

# PLEADING AS INFORMATION-FORCING

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## I

### INTRODUCTION

The federal pleading standards announced in *Ashcroft v. Iqbal*<sup>1</sup> and *Bell Atlantic Corp. v. Twombly*<sup>2</sup> have occupied the attention of academics, jurists, and practitioners since their announcement. *Iqbal* alone has, as of this writing, been cited by more than 26,000 courts, more than 500 law review articles, and innumerable briefs and motions.<sup>3</sup> Interested observers, including the Federal Judicial Center, many academics, and this author, have tried to estimate the empirical effect of the decisions, with differing results.<sup>4</sup> Others, including some participants in this symposium, have criticized *Iqbal* and *Twombly* for altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act.<sup>5</sup> Almost all commentators, however,

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1. 129 S. Ct. 1937 (2009). In the interest of full disclosure, I was counsel of record for the respondent in *Iqbal*.

2. 550 U.S. 544 (2007).

3. These figures were generated using the KeyCite function on the Westlaw database, on August 8, 2011.

4. The Federal Judicial Center (FJC) recently released a study that concluded that *Iqbal* has not resulted in a statistically significant increase in dismissals in most categories of cases. JOE CECILET AL., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (Fed. Jud. Center, Mar. 2011), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf). Unfortunately, the FJC's data are limited, having excluded all pro se matters, all cases involving prisoners, and any motions involving qualified immunity. *See id.* at 6. I am currently conducting a more complete analysis of motion activity both before and after *Iqbal*, the results of which will be forthcoming. Other scholarship suggests that *Iqbal* and *Twombly* are having a significant impact on the quality and quantity of federal litigation. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (estimating that motions to dismiss were four times more likely to be granted after *Iqbal* as they were during the *Conley* era, after controlling for relevant variables); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (suggesting that *Iqbal* and *Twombly* standards will not provide a better filter for weeding out meritless cases).

5. *See, e.g.*, Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1190 (2010); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 GEO. WASH. L. REV. 9, 28–29 (2009); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84–89 (2010); *cf.* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 538–39 (2011) (suggesting that Court's decisions in *Iqbal* and *Twombly* might reflect its own frustration with the rulemaking process).

agree that *Iqbal* and *Twombly* mark a break from the liberal pleading doctrine enunciated in 1957 by *Conley v. Gibson*.<sup>6</sup> It is hard to avoid this conclusion, given the *Twombly* Court's explicit rejection of at least one well-worn sentence from *Conley*. But exactly how much has changed is up for debate, and there are certainly well respected commentators who have suggested that *Iqbal* and *Twombly* are not necessarily as consequential as most academics seem to believe.<sup>7</sup>

This article does not deign to answer exactly how much *Iqbal* and *Twombly* have changed pleading. From my own reading of the two cases as well as lower courts' attempts to interpret them, it is clear that pleading is a different animal than it was before 2007. But even more striking is the confusion that the two cases have created for the advocates and judges who have to grapple with the new pleading standard. Even the Supreme Court has continued to sow the confusion, by citing to pre-*Twombly* pleading law instead of *Iqbal* or *Twombly* in a recent case.<sup>8</sup> This article suggests a source of this confusion distinct from the Court's own lack of clarity in explaining the decisions, and then tries to relate this confusion to two poles of pleading principles that appear to be operating in lower court interpretations of the cases.

The source of confusion at focus here is linguistic. *Iqbal* and *Twombly* have created havoc not simply because they upended settled expectations about the nature of pleading. Had the decisions clearly articulated the new pleading standard, it might have been subject to the same criticisms summarized above, but at least it would have been easier for lower courts to apply. Instead the Court shifted standards by using familiar words in a completely new manner. The Court's new standard places an emphasis on the words "conclusory" and "plausible," words that it had used before, but never in the way that it did in *Iqbal* and *Twombly*.<sup>9</sup> The term "conclusory," for example, had rarely been invoked by the Supreme Court in the pleading context; when it did so, it was to condemn legal, not factual, conclusions, as insufficient on their own to make a complaint viable. By contrast, conclusory factual allegations were fatal in legal contexts that involved the assessment of evidence—for example, summary judgment, "good cause" in discovery—but pleading has never been a site for sifting evidence. Thus, prior to *Iqbal*, what was to be disregarded as "conclusory" at the pleading stage differed from what was to be disregarded at other procedural stages. At least one reading of *Iqbal* collapses this procedural-

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6. See Reinert, *supra* note 4, at 121–25 & nn.11–24 (reviewing literature).

7. See generally Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (arguing for limited reading of *Twombly* and *Iqbal*); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (suggesting that *Iqbal* and *Twombly* can be read consistently with prior precedent).

8. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011). Even though *Skinner* was not focused on the sufficiency of pleading, it did not take long for commentators in the academy to wonder whether there was significance in the omission of *Iqbal* and *Twombly*. See Howard Wasserman, *Some Hints (or Further Confusion) About the State of Pleading*, PRAWFSBLAWG (Mar. 11, 2011, 9:21 EST), <http://prawfsblawg.blogs.com/prawfsblawg/2011/03/reading-pleading-tea-leaves.html>.

9. See *infra* Part III.

based meaning of “conclusory,” creating an evidentiary standard of proof at the pleading stage where it never before had existed. Similar comparisons can be made of the Court’s use of the word “plausible.”<sup>10</sup> The end result is a pleading inquiry that begins to look evidentiary in nature, an observation that has led some to view *Iqbal* and *Twombly* as merging the Rule 12 and Rule 56 inquiries.<sup>11</sup>

This leads to the second major point of this article: namely that conducting an evidentiary inquiry at the pleading stage has a distinct danger apart from criticisms that have been made by other commentators.<sup>12</sup> It poses the risk of substituting for notice pleading something analogous to an “information-forcing” rule. Information-forcing rules are typically associated with, but not confined to, contract doctrine.<sup>13</sup> In any event, the key insight of information-forcing rules is that it can sometimes be efficient to impose a penalty default on the party who fails to make known information that is asymmetrically in his possession. That is, where one party has better (or cheaper) access to relevant information, sometimes it makes sense to create incentives for that party to produce that information. As applied to pleading, however, the rationale loses its appeal, at least as to those kinds of information that are predictably unavailable to the pleader. For instance, it has often been observed that allegations regarding a defendant’s state of mind are difficult to plead with specificity, because of the profound informational asymmetry that exists with regard to state of mind evidence. And even for categories of facts to which a pleader may have better access than her opponent, one should still have a good reason for forcing that information out at the pleading stage rather than at a later stage of litigation.

There may be scenarios in which information-forcing principles could have limited application for pleading rules. For instance, where plaintiffs have access to private information, asking them to include it in their complaint at the pleading stage may be consistent with, if not mandated by, familiar information-forcing rationales. Similarly, where there is publicly-available information, there may be circumstances in which information-forcing pleading principles have purchase. But where the defendant has access to relevant information, and the plaintiff cannot access it, adopting an information-forcing rule that requires pleading beyond the requirements of notice pleading would be inappropriate. Even if one concludes that information-forcing principles may have limited

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10. Indeed, Ed Brunet has made similar observations about the Court’s use of the word “plausible” in prior summary judgment decisions. Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 3–8 (2010). Below, I expand on this by considering the Court’s use of the term “plausible” in other evidentiary contexts. *Infra* Part III.B.

11. See Miller, *supra* note 5, at 34; Suja A. Thomas, *Pondering Iqbal: The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

12. There are Seventh Amendment concerns, for instance. See Thomas, *supra* note 11. And, of course, there are concerns about subverting the traditional role of pleading. See sources cited at *supra* note 5.

13. See *infra* Part V.A.

application at the pleading stage, it is important to recognize that the procedural stage of the lawsuit may affect how stringently courts should apply the principle. Courts have, and should, insist on more information-forcing at the summary judgment stage than at the pleading stage, for instance. On this view, the failing of *Iqbal* and *Twombly* is that each case assumes the merits of an information-forcing pleading rule without analyzing whether the rule should apply to the kinds of allegations at issue in the case or whether the Rule 12(b)(6) stage is the appropriate place to impose information-forcing norms.

