an improper motive, and Twombly had more specific evidence of an actual agreement, both cases would have proceeded to discovery. Thus, it is hard to see the call for plausibility as anything other than a heightened pleading requirement.[95]

This is not to say that the Court is necessarily wrong about the desirability

---

contrast to *Iqbal*, which creates special burdens in cases involving allegations of bad faith or bad motive. *See infra* III.B.

92. *Swierkiewicz*, 534 U.S. at 514-15 ("Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (citation omitted) (quoting *Leatherman*, 507 U.S. at 168)); *Leatherman*, 507 U.S. at 168-69 ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

93. Indeed, Form 11 is about as "conclusory" as pleadings come. The complaint states merely that "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff." FED. R. CIV. P. Form 11. It then describes the plaintiff's injury and demands judgment. *Id.* As Justice Stevens noted in dissent in *Twombly*, "[t]he asserted ground for relief—namely, the defendant's negligent driving—would have been called a 'conclusion of law' under the code pleading of old." Bell Atlantic v. Twombly, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting). It is thus unclear whether Rule 84's admonition that the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate" survives *Twombly* and *Iqbal*. *See* FED. R. CIV. P. 84.

94. Indeed, the problem with Twombly's complaint was that it did not set out "*enough* facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (emphasis added). The same was true for Iqbal. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009) ("[R]espondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind.").

95. Justice Stevens made this observation first, in *Twombly* itself: "In this 'Big Case,' the Court succumbs to the temptation that previous Courts have steadfastly resisted. While the majority assures us that it is not applying any 'heightened' pleading standard, . . . I have a difficult time understanding its opinion any other way." 550 U.S. at 588 (Stevens, J., dissenting) (footnote omitted).

of a more demanding Rule 12(b)(6) standard. Scholars both on and off the bench have explored the problems of class action and discovery abuse, and called for reform of the pleading or discovery rules.[96] But procedural reforms like this one make no distinction between meritorious and frivolous suits, meaning that *all* lawsuits must now clear the higher 12(b)(6) bar. And, as seen from the lower courts' reaction to *Twombly*, the way in which such reform occurs makes a huge difference in how clear and lasting it will be.[97] Single-decision explications of a new pleading standard are necessarily confusing and incomplete, especially when the new standard is disguised as a mere extension of the old. And there are distinct advantages to legislative or administrative rulemaking versus judicial rulemaking, most importantly the ability to answer simultaneously many questions about the new rule rather than wait for individual cases to come forward and present new wrinkles.[98]

Labels, then, end up being largely instrumental, in two respects. On a large scale, *Twombly* and *Iqbal* reveal the malleability of the legislative-judicial dichotomy. Several times now, the Court has rejected the "legislative" act of imposing heightened pleading in particular sets of cases.[99] At the same time, it has engaged in the fundamentally "judicial" act of construing Rule 8 in *Twombly* and *Iqbal*. This "judicial" act, however, has had more far-reaching effects, because it changes the pleading standard in *all* cases. Practically speaking, then, there is not much difference between the "legislative" act of amending Rule 9(b) and the "judicial" act of interpreting Rule 8. But by using the "judicial" approach, the Court avoided overtly rewriting the Federal Rules.

On a smaller scale, *Twombly* and *Iqbal* give lower courts a tremendous power that they did not have before: the power to dismiss suits merely by

---

96. *See supra* note 77. Of course, the Rules Committee has taken great steps over the last two decades to curtail discovery abuse. *See* BABCOCK, MASSARO & SPAULDING, *supra* note 11, at 475-78 (describing evolution of discovery rules).

97. *See* BABCOCK, MASSARO & SPAULDING, *supra* note 11, at 330-32 (describing conflicting approaches to *Twombly* in the lower courts); *see also* Martinez, *supra* note 10, at 764 (same).