## II

### *IQBAL AND TWOMBLY IN BRIEF REVIEW*

Understanding the significance of *Iqbal* and *Twombly* requires some recourse to history. One must begin with the changes to pleading ushered in by the Federal Rules of Civil Procedure, adopted in 1938. The Rules sought to eradicate the technicalities of claim-specific pleading that had dominated legal practice for decades.<sup>14</sup> Commentators too numerous to count have reviewed and remarked upon the pleading changes enacted by the Federal Rules, noting that they embraced a gradual but significant turn to reliance on discovery and trial to determine merit rather than technical rules of pleading.<sup>15</sup> Rule 8, requiring only a “short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>16</sup> was key to accomplishing this transition.<sup>17</sup> “Fact” pleading, which the Federal Rules were meant to displace, too often “led to wasteful disputes about distinctions that [the drafters] thought were arbitrary or metaphysical, too often cutting off adjudication on the merits.”<sup>18</sup> As originally conceived, Rule 12(b)(6) motions would test the sufficiency of complaints not by reference to the facts alleged in the complaint, but by reference to whether there was a legal claim that could be supported by the facts alleged.<sup>19</sup>

The seminal case interpreting the new federal pleading rules, of course, was

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14. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438–40 (1986).

15. E.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–91 (2003); see also Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 76–77 (2008) (summarizing history of pleading standards and functions from medieval origins onward). For an overall history of the Federal Rules, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

16. FED. R. CIV. P. 8.

17. The goal of the Federal Rules was to create both simplicity and uniformity in pleading and to prevent premature dismissals. See Marcus, *supra* note 14, at 439 (“Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases ‘fact,’ ‘conclusion,’ and ‘cause of action.’”).

18. Mark Herrmann, James M. Beck & Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009) (Stephen Burbank in rebuttal).

19. As such, Rule 12(b)(6) motions were meant to address the rare circumstance in which a plaintiff’s claim for relief could be supported by no valid legal theory. See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 407 (2011); Burbank, *supra* note 5, at 1191–92.

the Supreme Court's decision in *Conley v. Gibson*,<sup>20</sup> in which the Court interpreted Rule 8 to focus on the notice given to the defendant of the nature of the plaintiff's lawsuit rather than on the relationship of particular pleaded facts to the legal claims at issue. The Court treated pleading as a way of "facilitat[ing] a proper decision on the merits"<sup>21</sup> by giving a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>22</sup> Thus, according to *Conley*, a complaint satisfied Rule 8 without "set[ting] out in detail the facts upon which [the claimant] bases his claim."<sup>23</sup> To the extent that a defendant sought additional facts, the *Conley* Court was satisfied that Rule 12(e), among other devices, would suffice.<sup>24</sup> As for the role of Rule 12(b)(6) motions, true to the original understanding of the drafters of the Federal Rules, the *Conley* Court referred to "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 that would entitle him to relief."<sup>25</sup>

Thus, after *Conley*, Rule 8 and Rule 12(b)(6) had a complex interrelationship. First, as to the sufficiency of factual allegations, Rule 8 required only "notice" pleading, not detailed facts. Second, Rule 12(b)(6) was to be used in those rare cases in which there was no viable legal theory to support a plaintiff's claim. A complaint, then, could satisfy Rule 8, but still be subject to dismissal under Rule 12(b)(6).<sup>26</sup> Finally, to the extent that a party-opponent believed that a complaint provides insufficient factual detail, Rule 12(e), not Rule 12(b)(6), was one of many available procedural remedies.

Rule 8's notice pleading standard dominated the resolution of pre-discovery motions, at least rhetorically, for decades.<sup>27</sup> Until *Twombly* and *Iqbal*, the Supreme Court maintained a relatively consistent commitment to *Conley*'s notice pleading rule, twice unanimously rejecting heightened pleading standards in civil rights and employment discrimination cases.<sup>28</sup> The Court even

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20. 355 U.S. 41 (1957).

21. *Id.* at 48.

22. *Id.* at 47.

23. *Id.*

24. *Id.* at 48 n.9.

25. *Id.* at 45–46.

26. *Bank of Abbeville & Trust Co. v. Commonwealth Land Title Ins. Co.*, 201 F. App'x 988, 990 (5th Cir. 2006) (per curiam); *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999).

27. Christopher Fairman has argued that notice pleading has rarely been the rule, at least in practice, pointing to examples from antitrust, RICO, environmental, civil rights, intellectual property, and defamation cases, among others, in which lower courts have constructed a variety of heightened pleading standards. See Fairman, *supra* note 15, at 998–1011 (summarizing different categories of heightened pleading).

28. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (stating that the heightened pleading standard for § 1983 claims against municipalities is "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); see also *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most

acknowledged that there might be “practical merits” to heightened fact pleading,<sup>29</sup> but reminded the lower courts that such changes may be obtained only “by the process of amending the Federal Rules,” not by judicial fiat.<sup>30</sup>

Everything changed with the Court’s decisions in *Twombly* and *Iqbal*. In the former, the Court adopted a “plausibility” standard in an antitrust case, expressing its concern, specifically in the antitrust context, that liberal pleading rules, combined with expansive discovery, would pressure defendants to settle weak or meritless cases.<sup>31</sup> There were at least three notable aspects of *Twombly*. First, the Court overruled in part *Conley v. Gibson*.<sup>32</sup> In particular, *Twombly* “retired” the language from *Conley* that cautioned district courts not to dismiss a case for insufficient pleading unless the court can conclude that “the plaintiff can prove no set of facts” consistent with the defendant’s liability.<sup>33</sup> Second, *Twombly* suggested that the “plausibility” of a plaintiff’s complaint played a role in resolving whether a defendant’s Rule 12(b)(6) motion should be granted.<sup>34</sup> This language had not been used with reference to Rule 12’s standards in the past.<sup>35</sup> Finally, the *Twombly* Court seemed to ground its decision largely in concerns that threats of burdensome discovery extracted settlements from defendants, even for claims of dubious merit.<sup>36</sup> In the Court’s view, careful case-management by district courts had not proven successful in reducing these risks.<sup>37</sup>

Although many lower courts took note of *Twombly*, substantial questions lingered. Some lower courts considered the possibility that *Twombly* was limited to cases in which the costs of discovery were likely to be high and settlement-forcing.<sup>38</sup> For others, *Twombly* was interpreted to apply broadly to all civil actions.<sup>39</sup> The Court’s decision in *Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims.<sup>40</sup>

*Iqbal* also articulated a two-step process for evaluating the sufficiency of a

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effectively resolved either by the rulemaking process or the legislative process.”).

29. *Swierkiewicz*, 534 U.S. at 515.

30. *Id.* (quoting *Leatherman*, 507 U.S. at 168).

31. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007).

32. 355 U.S. 41 (1957).

33. 550 U.S. at 561–63 (reviewing criticisms of *Conley* and concluding that expansive language of the case “has been questioned, criticized, and explained away long enough”).

34. *Id.* at 556–57.

35. See Brunet, *supra* note 10, at 3–8 (reviewing use of word “plausible” in summary judgment context).

36. 550 U.S. at 558–59.

37. *Id.* at 559.

38. *E.g.*, *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488–89 (6th Cir. 2009) (suggesting that *Twombly* was limited to “expensive, complicated litigation” (internal quotation marks omitted)).

39. See, *e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 172 n.6 (2d Cir. 2009); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008).

40. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

complaint.<sup>41</sup> First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a “conclusory” fashion.<sup>42</sup> In announcing this new gloss on pleading, the Court also held that allegations of state of mind, despite the explicit language of Rule 9(b),<sup>43</sup> must be alleged with some factual detail.<sup>44</sup> The second step, the plausibility analysis, assesses the fit between the non-conclusory facts alleged and the relief claimed.<sup>45</sup> *Iqbal* made it clear that the judge’s role in plausibility analysis was one that called for the exercise of “judicial experience and common sense,”<sup>46</sup> a surprising turn from the judicial role contemplated in *Conley*.<sup>47</sup>

Despite the contrast between the framework contemplated by the *Conley* Court and the drafters of the Federal Rules with that introduced by *Iqbal* and *Twombly*, the recent opinions disclaimed any intent to adopt a heightened fact pleading standard.<sup>48</sup> Unsurprisingly, however, lower courts are confused as to the precise ramifications of the cases.<sup>49</sup> As the Ninth Circuit recently noted, the contrast is “perplexing” and leaves courts unsure whether to apply “the more lenient or the more demanding standard.”<sup>50</sup>

Some of the confusion surrounding application of *Iqbal* is surely generated by inconsistencies within the opinion itself. For instance, on the issue of “conclusory” allegations, the Court focused attention on what was common knowledge prior to both *Twombly* and *Iqbal*: allegations that are mere “legal conclusions” or that are “[t]hreadbare recitals of the elements of a cause of action” will not suffice at the pleading stage.<sup>51</sup> Yet in applying this definition, the Court seemed to treat two very similar paragraphs of the *Iqbal* complaint

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41. *Id.*

42. *Id.*

43. *Id.* at 1954 (interpreting FED. R. CIV. P. 9(b) to require more than “general” allegations for state of mind even where neither fraud nor mistake is alleged). The *Iqbal* Court’s interpretation of Rule 9(b), which states that “conditions of a person’s mind may be alleged generally,” is arguably at odds with both the Rule’s text and the Advisory Committee notes to Rule 9. See FED. R. CIV. P. 9, Advisory Committee Notes to 1937 Adoption (citing ENGLISH RULES UNDER THE JUDICATURE ACT (The Annual Practice, 1937) O. 19, r. 22). The English rules cited by Rule 9 state that when a plaintiff makes allegations as to any “condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.” Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 146 n.19 (1985). Moreover, as some courts have recognized, the *Iqbal* Court’s treatment of Rule 9(b) is in some tension with its prior decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009); *Brown v. Castleton State Coll.*, 663 F. Supp. 2d 392, 403 n.8 (D. Vt. 2009); cf. *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012, at \*7 (E.D. Mich. Oct. 30, 2009) (stating that tension between *Swierkiewicz* and *Iqbal* has yet to be resolved).

44. *Iqbal*, 129 S. Ct. at 1949–50.

45. *Id.* at 1950.

46. *Id.*

47. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

48. See *Iqbal*, 129 S. Ct. at 1937; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

49. See *infra* Part III.

50. *Starr v. Baca*, 652 F.3d 1202, 1215–16 (9th Cir. 2011).

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

differently. Thus, an allegation that two defendants approved of a policy to hold detainees under certain conditions was treated as factual.<sup>52</sup> A separate allegation that the same defendants approved of a policy of treating detainees more harshly based on their protected class status was treated as conclusory.<sup>53</sup> While there are differences between these allegations, at root both alleged that the defendants approved of two different policies.<sup>54</sup>

In explaining the meaning of “plausible,” the Court has also been less than clear. Plausibility is something more than mere possibility or conceivability, the Court has told us, but something less than a preponderance test.<sup>55</sup> In addition, courts can come to a conclusion about the plausibility of a complaint by taking account of “judicial experience and common sense.”<sup>56</sup> Courts have struggled to comprehend the outer limits of plausibility and the role of their own experience when adjudicating a motion that historically has not involved determinations of fact.<sup>57</sup>

In sum, *Iqbal* and *Twombly* adopt “plausibility” pleading instead of *Conley*’s notice pleading, taking the relatively distinct roles accorded Rules 8, 12(b)(6), and 12(e), and conflating them to introduce a heightened fact pleading regime in direct conflict with the original purposes of the Federal Rules.<sup>58</sup> In so doing, the Court may have made factual screening a function of Rule 12(b)(6) and made Rule 12(e) “essentially irrelevant.”<sup>59</sup> Under notice pleading, a complaint was sufficient if the allegations, taken as true, created the possibility that the pleader will be entitled to some kind of relief. Under *Iqbal* and *Twombly*, what might have passed muster under *Conley* may no longer be sufficient. The following examples illustrate some of the differences between the standards:

Imagine that a plaintiff alleged simply that “Defendant violated my constitutional rights.” This allegation would almost surely be insufficient under both notice pleading and plausibility pleading. Under notice pleading, it does not provide enough information for the defendant to prepare an answer or defenses. Under plausibility pleading, it is a bare legal conclusion and nothing more.

Now imagine a little more detail, in which the plaintiff claims that “Defendant violated my right to equal protection under the law.” Without any other facts, this too would likely be insufficient under both notice pleading and plausibility pleading. There are many ways in which a defendant may violate the

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52. *Id.* at 1951 (reviewing paragraph 69 of complaint).

53. *Id.* (reviewing paragraph 96 of complaint).

54. Indeed, both policies also were unlawful. It just so happened that one of the unlawful policies—the one implicated by paragraph 69—was not before the Court whereas the other—the one implicated by paragraph 96—was before the Court.

55. *Iqbal*, 129 S. Ct. at 1950.

56. *Id.*

57. *See infra* Part III.

58. Burbank, *supra* note 5, at 1191–92.

59. *Id.* at 1192.



equal protection clause, and this allegation provides no factual context whatsoever. Even notoriously vague Form 11, which alleges that a plaintiff was injured by the defendant's "negligence," at least purports to identify the location and time of the injury.<sup>60</sup>

Now imagine that plaintiff alleged the following: "On \*\* Date, Defendant fired me because of my race, in violation of the Fifth Amendment." Under notice pleading, so long as the defendant is governed by the Fifth Amendment, this would likely be sufficient.<sup>61</sup> Under plausibility pleading, at least some courts have said that it would be insufficient, because there are no factual allegations to support the contention that the termination was "because of" race, and the "because of" allegation cannot be taken as true on its own.<sup>62</sup>

Finally, imagine that plaintiff alleges "On \*\* Date, Defendant fired me and replaced me with J. Doe, a less qualified white person. Defendant's termination violated the Fifth Amendment." This clearly would satisfy notice pleading, and for some courts that would find the previous allegation insufficient, this would likely satisfy plausibility pleading as well. It provides some factual detail from which one could draw a plausible inference of discrimination. Not all courts applying plausibility pleading would be satisfied with this, however.<sup>63</sup>

It is difficult to know what motivated the Court in *Twombly* and *Iqbal* to seemingly abandon the traditional means for making changes to the Federal Rules: rule-making through the process contemplated by the Rules Enabling Act. One story to tell about the transition from *Conley* to *Iqbal* and *Twombly* is that of a Court that only recently lost faith in a notice pleading standard, perhaps as a result of judgments about the practicalities of modern litigation. But it is important to acknowledge the Court's embrace of notice pleading had shown some limitations, as evidenced by the Court's flirtation with heightened pleading well before *Iqbal* and *Twombly*.<sup>64</sup> Given the Court's own seeming ambivalence about *Conley*—at least in particular categories of cases like antitrust and civil rights—one can better understand lower courts' willingness to announce temporary departures from a pure notice pleading standard, even before *Twombly* and *Iqbal*.<sup>65</sup>

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60. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (implicitly approving of Form 11's allegations under plausibility pleading).

61. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 514 (2002).

62. Perhaps the best example of this is *Iqbal* itself. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

63. See cases discussed *infra* Part III.A & B.

64. See Fairman, *supra* note 15, at 997 & nn.79–81 (summarizing aspects of Court's jurisprudence in which commitment to notice pleading wavered).

65. At various times, some circuit courts adopted heightened pleading standards in civil rights cases. See *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001); *Breidenbach v. Bolish*, 126 F.3d 1288, 1293–94 (10th Cir. 1997); *Veney v. Hogan*, 70 F.3d 917, 921–22 (6th Cir. 1995); *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994); *Kartseva v. Dep't of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994); *Williams v. Ala. State Univ.*, 865 F. Supp. 789, 798–99 (M.D. Ala. 1994), *rev'd on other grounds*, 102 F.3d 1179 (11th Cir. 1997). By the time that *Twombly* was announced, however, most circuit courts had recognized that their heightened pleading standards could not survive the Supreme Court's decisions in

## III

LOWER COURT INTERPRETATIONS OF *IQBAL* AND *TWOMBLY*

It is early yet to offer a definitive conclusion of *Iqbal* and *Twombly*'s effect on lower courts' treatment of motions to dismiss. Some empirical evidence suggests that district courts have granted a significantly higher percentage of motions to dismiss post-*Iqbal*, particularly in areas involving civil-rights litigation.<sup>66</sup> In addition, a review of lower court opinions suggests that, despite the Court's disclaimer that neither *Twombly* nor *Iqbal* imposes a heightened pleading standard, lower courts are in a state of confusion as to how to square that language with the Court's two holdings. It is impossible to capture the nuance of all of these decisions, so here I will try to hit on some of the broad themes that are sowing confusion in the lower courts.

## A. Lower Court Explication of "Conclusory"

The first key question prompted by *Iqbal* is how courts are to distinguish between "factual" and "conclusory" allegations.<sup>67</sup> *Iqbal* offers courts some guidance in this inquiry: an allegation that merely mirrors the elements of a cause of action is conclusory and not to be credited.<sup>68</sup> But this guidance is limited, and on its face does not necessarily mark a break from past practice.<sup>69</sup> Many lower courts, however, have taken *Iqbal* beyond the Court's stated definition. For instance, lower courts have disagreed as to whether allegations which fail to distinguish among defendants are by definition conclusory or not.<sup>70</sup>

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*Leatherman*, *Crawford-El*, and *Swierkiewicz*. See *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (noting that Fifth Circuit's heightened pleading standard for qualified immunity cases had been overruled in 1995); *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1124–26 (9th Cir. 2002) (overruling cases which applied heightened pleading standard to civil rights claims); *Goad v. Mitchell*, 297 F.3d 497, 502–03 (6th Cir. 2002) (overruling *Veney* in light of *Crawford-El*); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) (overruling *Breidenbach* in light of *Crawford-El*); *Kimberlin v. Quinlan*, 199 F.3d 496, 499 (D.C. Cir. 2000) (noting that *Crawford-El* rejected D.C. Circuit's heightened pleading standard). But see *Darymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003) (continuing to apply heightened pleading to civil rights claims). Ironically, the Eleventh Circuit has now interpreted *Iqbal* to reject a heightened pleading standard for civil rights claims. See *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010).

66. See Hatamyar, *supra* note 4.

67. The Third Circuit described the process for evaluating a complaint after *Iqbal* as follows:

First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief."

*Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (citations omitted).

68. See *supra* Part II.

69. By this, I mean that almost all lower courts, pre-*Iqbal*, would have found a complaint lacking if all it did was repeat the elements of a cause of action without any additional factual amplification.

70. Compare *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (holding allegations conclusory because they do not distinguish among different defendants), and *Warren v. Luzerne Cnty.*, No. 3:CV-09-0946, 2010 WL 521130, at \*2–3 (M.D. Pa. Feb. 9, 2010) (same), and *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 903–04 (6th Cir. 2009) (same), and *Penalbert-Rosa v. Fortunato-Burset*, 692 F. Supp. 2d 206, 210 (D.P.R. 2010) (same), and *Short v. Sanzberro*, No. 1:09-cv-00996-OWW-GSA PC, 2009 WL 5110676, at \*1 (E.D. Cal. Dec. 18, 2009) (finding failure to distinguish among defendants fatal to § 1983 claim), with *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 184–85 (D.P.R. 2010)

There has been some disagreement about whether the Form Complaints incorporated by the Federal Rules are now inadequate under *Iqbal*.<sup>71</sup>

There are also many differences of opinion among lower courts as to the conclusoriness of particular categories of allegations under *Twombly* and *Iqbal*. Sometimes the difficulty is addressing allegations that are a mix of law and fact, such as allegations as to disability,<sup>72</sup> dangerousness,<sup>73</sup> and bribery,<sup>74</sup> to take only a few examples. Relatedly, some courts treat allegations as to whether a private individual is acting under color of law as factual,<sup>75</sup> and others treat it as conclusory.<sup>76</sup> There is similar variation as to allegations regarding corporate

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(finding sufficient allegations that did not distinguish among different defendants, at least for certain claims), and *Narodetsky v. Cardone Indus., Inc.*, No. 09-4734, 2010 WL 678288, at \*2 (E.D. Pa. Feb. 24, 2010) (same), and *Consumer Protection Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, at \*2–3 (D. Ariz. July 16, 2009) (finding references to defendants generally sufficient).

71. *Compare* *Mark IV Indus. Corp. v. Transcore, L.P.*, No. 09–418 GMS, 2009 WL 4403187, at \*2–4 (D. Del. Dec. 2, 2009) (denying, in patent action, the motion to dismiss because the complaint’s allegations conform with Form 18 of the FRCP), *with* *Anthony v. Harmon*, No. CIV. 2:09-2272 WBS KJM, 2009 WL 4282027, at \*1–2 (E.D. Cal. Nov. 25, 2009) (stating that Form complaints “have been cast into doubt”), and *Doe v. Butte Valley Unified Sch. Dist.*, No. CIV. 09-245 WBS CMK, 2009 WL 2424608, at \*8 (E.D. Cal. Aug. 6, 2009) (calling into question whether, after *Iqbal*, the FRCP Form Complaints are still sufficient); *cf.* *The Cincinnati Ins. Co. v. Tienda La Mexicana, Inc.*, No. 5:09-CV-00021, 2009 WL 4363450, at \*2, \*5 (W.D. Va. Dec. 1, 2009) (finding allegation that insured “negligently” caused fire sufficient to state a claim for breach of insurance contract).

72. *See* *Lawson v. Ellison Surface Techs., Inc.*, No. 10-11-DLB, 2010 WL 935361, at \*1–2 (E.D. Ky. March 10, 2010) (finding allegation that plaintiff is disabled, without alleging facts that show he satisfies this condition, is conclusory). *But see* *Doe v. Astrue*, No. C 09-00980 MHP, 2009 WL 2566720, at \*13 (N.D. Cal. Aug. 18, 2009) (finding allegation that plaintiff was “otherwise qualified” for benefits was not conclusory).

73. *See* *Stevens v. Spegal*, No. 4:09CV1394MLM, 2010 WL 106603, at \*2 (E.D. Mo. Jan. 6, 2010) (finding allegations that snow blade constituted a “dangerous condition” and that it presented a “reasonably foreseeable risk of harm” were conclusory); *see also* *Altman v. HO Sports Co., Inc.*, No. 1:09-cv-1000 AWI SMS, 2009 WL 4163512, at \*4–6, \*8–9 (E.D. Cal. Nov. 23, 2009) (finding allegations that product did not meet consumer expectations, that product defects were substantial causes of plaintiff’s injuries, and that there was an inadequate warning of a “known risk of injury” were conclusory without explanation of why the product did not meet expectations, how it caused injury, and what warnings were insufficient).

74. *See* *Dauphinis v. Cunningham*, No. 3:08-cv-1449 (VLB), 2009 WL 4545293, at \*3–4 (D. Conn. Nov. 30, 2009) (finding plaintiff’s allegation that he believed defendant had bribed state officials was conclusory). *But see* *Halpin v. David*, No. 4:06cv457-RH/WCS, 2009 WL 2960936, at \*2–3 (N.D. Fla. Sept. 10, 2009) (“That a defendant took a bribe is a factual allegation that must be accepted as true.”).

75. *See* *Carpenter v. Kloptoski*, No. 1:08-CV-2233, 2010 WL 891825, at \*5 (M.D. Pa. Mar. 10, 2010) (finding extensive factual allegations sufficient to support claim of private actor acting under color of law); *Huxtable v. Geithner*, No. 09cv1846 BTM (NLS), 2009 WL 5199333, at \*1–2 (S.D. Cal. Dec. 23, 2009) (finding allegation that private lender defendants are effectively acting as government agents for federal loan program was sufficient to allege action under color of law).