98. Indeed, in a recent decision declining to expand the scope of the judicially created collateral order doctrine, the Court itself extolled the benefits of the rulemaking process, such as "the opportunity for full airing it provides." Mohawk v. Carpenter, 130 S. Ct. 599, 609 (2009) ("[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar . . . and it facilitates the adoption of measured, practical solutions."). *See also* Spencer, *supra* note 6, at 489 ("[T]he rising cost of complex litigation—particularly in the class action context—is a valid concern and there may be a way that civil pleading standards could be revised to address the issue. . . . [H]owever, the Civil Rules Advisory Committee—in consultation with the entire legal community—would be much better suited to the task. By taking the rules as a whole into account and by balancing the interests of defendants desiring to avoid unwarranted litigation expenses and the interests of plaintiffs pressing potentially valid claims, the Committee is better suited to develop a nuanced solution to address the issue in a targeted fashion. It is in that regard that the Court's new plausibility standard falls short." (footnote omitted)).

99. *See supra* note 85 and accompanying text.

labeling certain allegations "conclusory" or "legal." After all, once an allegation is deemed "conclusory," it is entitled to no weight in the 12(b)(6) calculus.[100] Yet at the same time, the disagreement between Justices Souter and Kennedy on what constitutes a "conclusory" allegation reveals that the distinction is as manipulable as it is powerful.[101]

III. CIVIL RIGHTS SUITS AND THE DISCOVERY PARADOX

There are many aspects of *Iqbal* that create confusion and complexity: the prominence of Ashcroft and Mueller, the national security implications of the case, and the specter of 9/11 in the background. Yet, at its core, *Iqbal* presents a fairly simple civil rights suit alleging unconstitutional discrimination. And the problem with Iqbal's suit is equally simple: he failed to allege enough facts to support his allegations of improper motive and high-level supervision.

The Court's holding certainly has important ramifications for the future of Rule 8. Yet without saying so explicitly, *Iqbal* also dramatically shifts the Court's jurisprudence on pleading in civil rights cases. In particular, *Iqbal* undermines at least two prominent civil rights precedents and makes it significantly harder for plaintiffs adequately to allege motive-based constitutional torts.

A. Crawford-El *and Heightened Pleading*

A little over ten years ago, the Court faced a difficult choice in *Crawford-El v. Britton*:[102] it could uphold *Conley*'s application to section 1983 suits or create a heightened pleading standard to address concerns about frivolous lawsuits and discovery abuse. In many ways, the case was similar to *Twombly* and *Iqbal*. Yet the Court reached a different result.

Crawford-El arose from somewhat peculiar facts. The plaintiff, a "litigious and outspoken prisoner" in the District of Columbia correctional system, was transferred between several prison facilities in several different states due to overcrowding.[103] Crawford-El bounced from facility to facility, returning once to his initial facility in Lorton, Virginia before being transferred to his final

100. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009) ("[Iqbal's] bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . . As such, the allegations are conclusory and not entitled to be assumed true." (quoting *Twombly*, 550 U.S. at 555)).

101. To be sure, the *Twombly-Iqbal* pleading standard will not change the outcome in all, or even most, 12(b)(6) cases. Some complaints will survive scrutiny under either standard, and others will fail both. But in cases where the new standard can make a difference, it almost certainly will, with district courts severely overburdened and often operating without a full complement of judges.

102. 523 U.S. 574 (1998).

103. *Id.* at 578. I refer to pages 578-79 of the opinion throughout this paragraph.

destination in Florida. His belongings travelled separately. After Crawford-El's second transfer out of the Lorton facility, the warden arranged for his brother to pick up Crawford-El's belongings rather than forward them to the next destination. This decision caused a delay of several months between Crawford-El's arrival in Florida and receipt of his belongings. Upon receiving his items, Crawford-El filed suit, alleging that the warden had deliberately misdirected his belongings in retaliation for Crawford-El's exercise of his First Amendment rights while in the Lorton facility. By alleging First Amendment retaliation, Crawford-El converted a simple tort into a constitutional one.