76. *See* *McCain v. Episcopal Hosp.*, 350 F. App’x 602, 604–05 (3d Cir. 2009) (holding allegation that private hospitals acted under color of state law was conclusory); *Francis v. Giacomelli*, 588 F.3d 186, 194–95 (4th Cir. 2009) (holding that a Fourth Amendment claim was implausible because it “did not allege that the defendants were engaged in a law-enforcement effort;” instead, the facts showed that the defendants’ actions were those of a government employer retrieving its property from terminated employees and escorting them off the premises); *Claudio v. Sawyer*, 675 F. Supp. 2d 403, 407–10 (S.D.N.Y. 2009) (holding allegation that off-duty officer was acting under color of law was conclusory in the absence of factual showing that officer was acting in capacity as police officer).

status.<sup>77</sup> Even allegations relating to the status of plaintiffs, tinged with both legal and factual elements, have been subjected to varying treatment by lower courts.<sup>78</sup>

For the purposes of many civil rights claims, allegations of a defendant's state of mind are perhaps most significant, and unsurprisingly these kinds of allegations have been heavily litigated post-*Iqbal*. Part of the source of the confusion is that, after *Iqbal*, it is unclear whether *Swierkiewicz*<sup>79</sup> is still good law in employment discrimination cases.<sup>80</sup> The Supreme Court itself has contributed to the confusion: in *Iqbal*, the Court made no mention of *Swierkiewicz* despite the parties' focus on the case.<sup>81</sup> In a recent decision, however, the Court treated *Swierkiewicz* as a relevant precedent for pleading purposes, failing even to cite to *Iqbal* and *Twombly*.<sup>82</sup> There is thus a broad dispute over whether "general" allegations of state of mind are sufficient on

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77. See *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (holding allegation that Wal-Mart exercised control over day-to-day employment so as to constitute a joint employer was conclusory); *Robles v. Copstat Sec., Inc.*, No. 08 Civ. 9572(SAS), 2009 WL 4403188, at \*3 (S.D.N.Y. Dec. 2, 2009) (finding allegations that defendant was sole shareholder, directed the "day-to-day operations," that company "is currently a 'shell entity,' and no longer engages in business," and "maintains few, if any, assets," and that assets "have been transferred to [defendant]" were "rather general," but sufficient to support veil-piercing theory); *Cortelco Sys. of P.R. Inc. v. Phoneworks, Inc.*, No. 09-1371CCC, 2009 WL 4046794, at \*3 (D.P.R. Nov. 20, 2009) (finding allegation of alter ego status is conclusory); *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at \*6 (W.D.N.Y. Sept. 30, 2009) (in Fair Labor Standards Act (FLSA) case, finding allegation that corporate officer made decisions about hours, schedules, and benefits was sufficient to add individual as defendant). *Tracy* can be compared to *Trustees of the Road Carriers Local 707 Welfare Fund v. Goldberg*, No. 08-CV-0884 (RRM) (MDG), 2009 WL 3497493, at \*4 (E.D.N.Y. Oct. 28, 2009), in which plaintiffs' allegations that the defendant exercised authority and control with respect to employee and employer contributions were conclusory, but plaintiffs' further allegations that defendant was the president and principal shareholder of the company at issue, was the individual responsible for making payment to the fund on behalf of the company, and used such contributions as company assets were sufficiently specific to establish defendant as a fiduciary with respect to the fund.

78. See *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 28 (1st Cir. 2009) (finding allegation that relator in qui tam action was "original source" was conclusory when based on allegation that relator had "direct and independent knowledge of information on which the allegations are based, and have provided such information to the United States before filing suit, as required by 31 U.S.C. § 3730(e)(4)"); *Haskins v. VIP Wireless Consulting*, No. 09-754, 2009 WL 4639070, at \*7 (W.D. Pa. Dec. 2, 2009) (in FLSA action, finding allegation that plaintiff was not a salaried employee was not conclusory).

79. 534 U.S. 506 (2002) (holding that a complaint alleging employment discrimination need not allege specific facts establishing every element of an employment discrimination case, but instead must only provide a short and plain statement of a valid claim in accordance with *Conley*).

80. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404–05 (7th Cir. 2010) (affirming that *Swierkiewicz* is still good law); *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012 (E.D. Mich. Oct. 30, 2009) ("[R]ead together, *Swierkiewicz* and *Twombly* require employment discrimination plaintiffs to allege sufficient material facts to state a plausible claim for relief, but do not mandate doing so on every element of the *McDonnell Douglas* prima facie case."); *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at \*2 (N.D. Ill. Oct. 26, 2009) (affirming that *Swierkiewicz* is still good law).

81. Neither the majority nor dissenting opinions in *Iqbal* cite *Swierkiewicz*. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). All of the parties to the case discussed its significance, however. See Brief for Petitioners at 8, 37–38, 39, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015); Brief for Respondent *Javaid Iqbal* at 7, 9, 23, 24, 35–36, 39–42, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

82. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

their own.<sup>83</sup> Courts differ over whether allegations of discriminatory or retaliatory intent are factual or conclusory.<sup>84</sup> They differ over whether an allegation that a defendant “knew” or was “aware” of a particular fact is conclusory<sup>85</sup> or factual.<sup>86</sup>

As some of these examples suggest, there has been the hint of required fact pleading in certain areas of litigation. Some courts have suggested that

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83. *Compare* *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 186–87 (D.P.R. 2010) (general allegations of defendants’ state of mind found sufficient), *and* *Young v. Speziale*, No. 07-03129 (SDW-MCA), 2009 WL 3806296, at \*6–7 (D.N.J. Nov. 10, 2009) (stating general allegations may be sufficient in deliberate indifference context), *and* *Henderson v. Fries*, No. 1:09-CV-268-TS, 2009 WL 3246673, at \*2–3 (N.D. Ind. Oct. 5, 2009) (finding it sufficient for plaintiff to state that plaintiff had a serious medical need in jail and that jail officials denied him medical attention), *with* *First Med. Health Plan, Inc. v. CaremarkPCS Caribbean, Inc.*, 681 F. Supp. 2d 111, 119 (D.P.R. 2010) (finding general allegation of state of mind insufficient), *and* *Cuevas v. City of New York*, No. 07 civ. 4169(LAP), 2009 WL 4773033 (S.D.N.Y. Dec 7, 2009) (general allegations of *Monell* liability insufficient; complaint was “heavy on descriptive language” but “light on facts”), *and* *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 WL 2567866, at \*4–5 (W.D. Tex. Aug. 14, 2009) (finding allegation that defendants acted with deliberate indifference is conclusory).

84. For cases treating discriminatory allegations alone as conclusory, see, for example, *Holmes v. Poskanzer*, 342 F. App’x 651, 653 (2d Cir. 2009) (holding allegation that defendants were “not impartial” was conclusory and, without facts to support actual bias or conflict of interest, could not state due process claim); *Penalbert-Rosa v. Fortuno-Burset*, 692 F. Supp. 2d 206, 210 (D.P.R. 2010); *Delgado-O’Neil v. City of Minneapolis*, No. 08-4924 (MJD/JJK), 2010 WL 330322, at \*10–11 (D. Minn. Jan. 20, 2010) (finding allegation that defendant took several adverse employment actions “in retaliation” for plaintiff’s protected conduct were conclusory). For cases treating such allegations as factual, see, for example, *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at \*2–4 (7th Cir. July 30, 2010) (allegation of lending discrimination sufficient where plaintiff alleged the kind of discrimination, by whom, and when); *P.W. v. Del. Valley Sch. Dist.*, No. 3:09cv480, 2009 WL 5215397, at \*3–4 (M.D. Pa. Dec. 29, 2009) (finding allegation of disability discrimination sufficient where plaintiff alleges that he is a “handicapped person who has a mental impairment which substantially limits his life activities” and who was “denied” a “meaningful educational benefit.”); *Riley v. Vilsack*, 665 F. Supp. 2d 994 (W.D. Wis. 2009) (finding plaintiff’s allegations of age discrimination survive because they are “more than conclusions,” in that plaintiff alleges that “defendants targeted for outsourcing the job responsibilities of older workers while making comments about their preference for younger workers”).

85. *See, e.g.,* *Jones v. Hashagen*, No. 4:09-CV-887, 2010 WL 128316, at \*4 (M.D. Pa. Jan. 12, 2010) (finding plaintiff’s allegation that the superintendent’s “failure to take action to curb Inmate Mitchell’s pattern of assaults, known or should have been known to [him], [and] constituted deliberate indifference” is conclusory); *Milne v. Navigant Consulting*, No. 08 Civ. 8964 (NRB), 2009 WL 4437412, at \*9–10 (S.D.N.Y. Nov 30, 2009) (finding retaliation claim implausible where no facts supported allegation that defendant was aware that plaintiff intended to file Title VII claim); *Choate v. Merrill*, No. 08-49-B-W, 2009 WL 3487768, at \*6 (D. Me. Oct. 20, 2009) (in Eighth Amendment case, finding allegation of supervisor’s knowledge of and indifference to lack of adequate life-saving equipment and training was conclusory).