After the district court denied the defendant's motion to dismiss, the defendant appealed to the D.C. Circuit. Sitting en banc, the D.C. Circuit decided, in a fractured opinion, to impose a heightened "clear and convincing evidence" standard for evaluating the allegations of motive at the 12(b)(6) stage.[104] The problem, as the Court aptly observed, was that "an official's state of mind is 'easy to allege and hard to disprove,'" meaning that intentional tort claims were "less amenable to summary disposition than other types of claims against government officials."[105] This problem came with costs: the costs, both financial and social, of subjecting government officials to trial.[106]

When the case arrived at the Supreme Court, it was not a clear candidate for reversal. Indeed, the Court could have tried to sustain the D.C. Circuit's ruling by extending its earlier precedent in *Harlow v. Fitzgerald*.[107] In that case, the Court had faced a similar problem: under the Court's qualified immunity precedents pre-*Harlow*, a plaintiff could defeat qualified immunity in two ways—by showing that the officer's conduct was objectively unreasonable under clearly established law, or by showing that the officer had acted in bad faith.[108] But because bad faith was "easy to allege and hard to disprove," a mere allegation of improper motive was often enough to defeat an assertion of

104. *Id.* at 582-84. The primary opinion adopted the "clear and convincing evidence" standard. Judge Silberman joined the majority, but criticized the approach as confusing; the better approach for him was to permit "only an objective inquiry into the pretextuality" whenever a "defendant asserts a legitimate motive for his or her action." Crawford-El v. Britton, 93 F.3d 813, 829, 834 (D.C. Cir. 1996) (Silberman, J., concurring). Judge Ginsburg agreed with the clear and convincing standard, but took issue with other aspects of the majority. *Id.* at 838-39 (Ginsburg, J., concurring). Judge Henderson "fully endorse[d]" the plurality, but thought that en banc review was inappropriate. *Id.* at 844-46 (Henderson, J., concurring). Five judges rejected the "clear and convincing" standard, concurring only in the judgment to remand. *Id.* at 847-54 (Edwards, J., concurring in the judgment to remand).

105. *Crawford-El*, 523 U.S. at 584-85.

106. *Id.* at 585.

107. 457 U.S. 800 (1982).

108. *See id.* at 815-16 ("[Q]ualified immunity would be defeated if an official *knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury." (internal quotations, brackets, and ellipses omitted)).

qualified immunity at the 12(b)(6) stage.[109] In *Harlow*, the Court responded to this problem by eliminating the bad faith prong of qualified immunity.[110] It thus seemed at least possible that the Court would be willing to recognize the D.C. Circuit's heightened pleading standard in *Crawford-El* as *Harlow*'s heir.

But imposing heightened pleading in *Crawford-El* was much more difficult than revising the qualified immunity standard in *Harlow*. At bottom, qualified immunity is a judge-created doctrine.[111] While the decision to redefine the substance of qualified immunity constituted a decisive break with former precedent, that precedent carried no more weight than any other judicial opinion. To uphold the heightened pleading standard in *Crawford-El* would be a more profound and controversial decision; the Court would either have to redefine the underlying constitutional right as requiring more evidence of an improper motive, or create a new pleading rule out of whole cloth that would conflict with Rules 8 and 9.

To avoid these problems, the Court simply distinguished *Harlow*, and disavowed the heightened pleading standard applied by the lower court. The Court began by noting that nothing in *Harlow* affected pleading or substantive standards for the underlying constitutional rights.[112] And the Court was not willing to countenance the lower court's extension of *Harlow*, partly because the Federal Rules of Civil Procedure would not permit it to.[113] Instead, the

---

109. *Id.* ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." (footnote omitted)).

110. *Id.* at 817-18. ("Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

111. Thomas E. O'Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 767 (2004) ("Qualified immunity is a judicially created doctrine . . . .").

112. Crawford-El v. Britton, 523 U.S. 574, 588 (1998) ("Our holding [in *Harlow*] that 'bare allegations of malice' cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation.").

113. *Id.* at 594 ("In fashioning a special rule for constitutional claims that require proof of improper intent, the judges of the Court of Appeals relied almost entirely on our opinion in *Harlow*, and on the specific policy concerns that we identified in that opinion. As we have explained, neither that case nor those concerns warrant the wholesale change in the law that they have espoused. . . . Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself.").

Court noted that it had repeatedly "declined similar invitations to revise established rules [like Rule 8] that are separate from the qualified immunity defense."[114] Indeed, as the Court observed, "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process"; those decisionmakers would be able to evaluate the effects of the proposed standard "upon plaintiffs with bona fide constitutional claims."[115] Rather than impose such a legislative change, the Court relied on the discretion of district courts applying various tools to weed out frivolous claims, such as ordering a reply to the defendant's answer, granting a motion for more definite statement, tailoring discovery under Rule 26, and sanctioning plaintiffs for truly frivolous suits.[116] After all, "[i]t is the district judges rather than appellate judges . . . who have had the most experience in managing cases in which an official's intent is an element."[117]

I offer this extensive summary not to rehash the details of *Crawford-El*, but to expose the striking similarities between *Crawford-El* and *Iqbal*. In both cases, the Court confronted the "easy to allege and tough to disprove" problem created by motive-based torts. In both cases, the Court considered the option of imposing a heightened pleading standard, while also recognizing the availability of other procedural tools to weed out frivolous claims. But the two cases led to drastically different results: in *Crawford-El*, the Court followed its Rule 8 precedents and declined to usurp the legislative process; in *Iqbal* (and *Twombly*), the Court reinterpreted Rule 8 to dismiss Iqbal's complaint as "implausible."

It is difficult, if not impossible, to read *Iqbal* as doing anything other than calling *Crawford-El* into question.[118] While the *Iqbal* Court did not even mention *Crawford-El*, the result of the latter opinion seems squarely in the former's sights.[119] The labels are different—in *Crawford-El*, the Court rejected

---

114. *Id.* at 595.

115. *Id.* at 595-96.

116. *Id.* at 597-600.

117. *Id.* at 600.

118. One way to read *Iqbal* and *Crawford-El* harmoniously is to read *Iqbal* as pointing out a way in which *Crawford-El* could have lost. That is, the problem with Britton's argument was not that it was too bold, it was that it was too modest: rather than arguing for heightened pleading only in one type of case, Britton could have (successfully, in the *Iqbal* Court's opinion) argued for heightened pleading across the board. This argument, however, ignores the broader spirit of both decisions, as explained above.

119. *Iqbal* almost certainly overrules *Swierkiewicz v. Sorema N.A.* as well. In that opinion, the Court rejected the defendant's argument that dismissal of the plaintiff's complaint under a heightened pleading standard was appropriate because "allowing lawsuits based on conclusory allegations of discrimination to go forward [would] burden the courts and encourage disgruntled employees to bring unsubstantiated suits." 534 U.S. 506, 514-15 (2002). This statement, as well as *Swierkiewicz*'s unabashed endorsement of liberal notice pleading, *see id.* at 512-14, conflicts with the text and spirit of *Iqbal*. Of course, this may be another instance of the defendants being too modest in asking for a heightened pleading rule

a "heightened pleading standard," whereas in *Iqbal*, the Court rested on the language of "plausibility." But the suits are similar enough to make the Court's change of course all the more striking. At bottom, in *Iqbal*, the Court does precisely what it declined to do just over ten years earlier: impose a higher, almost impossible bar on civil rights plaintiffs alleging motive-based torts. [120] For while it is easy to allege motive in a pleading, it is difficult if not impossible to prove it before discovery.[121]

B. *Questions of Law as Questions of Fact?*

Prior to *Iqbal*, perhaps as settled as the Court's rejection of heightened pleading standards was its conclusion that the existence of discriminatory intent in civil rights cases is fundamentally a question of fact. In 1982, the Court made this position clear in *Pullman-Standard v. Swint*.[122] In *Swint*, a group of African-American employees at a railway freight car plant sued their employer and their union, alleging that the seniority system maintained by the company discriminated on the basis of race or color in violation of Title VII.[123] The

---

only in employment discrimination cases. *See supra* note 118.

120. It is possible that *Iqbal* does not actually have *Crawford-El* in its sights. That is, one could argue that the *Iqbal* Court's true concerns are the distractions and diversions created by suits against high-level officials essential to the functioning of government. But to paraphrase one prominent Supreme Court litigator, *Iqbal* represents a buzz saw, not a scalpel—its holding is not limited to suits against high-level officials, or even to suits against government officials in general. *See* Transcript of Oral Argument at 39, United States v. Stevens, No. 08-769 (U.S. Oct. 6, 2009). Whatever the Court's concerns, its words have far-reaching effects.