86. *See, e.g.,* *Decker v. Borough of Hughestown*, No. 3:09-cv-1463, 2009 WL 4406142, at \*4 (M.D. Pa. Nov. 25, 2009) (finding allegation that Defendants “knew or should have known of Plaintiff’s right to express himself in such a manner” was sufficient to support failure to train claim in First Amendment *Monell* case); *Gioffre v. Cnty. of Bucks*, No. 08-4232, 2009 WL 3617742, at \*5 (E.D. Pa. Nov. 2, 2009) (in § 1983 (Eighth Amendment) case, finding following allegations sufficient: plaintiff needed medical examination upon admission; exam was not provided because of policies and practices of prison; defendants had tolerated practice of denying care to preserve resources; and defendants were on notice); *Mallinckrodt Inc. v. E-Z-Em Inc.*, 671 F. Supp. 2d 563, 569–70 (D. Del. 2009) (in patent case, finding the plaintiff satisfied the pleading standard for an infringement claim by alleging that defendant “became aware” of patent “shortly after” its issuance and that defendants “actively induced” infringing acts).

discrimination plaintiffs must make some factual allegation about similarly situated individuals who were treated more favorably in order to state a claim for disparate treatment.<sup>87</sup> But a significant number of courts have rejected heightened fact pleading in the discrimination context. Courts have seemed to approach requiring detailed fact pleading in some other civil rights cases as well. For instance, where a complaint brought pursuant to 42 U.S.C. § 1983 alleged that a Mayor participated in and executed raids in which household pets were confiscated and killed in violation of plaintiff's Fourth and Fourteenth Amendment rights, the First Circuit treated that allegation as conclusory and not credited.<sup>88</sup> And in a school disciplinary case, the Second Circuit held that an allegation that defendants were "not impartial" was conclusory without more detail.<sup>89</sup> The Second Circuit has contemporaneously suggested that *Iqbal*'s requirement of factual detail was a limited one, in a case involving a claim between businesses alleging negligent false statements.<sup>90</sup> There are numerous other cases in which lower courts have treated *Iqbal* as establishing a fact-detailed pleading system, in arguable contrast to the notice pleading system which prevailed pre-*Twombly*.<sup>91</sup>

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87. See *Jenkins v. Murray*, 352 F. App'x 608, 611 (3d Cir. 2009) (same for equal protection claim); *McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009) (same for First Amendment religion claim); see also *Francis v. Giacomelli*, 588 F.3d 186, 194 (4th Cir. 2009) (holding that discrimination claim was implausible where one of plaintiffs was white and complained of exact same treatment as black plaintiffs); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 971–72 (9th Cir. 2009) (dismissing First Amendment claim where allegations did not support inference of disparate treatment of similarly situated groups); *Hughes v. Am.'s Collectibles Network, Inc.*, No. 3:09-CV-176, 2010 WL 890982, at \*4 (E.D. Tenn. March 8, 2010) (in age-discrimination claim, plaintiff's allegation that she was in "protected class" and that replacement employee was not is insufficient—plaintiff did not allege what her age is and did not allege anything to support a "pattern" of discrimination); *Lopez v. Bay Shore Union Free Sch. Dist.*, 668 F. Supp. 2d 406, 414–15 (E.D.N.Y. 2009) (finding statutory discrimination claim conclusory in the absence of any allegations of different treatment of similarly situated individuals); *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012, at \*4–5 (E.D. Mich. Oct. 30, 2009) (finding age discrimination complaint implausible because plaintiff did not provide age of replacement employee). *But see* *Kubicek v. Westchester Cnty.*, No. 08-CV-372 (KMK), 2009 WL 3720155, at \*8 (S.D.N.Y. Oct. 8, 2009) (finding employment discrimination complaint sufficient despite failure to identify person who was hired to position to which plaintiff applied, other than that person was African-American "and/or" younger than plaintiff, and despite failure to identify who made discriminatory hiring decisions).

88. *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009).

89. *Holmes v. Poskanzer*, 342 F. App'x 651, 653 (2d Cir. 2009).

90. *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 347 F. App'x 617, 622 (2d Cir. 2009) (suggesting that plaintiff would not have to pinpoint exactly when defendant knew what facts, but simply allege that defendant knew material facts before a critical date).

91. *E.g.*, *Lopez v. Beard*, 333 F. App'x 685, 687 (3d Cir. 2009) (per curiam) (affirming district court dismissal of claim based on HIV status discrimination for lack of detail); *Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at \*3 (N.D. Okla. Aug. 11, 2009) (stating that claim might have survived under *Conley* standard; plaintiff alleged that she was sole female employee in her department and that she was subjected to offensive and insulting remarks based upon her gender); *Dorsey v. Ga. Dep't of State Rd. & Tollway Auth.*, No. 1:09-CV-1182-TWT, 2009 WL 247756, at \*7 (N.D. Ga. Aug. 10, 2009) (finding allegations of "numerous" racially disparaging remarks insufficient to state hostile work environment claim without greater detail establishing that remarks were severe enough to alter the conditions of employment); *Carrea v. California*, No. EDCV 07-1148-CAS (MAN), 2009 WL 1770130, at \*9 (C.D. Cal. June 18, 2009) (finding equal protection claim dismissed because, although plaintiff alleged that no white prisoner was ever treated the same as the

Many courts also have taken *Iqbal*'s conclusory analysis beyond states of mind allegations. Some courts have held that it is not enough to allege the existence of a contract, for instance, without setting forth the details that establish the formation of a contract.<sup>92</sup> In a patent infringement action, alleging that a product “reproduces the novel distinctive design appearance” of the plaintiff's products without saying something specific about how the product infringes was considered insufficient.<sup>93</sup> Alleging that a defendant cursed at a plaintiff was found to be insufficient to establish emotional distress necessary for an intentional infliction of emotional distress claim without some allegation as to how the defendant caused emotional distress.<sup>94</sup>

There are counter-examples. In a recent case from the Seventh Circuit, the court found that an allegation of lending discrimination was sufficient where the plaintiff's complaint identified “the type of discrimination that she thinks occurs (racial), by whom [the bank, through its manager and outside appraisers], and when (in connection with her effort in early 2009 to obtain a home-equity loan).”<sup>95</sup> In a case from the Southern District of Indiana, a court found that an allegation that the defendant was “deliberately indifferent” to serious medical needs was conclusory, but the court in the same case found factual the allegations that the defendant had “knowledge of the substandard medical care provided to inmates” but “remained indifferent to the medical needs of inmates at the facility.”<sup>96</sup> In the Eastern District of Pennsylvania, a district court focused on the notice provided by the complaint and upheld a supervisory liability claim that alleged that defendants had “established, tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates” because of the costs imposed by such medical care.<sup>97</sup> The court did so even though the complaint “lack[ed] much detail,” did not “identify the precise policy or practice instituted by Defendants,” and was only “barely” more than “a blanket, general assertion of entitlement to relief.”<sup>98</sup>

Overall, then, the lower courts are still feeling out the boundaries of the term “conclusory” as it was used in *Iqbal*. One might hope that matters will become clearer as appellate courts sift through lower court decisions, but it is important to note that many of these decisions are context- and fact-specific, and therefore admit of few generalizations. The Court's abandonment of the principles that informed the Federal Rules, combined with the absence of any

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plaintiff, there were no factual allegations regarding housing, medical care, conditions of segregation or other treatment of white prisoners).

92. See, e.g., *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 602–03 (7th Cir. 2009).

93. *Colida v. Nokia, Inc.*, 347 F. App'x 568, 570 (Fed. Cir. 2009).

94. *Destro v. Hackensack Water Co.*, No. 08-04776 (SRC), 2009 WL 3681903, at \*5 (D.N.J. Nov. 2, 2009).

95. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405–06 (7th Cir. 2010).

96. *Estate of Allen ex rel. Wrightsmann v. CCA of Tenn., LLC*, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at \*2–3 (S.D. Ind. July 14, 2009)

97. *Gioffre v. Cnty. of Bucks*, No. 08-4232, 2009 WL 3617742, at \*3, \*5 (E.D. Pa. Nov. 2, 2009).

98. *Id.* at \*4.

guiding framework to replace them, threatens to leave pleading in an extended state of confusion.

## B. Lower Court Treatment of Plausibility

When a court considers the plausibility of a plaintiff's claim for relief vis-à-vis other alternative plausible explanations, a key issue is implied in the analysis: the comparative level of plausibility of the plaintiff's theory versus alternative explanatory theories. If the plaintiff's theory must be more plausible than the alternative lawful explanations, then there are substantially different consequences than if the alternative lawful explanations have to be significantly more plausible than the plaintiff's theory. The Supreme Court did not resolve this question, other than to suggest, as it did in *Twombly*, that the alternative explanation must be "obvious" in order for the plaintiff's claim to be implausible.<sup>99</sup>

Courts have taken varying approaches to plausibility analysis. Some have insisted that any alternative explanation from the defendant must be much more obvious than the plaintiff's theory of relief to render a claim "implausible."<sup>100</sup> Some have simply insisted that the defendant's explanation be more plausible than the plaintiff's.<sup>101</sup> For instance, a court has found that rather than believe that a warden transferred a prisoner because of deliberate indifference to contagious diseases, it was "more likely" that the warden relied on the advice of competent professionals and was not deliberately indifferent.<sup>102</sup> Similarly, a court hearing a retaliation claim filed by a prisoner found it "more likely" that the prisoner was transferred to segregation for his own safety and not because of retaliation for his complaints.<sup>103</sup> Finally, some courts have failed to address the quantum of plausibility at all, while suggesting that it is a high hurdle for plaintiffs to overcome.<sup>104</sup>

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99. 550 U.S. 544, 567 (2007).

100. See *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (holding plaintiff can state a claim where "reasonable minds can differ" about whether particular conduct violates the Fair Debt Collection Practices Act (FDCPA)); *Destro v. Hackensack Water Co.*, No. 08-04776 (SRC), 2009 WL 3681903, at \*3 (D.N.J. Nov. 2, 2009) (finding plaintiff's claim plausible where there "could" be a violation of duty of fair representation); *Ark. PERS v. GT Solar Int'l, Inc.*, No. 08-cv-312-JL, 2009 WL 3255225, at \*4 (D.N.H. Oct. 7, 2009) (finding defendant's alternative explanation does not render plaintiff's complaint implausible because defendant's explanation is not "obvious"); *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (stating defendant's explanation has to be "so overwhelming, that the claims no longer appear plausible").

101. See *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908-10 (6th Cir. 2009) (finding where defendants' explanation is "just as likely" as plaintiffs' explanation, plaintiffs' claim is implausible); *Blanchard v. Yates*, No. CV 1-06-1841-NVW, 2009 WL 2460761, at \*3 (E.D. Cal. July 27, 2009); *Phillips v. Bell*, 365 F. App'x 133, 141-42 (10th Cir. 2010) (finding complaint implausible because "more plausible" reasons exist for alleged conduct).

102. *Blanchard*, 2009 WL 2460761, at \*3.

103. *Lacy v. Tyson*, No. CV 1-07-0381-JMR, 2009 WL 2777026, at \*4 (E.D. Cal. Aug. 27, 2009).

104. See *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 591 F.3d 250, 262 (4th Cir. 2009) (in dissent, characterizing the majority as applying an incorrect "rule that the existence of any other plausible explanation that points away from liability bars the claim"); *Errivares v. Transp. Sec. Admin.*, No. DKC 09-1138, 2010 WL 610774, at \*2 (D. Md. Dec. 17, 2010) (finding allegation of conversion is



Along with determining the quantum of plausibility, lower courts have had to take up the Supreme Court's invitation to use their "judicial experience and common sense" to mediate the plausibility analysis. In the Southern District of New York, for example, a court dismissed a § 1983 claim against the City of New York that had alleged that a Fourth Amendment violation was the result of an unwritten City policy, finding it more plausible to believe that the officer who carried out the search "was a rogue officer who disobeyed City policy."<sup>105</sup> In a suit against a Tennessee County under a "class of one" theory of equal protection, the Court found an "obvious alternative explanation" for the differential treatment of plaintiffs was that the defendants "made a mistake in applying the law," not that they singled out plaintiffs for pernicious reasons.<sup>106</sup> Arguably, courts could also rely on their experience and common sense to amplify a plaintiff's pleadings by taking notice of some particularly well-recognized problems.<sup>107</sup>

The case of *King v. United Way of Central Carolinas, Inc.*<sup>108</sup> provides a nice framework for understanding the significance of both conclusoriness and plausibility together. In *King*, the plaintiff, an African-American woman, alleged that she had been terminated because of her race, gender, and age. The magistrate judge recommended that her discrimination claim be dismissed because he found that her allegations of termination "because of" discrimination were conclusory, relying on *Iqbal*.<sup>109</sup> The court stated that it would not draw an inference of discrimination from her factual allegations that the committee that terminated her was composed entirely of men and that the person who replaced her was a white man.<sup>110</sup> Instead of crediting the plaintiff's allegation that she was terminated in part because of community discomfort with an African-American woman receiving high compensation, the magistrate judge found it more plausible to believe that the plaintiff was terminated because of the public reaction to the disclosure of her high compensation and

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not plausible where facts show only that defendant's employee "could have acted wrongfully"). *But see* *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Just as a plaintiff cannot proceed if his allegations are merely consistent with a defendant's liability, so a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct."); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) (claims are plausible so long as they are not unreasonable); *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854-55 (7th Cir. 2009) (clarifying that pleading need not exclude all alternative possibilities to be plausible).

105. *5 Borough Pawn, LLC v. City of New York*, 640 F. Supp. 2d 268, 300 (S.D.N.Y. 2009).

106. *Arnold v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3:09cv0163, 2009 WL 2430822, at \*5 (M.D. Tenn. Aug. 6, 2009); *see also* *Chassen v. Fid. Nat'l Fin., Inc.*, No. 3:09cv0163, 2009 WL 4508581 (D.N.J. Aug. 6, 2009) (finding allegation that defendants were part of RICO enterprise was conclusory, in part based on the court's "common experience").

107. *See, e.g.,* *Chao v. Ballista*, 630 F. Supp. 2d 170, 178 (D. Mass. 2009) (taking notice of public attention devoted to abuse in prisons to support conclusion that the facts alleged in the complaint raised plausible inference of deliberate indifference to risk of sexual abuse in prison).

108. No. 3:09CV164-MR-DSC, 2009 WL 2432706 (W.D.N.C. Aug. 6, 2009), *report and recommendation adopted in part, rejected in part* by *King v. United Way of Cent. Carolinas, Inc.*, No. 3:09cv164, 2010 WL 1958128 (W.D.N.C. May, 14, 2010).

109. *Id.* at \*9.

110. *Id.*

that the person who replaced her replaced her not because of race but because he “is a respected local figure.”<sup>111</sup> In other words, the magistrate judge accepted the plaintiff’s allegation that she was terminated because the community was uncomfortable with her high salary, but did not believe that the discomfort was related to her being a black woman.

The report and recommendation of dismissal was ultimately rejected by the district court, however, because the district court found that the plaintiff’s allegations were sufficient to state a claim of discrimination under the *Swierkiewicz* test.<sup>112</sup> In so doing the district court focused solely on the plaintiff’s allegations that she was a member of a protected class, that she was qualified and performed well, and that she was terminated and replaced by a white man.<sup>113</sup> The district court appeared not to consider any alternative explanations offered for the adverse employment action, at least to the extent that they were found outside of the four corners of the complaint. While the magistrate judge’s conclusion that the plaintiff’s claims were implausible seemed to rest on assessment of the strength of the evidence supporting the claim of discrimination, the district court judge appeared to be loathe to look beyond the plaintiff’s complaint to assess plausibility. Both the district judge and the magistrate applied *Iqbal* to the pleadings, but they differed in their understanding of both conclusoriness and plausibility.

### C. The Evidentiary Nature of Pleading After *Iqbal* and *Twombly*

Although it is impossible to entirely rationalize lower court application of *Iqbal* and *Twombly*, it is clear that many courts have adopted something akin to an evidence-based standard for pleading in the wake of the two decisions, modified in some cases by differing presumptions about information availability.<sup>114</sup> Thus, for some courts considering whether an allegation is conclusory or factual, the extent to which the allegation resembles an evidentiary submission appears to play a role. For example, some courts ask whether the allegation states the who, the what, the where, the when, etc.—an inquiry more suited to heightened pleading under Rule 9(b). And similarly, when considering whether a particular claim for relief is plausible, some lower courts appear to be asking themselves whether or not they find the claim believable, especially as compared to other possible scenarios.<sup>115</sup> At the same time, some courts depart from an evidentiary approach by forgiving thin pleadings when the plaintiff is at an asymmetrical informational disadvantage

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111. *Id.*

112. *King v. United Way of Cent. Carolinas, Inc.*, No. 3:09cv164, 2010 WL 1958128, at \*5 (W.D.N.C. May 14, 2010) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002)).