121. Former D.C. Circuit Judge Patricia Wald summed the problem up quite aptly, albeit in describing a line of now-overruled D.C. Circuit cases imposing a heightened pleading standard on plaintiffs facing motions for summary judgment on the basis of qualified immunity:

> After [these cases,] a plaintiff had a tough row to hoe if he wanted to show that a government official had it in for him. Before the plaintiff could engage in any discovery, he had to come up with direct evidence of the officer's unconstitutional motive, and if he did not somehow have independent access to such direct evidence, he would virtually never have the opportunity to conduct discovery and uncover it—the Rule 12(b) dismissal or Rule 56 summary judgment guillotine would fall on his claim then and there.

Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1923 (1998). *See also* Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 292 (2002) ("[A] heightened pleading standard erects a hurdle at the pleading stage that most civil rights plaintiffs are unable to clear.").

Iqbal may not be the sole culprit here, as "[t]he rate of dismissal in civil rights cases . . . spiked in the four months [after] *Twombly*." 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, 1815 (2008) (empirical study establishing that *Twombly*'s greatest effect, at least in the early going, was raising the rates of dismissal in civil rights cases). It is likely that *Iqbal* will further cement this trend.

122. 456 U.S. 273 (1982). I thank Pamela Karlan for bringing this case to my attention.

123. *See id.* at 275.

district court found no such discriminatory intent, but the court of appeals reversed.[124] In so doing, the court of appeals committed (at least in the Court's eyes) two fundamental errors. First, it rejected the district court's fact-finding and conducted its own, relying on a circuit rule stating that factual findings regarding discriminatory intent were not subject to the "clearly erroneous" standard of review under Rule 52.[125] In dismissing this analysis as improper, the Court stated quite simply that the question of whether the facts support a finding of discriminatory intent is a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact."[126] The court of appeals thus erred in not deferring to the district court's fact-finding.

Second, the court of appeals mishandled the only *legal* error in the proceedings below. The court of appeals concluded that the district court had failed to consider relevant evidence that might have led it to a different conclusion.[127] But instead of remanding the case to the district court for further proceedings to consider that evidence, the court of appeals weighed the evidence and made its own conclusion about what that evidence meant.[128] "Proceeding in this manner" was "incredible" to the Court; because discriminatory intent is a factual matter, remand was the proper course for an appellate court setting aside a district court's findings of fact.[129]

On its face, *Swint* seems far removed from *Iqbal*. *Swint* concerns a trial-level issue in civil procedure: the proper standard governing actual factual findings made by a jury or a judge. *Iqbal*, by contrast, concerns one of the key pretrial proceedings: motions to dismiss under Rule 12(b)(6). Moreover, at the 12(b)(6) stage, the actual facts of the case are irrelevant; courts are required to take all the facts alleged by the plaintiff as true without regard to whether they actually occurred.[130] That is why the question of whether a complaint states a claim is a legal, rather than factual, question.

Nevertheless, *Swint* and *Iqbal* are inextricably intertwined. Even though *Iqbal* presented a question of law under Rule 12(b)(6), the Court answered that question through the fact-intensive process of determining which allegations are conclusory and then weighing the non-conclusory allegations for plausibility.[131] That methodology is roughly analogous to that used by district

---

124. *Id.* at 277.

125. *See id.* at 285-86; *see also* FED. R. CIV. P. 52(a).

126. *Swint*, 456 U.S. at 288.

127. *Id.* at 291.

128. *Id.* at 292.

129. *Id.* at 293; *see also* DeMarco v. United States, 415 U.S. 449, 450 & n.* (1974) (per curiam) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts . . . .").

130. *See supra* Part I.A.

131. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009) ("We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to

judges making actual factual findings: they discard inadmissible evidence, and then weigh the remaining evidence to reach the best resolution of the case. At bottom, then, the process for resolving the legal question of whether a complaint is valid looks a lot like the process outlined in *Swint* for answering the factual question of whether the plaintiff should win or lose.[132]

More fundamentally, the Court's ruling in *Iqbal* threatens to render *Swint* a nullity. For plaintiffs who actually assemble strong evidence of discriminatory intent, *Swint* is a boon insofar as it requires reviewing courts to uphold a finding of such intent absent clear error. But under *Iqbal*, plaintiffs need to assemble such evidence *before* filing their complaints in order to avoid having their allegations of improper purpose dismissed as conclusory.[133] This is no easy task; defendants in discrimination cases are rarely upfront about their unconstitutional conduct.[134] For example, in *Swint*, the Fifth Circuit made its findings of discriminatory intent based largely on "the I. A. M.'s role in the creation and establishment of the seniority system . . . ."[135] It is far from clear that plaintiffs would be able to uncover such evidence before filing their complaint. Similarly, it is hard to imagine how Iqbal could uncover actual evidence of Ashcroft's and Mueller's "role in the creation and establishment of" the classification system without access to the tools of discovery.

Thus, while *Swint*'s holding that discriminatory purpose is ultimately a factual finding may still stand, the number of cases that will get to the fact-finding process is undoubtedly now much smaller.[136] For the plaintiff who, post-discovery, would have smoking-gun or solidly circumstantial evidence of discriminatory purpose, *Swint* is cold comfort—and *Iqbal* a lock on the courthouse door.[137]

---

relief.").

132. Of course, there is one key difference: the disposition of a motion to dismiss is reviewed de novo, whereas actual factual findings receive deferential review. One might thus read *Iqbal* as representing some uneasiness with the fact-finding conducted by district courts, in that it gives up to three courts (the district court, the court of appeals, and the Supreme Court) an unfettered opportunity to dismiss a claim at the front end.

133. *See, e.g.*, Wendy N. Davis, *Just the Facts, But More of Them*, A.B.A. J., Oct. 2007, at 16, 16-17; Spencer, *supra* note 6, at 448.

134. *See, e.g.*, Spencer, *supra* note 6, at 481 ("Under plausibility pleading, one has no confidence that a plaintiff's dismissed claim was frivolous or nonmeritorious because it permits the dismissal of complaints that assert wrongdoing, but merely offer supporting factual allegations consistent with—rather than factually suggestive of—liability. Thus, although discovery might reveal facts that prove liability, that opportunity is preemptively foreclosed and the investigation for supporting facts that the rules contemplate never occurs. Indeed, it is a greater shame that discovery is foreclosed . . . in circumstances where the needed supporting facts lie in the exclusive possession of the defendants . . . .").

135. Pullman-Standard v. Swint, 456 U.S. 273, 284 (1982) (internal quotations omitted).

136. *See, e.g.*, Spencer, *supra* note 6, at 494 ("Ultimately, *Twombly* raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance."); Hannon, *supra* note 121.

137. This result is not necessarily troubling. It is true that an opportunistic plaintiff

C. *The Discovery Paradox*

On a practical level, the implications of the shift from *Conley* to plausibility are profound. In motive-based tort suits, district judges now have the ability to discard any bald allegations of motive as merely "conclusory recitations of elements of the claim." They can do so looking at the claims in isolation rather than in the context of the complaint as a whole. And this determination will be a legal one—not a factual one—meaning it is entitled to *de novo* review by an appellate court, and possibly the Supreme Court. All in all, the bar to getting such a suit dismissed is, on balance, lower.[138]

It would be one thing if such dismissals were rare, but there is good reason to think that is not the case. Just as with agreements in the antitrust context, information about a defendant's mental state is notoriously hard to come by, even with discovery.[139] Conversations, stray statements to fellow employees, written work product—all of these sources may evince a discriminatory motive. But as with *Twombly*, a profound problem exists: plaintiffs cannot get those documents without discovery, meaning they likely cannot get the documents at all.[140] Civil rights plaintiffs alleging motive-based torts thus face a classic Catch-22: they cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim.

This result is especially striking because motive-based torts are often considered to be the worst kind of constitutional tort, and the kind most in need of deterrence.[141] And it is in those cases where *Twombly* and *Iqbal* will have most heft. In situations where the plaintiff is in command of all the relevant information to make out a claim—for example, a constitutional tort alleging

might add a discriminatory purpose claim to an "ordinary suit" in the hopes of surviving 12(b)(6) and then go on a fishing expedition through the defendant's files. Similarly, there are undeniable social and financial costs to requiring high-level officials to participate in discovery. Desirable or not, though, *Iqbal* and *Twombly* represent a decided break from past practice in the Rule 8 and civil rights context, and deserve to be probed for strength as well as weakness. I focus primarily on the latter because it goes largely undiscussed in both cases.

138. This is especially striking because even Rule 9(b), which imposes a heightened pleading standard in some cases, permits "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged *generally*." FED. R. CIV. P. 9(b) (emphasis added).

139. *See* Korb & Bales, *supra* note 121.

140. *See supra* note 134 and accompanying text.

141. *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 414 (2003) (describing "the worst forms of government misconduct" as "acts that are clearly unreasonable, malicious or reckless"). Justice Scalia disagrees; in dissenting from *Crawford-El* and suggesting that "once the trial court finds that the asserted grounds for the official action were objectively valid . . . it [should] not admit any proof that something other than those reasonable grounds was the genuine motive," he added, "[t]his is of course a more severe restriction upon 'intent-based' constitutional torts; I am less put off by that consequence than some may be, since I believe that *no* 'intent-based' constitutional tort would have been actionable under the § 1983 that Congress enacted." Crawford-El v. Britton, 523 U.S. 574, 612 (1988) (Scalia, J., dissenting).

excessive force—*Iqbal* has little effect.[142] The plaintiff will allege where she was, what she was doing, what the officer did, and that will likely be enough. But in motive-based cases, the plaintiff will not have—indeed cannot have—all the necessary information to file suit, because some of that information rests between the defendant's ears.[143] In these cases, *Iqbal* will likely often result in dismissal, as there will be little more backing up the plaintiff's allegations of improper motive than his or her own suspicion or belief.[144]

This result is not altogether surprising in the civil rights context. The Court has often preferred to throw out meritorious claims to scrub dockets of frivolous ones, rather than permit more claims to proceed in the hopes that all meritorious ones will make their way to judgment.[145] But the Court's efforts here have been particularly far-reaching; in addition to its subtle creation of a discovery Catch-22, the Court has overruled or undermined precedents like *Crawford-El* and *Swint* in function without so much as the "eulogy" that Justice

142. Take, for example, the case of *Scott v. Harris*, 550 U.S. 372 (2007). The case involved a lawsuit by a motorist rendered quadriplegic after an officer ran him off the road during a high-speed chase. Harris filed a Fourth Amendment suit against the officer and others, alleging, among other things, that Scott used excessive force in violation of the Fourth Amendment. *Id.* at 375-76. Prior to discovery, Harris knew all of the facts necessary to make out his claim—that Scott was an officer chasing Harris, that Scott had rammed Harris's car, that the ramming caused Harris's injuries. To those facts, Harris had to add little more than an allegation of excessive force.

143. *See, e.g.*, Spencer, *supra* note 6, at 482.

144. Of course, in truly meritless suits, judges may ignore *Twombly* and *Iqbal* altogether. *See, e.g.*, Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009) ("So maybe neither *Bell Atlantic* nor *Iqbal* governs here. It doesn't matter. It is apparent from the complaint and the plaintiff's arguments, without reference to anything else, that his case has no merit. That is enough to justify, under any reasonable interpretation of Rule 12(b)(6), the dismissal of the suit."). The more provocative question is whether *Twombly* and *Iqbal* will truly result in the dismissal of more frivolous, docket-clogging lawsuits. And that question will now have to be explored in backwards-looking legal scholarship rather than prospective rulemaking proceedings.

145. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598 (2001) (holding that to be a "prevailing party" and collect attorney's fees under 42 U.S.C. § 1988, a plaintiff must secure judgment on the merits or a court-ordered consent decree, and dismissing the so-called "catalyst theory," which would permit fee awards where a plaintiff achieves the desired result through a voluntary change in the defendant's conduct). In concurrence, Justice Scalia stated quite bluntly:

> It could be argued, perhaps, that insofar as abstract justice is concerned, there is little to choose between the dissent's outcome and the Court's: If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the extortionist.

Id. at 618 (Scalia, J., concurring).

Stevens penned for *Conley*.[146]

CONCLUSION: THE MYTH OF THE BIG CASE

As law students learn early in their legal education, there is no such thing as a "pure civil procedure case." Every civil procedure case arises out of some body of substantive law, be it antitrust, constitutional tort, or something else entirely. Every civil procedure case, then, brings with it a temptation to cabin the case as "belonging" to the relevant area of substantive law. For example, in the aftermath of *Twombly*, some scholars argued that the decision only applied to antitrust cases, or to complex, "big" suits[147]—a position that grew more credible, if not more attractive, when the Court issued its *per curiam* opinion in *Erickson v. Pardus* just a few days after *Twombly*.[148] *Erickson* seemed tailor-made to reassure litigants and civil procedure scholars alike that *Twombly* was limited to its facts, or at least to its context. *Iqbal*, of course, pierced that myth. But *Iqbal*, like *Twombly*, is a "big case"—one involving bold allegations, a controversial plaintiff, and a relatively sizeable amount of factual discovery that would have to occur were the case to proceed. So the same temptation may exist: to view *Iqbal* as a *Bivens* case, a civil rights case, or a case involving high-level officials—and as limited to that context.

Read fairly, though, *Iqbal*, like *Twombly*, is fundamentally a Rule 8 decision. As Justice Kennedy noted in *Iqbal*, the decision in *Twombly* was "based on [the Court's] interpretation and application of Rule 8," which "governs the pleading standard 'in *all* civil actions and proceedings in the United States district courts.'"[149] Because *Twombly* and *Iqbal* clarify the pleading standard for "all civil actions," their reach extends far beyond antitrust suits.[150] As a result, all of *Twombly* and *Iqbal*'s innovations—from the embrace of heightened pleading, to the new two-step plausibility process, to the crucial distinction between issues of fact and law—are transsubstantive.[151]

---

146. Bell Atlantic v. Twombly, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting).

147. *See supra* note 7.

148. 551 U.S. 89 (2007) (per curiam). In *Erickson*, the Court reversed a lower court's finding that an *in forma pauperis* complaint rested on allegations that were too "conclusory." *Id.* at 89-90. The Court cited *Twombly* only twice, and for curious, *Conley*-like propositions: that a complaint "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" and that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.* at 93-94 (ellipsis in original).

149. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (emphasis added) (quoting FED. R. CIV. P. 1).

150. *Id.*

151. The Rules Committee could respond, either by revising Rule 8 to reflect the standard espoused in *Twombly* and *Iqbal*, or by adopting a different standard entirely. Whether they will do so is a different question; they have not yet formulated any response to *Twombly*. Senator Arlen Specter has been more proactive, introducing a bill designed to revert to the days of *Conley*. *See* Notice Pleading Restoration Act, S. 1504, 111th Cong. § 2

And while this Comment has argued that those innovations have great weight in the civil rights context, it would be naïve to argue that they are limited to that—or any—context. In just a few short months, *Twombly* became a darling of the defense bar, and one of the most frequently cited cases in U.S. courts.[152] There is little reason to think *Iqbal* will be any different.

(2009) ("Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957)."); Posting of David Ingram to The BLT: The Blog of Legal Times, Specter Proposes Return to Prior Pleading Standard, http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html (July 23, 2009, 11:43 EST). Other Congressmen have followed suit. *See* Posting of Howard Wasserman to PrawfsBlawg, How Do You Solve a Problem Like *Iqbal*, http://prawfsblawg.blogs.com/prawfsblawg/2010/01/how-do-you-solve-a-problem-like-iqbal.html (Jan. 21, 2010, 11:11 EST) (summarizing legislative and scholarly proposals to "undo *Iqbal*"). As of the time this Comment was submitted for printing, the Senate Judiciary Committee had held hearings on the Specter bill but taken no further action. *See* Posting of David Ingram to The BLT: The Blog of Legal Times, Former Solicitor General Feels the Wrath of Senators, http://legaltimes.typepad.com/blt/2009/12/former-solicitor-general-feels-the-wrath-of-senators.html (Dec. 2, 2009, 15:12 EST) (summarizing Senate Judiciary Committee hearing related to pleading standards).

152. *See supra* note 10.