113. *Id.*

114. In the wake of *Iqbal* and *Twombly*, Adam Steinman has criticized an “evidentiary approach” to pleading in which courts require a complaint to contain evidentiary support for each allegation. Steinman, *supra* note 7, at 1328–33. He distinguishes such an approach from courts that require detailed allegations about specific issues. *Id.* at 1343–44, although he finds both objectionable.

115. *See supra* notes 100–104.

compared to the defendant.<sup>116</sup>

Consider an example of two cases from the Third Circuit that seem to be in conflict: two claims of employment discrimination in which the appellate court came to opposite conclusions regarding the sufficiency of the allegations.<sup>117</sup> To some extent, however, these different outcomes can be explained as a function of informational asymmetry. In the case in which the Third Circuit was lenient toward thin pleadings, the key allegation related to the defendant's state of mind.<sup>118</sup> In the case where the plaintiff was given less leeway, the key allegations related to what kind of conduct the plaintiff alleged was harassing or retaliatory, what kinds of promotional opportunities were denied to the plaintiff, what kind of adverse employment actions she suffered, and what "specific" actions of racial animus were taken against her.<sup>119</sup> Allegations as to these facts are clearly more within the realm of information possessed by the plaintiff as compared with allegations of the defendant's state of mind. Thus, one can see how the evidentiary framework suggested by *Iqbal* and *Twombly* might function differently in these two cases, based on the presumed availability of particular kinds of information at the pleading stage.

The Third Circuit also has appeared to accept conclusory allegations of state of mind in other arenas. In the context of tortious interference with contractual relations, the Third Circuit has accepted as factual an allegation that a defendant "engaged in a course of action and communications to the Commissioner of the Virgin Islands Department of Planning and Natural Resources" that "was designed and calculated to delay and interfere with" a particular construction project.<sup>120</sup> And to the extent that plaintiffs make allegations based on specific interactions with defendants, the Third Circuit seems more willing to find such allegations factual and sufficient to state claims that rely on a defendant's state of mind.<sup>121</sup> In other words, where a court thinks

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116. *E.g.*, *Morgan v. Hubert*, 335 F. App'x 466, 473 (5th Cir. 2009) (per curiam) (ordering discovery where "key facts are unknown" and solely within defendant's possession); *Connolly v. Smugglers' Notch Mgmt. Co.*, No. 2:09-CV-131, 2009 WL 3734123, at \*2-3 (D. Vt. Nov. 5, 2009) (finding it was not necessary for FLSA plaintiff to allege specific time periods when she worked overtime, given informational asymmetry); *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1155 (E.D. Cal. 2009) (not requiring that plaintiff make separate allegations as to each defendant where plaintiff was not in room where defendants executed search).

117. *Compare* *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211-12 (3d Cir. 2009), *with* *Holmes v. Gates*, 342 F. App'x 651, 653 (3d Cir. 2010).

118. *Fowler*, 578 F.3d at 212.

119. *Holmes*, 342 F. App'x at 653.

120. *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 834 (3d Cir. 2011). *But see* *Culinary Serv. of Del. Valley, Inc. v. Borough of Yardley*, 385 F. App'x 135, 143 (3d Cir. 2010) (holding dismissal of tortious interference claim is proper where plaintiffs "make bare assertions that [defendant] acted willfully to bring about the termination of the Agreement").

121. *Matthews v. Vilella*, 381 F. App'x 137, 139 (3d Cir. 2010) (finding allegation of malicious use of force sufficient where plaintiff alleged use of force while plaintiff was handcuffed and not offering any resistance); *Flood v. Schaefer*, 367 F. App'x 315, 319 (3d Cir. 2010) (finding allegation of excessive force during arrest plausible where plaintiff alleged that officers were aware of his severe back injury and handcuffed him in a manner that would cause excessive pain); *Merritt v. Fogel*, 349 F. App'x 742, 746-47 (3d Cir. 2009) (per curiam) (holding allegations based on specific interactions with medical staff

that it is more plausible that a plaintiff has knowledge of an allegation, it is more likely to consider that allegation factual.

Many other appellate courts have drawn similar lines, being less likely to find allegations factual and claims plausible when the plaintiff has omitted facts from her complaint to which one would expect her to have access. In one takings case, for instance, the Fourth Circuit applied a relatively lenient pleading standard, finding a plausible claim for relief based on allegedly “inequitable and illegitimate” governmental conduct.<sup>122</sup> In a procedural due process case, on the other hand, the same circuit held that an allegation that a student “was not afforded notice or a hearing prior to his removal from the [academic] program” was conclusory because it stated an element of the cause of action.<sup>123</sup>

The Fifth Circuit also has been more willing to credit allegations that appear to stem from the direct knowledge of the plaintiff.<sup>124</sup> Thus, a plaintiff’s allegation that he was subjected to an “arrest” and “interrogation” was conclusory, but his allegations regarding exactly what was said to him by various police officers were factual.<sup>125</sup> The Fifth Circuit, like many other circuits, also has held that limited discovery may be appropriate where the plaintiff suffers from informational asymmetry with respect to essential elements of his claim.<sup>126</sup>

One can see similar lines drawn in the Sixth,<sup>127</sup> Tenth,<sup>128</sup> and Eleventh<sup>129</sup>

sufficient to establish claim for deliberate indifference).

122. *Acorn Land, LLC v. Baltimore Cnty.*, 402 F. App’x 809, 817 (4th Cir. 2010).

123. *Brown v. Rectors & Visitors of Univ. of Va.*, 361 F. App’x 531, 534 (4th Cir. 2010).

124. *Giardina v. Lawrence*, 354 F. App’x 914, 915 (5th Cir. 2009) (finding allegations sufficient to allege excessive force claim where plaintiff alleged that he was shot by a National Guardsman and arrested for aggravated assault upon a peace officer with a firearm, even though no firearm found on him); *Gonzalez v. Corr. Corp. of Am.*, 344 F. App’x 984, 986 (5th Cir. 2009) (finding that district court erred by disregarding plaintiff’s allegations about the frequency of meals in prison).

125. *Rhodes v. Prince*, 360 F. App’x 555, 559–60 (5th Cir. 2010). *Rhodes* is a strange decision in at least one way: it holds that the factual allegations made by the plaintiff did not support a finding that he was arrested, in part because he did not allege that he subjectively felt that he was not free to leave. *Id.* But the Fourth Amendment is indifferent to the subjective perceptions of a plaintiff—what is relevant is whether a reasonable person would have felt free to leave under the circumstances.

126. *See Morgan v. Hubert*, 335 F. App’x 466, 470–71 (5th Cir. 2009) (per curiam). In a case stemming from alleged misconduct by police officers in the aftermath of Hurricane Katrina, the court recognized that there “may be no supportive evidence” for the plaintiff’s claim, but his allegations regarding the defendant’s state of mind “is the type of conflict that warrants discovery.” *Floyd v. City of Kenner*, 351 F. App’x 890, 895 (5th Cir. 2009). At the same time, the court found conclusory an allegation that a defendant “participated in, approved and directed” particular misconduct. *Id.* at 898. This allegation lacked any detail and therefore could not support the plaintiff’s allegations.

127. *See Wright v. Leis*, 335 F. App’x 552, 555 (6th Cir. 2009); *see also Williams v. Curtin*, 631 F.3d 380, 384 (6th Cir. 2011) (finding excessive force sufficiently pleaded where plaintiff essentially alleged that he posed no security threat at the time force was used against him, thus creating an inference that the use of force was unnecessary and motivated by malice); *Garrett v. Belmont Cnty. Sheriff’s Dep’t*, 374 F. App’x 612, 616–17 (6th Cir. 2010) (finding allegations sufficient to state Eighth Amendment claim where “Plaintiff has further alleged that Defendants ‘ignored and mocked’ the threats of suicide Plaintiff received from his wife, from which it seems plausible that Plaintiff could prove the subjective prong of deliberate indifference”).

128. *Compare Gee v. Pacheco*, 627 F.3d 1178, 1185–86 (10th Cir. 2010) (suggesting that prisoners do not suffer from informational asymmetry because of grievance system), *with Arocho v. Nafziger*, 367 F.

Circuits as well. In the First<sup>130</sup> and Second<sup>131</sup> Circuits, courts have been more ambivalent about abandoning notice pleading even when the plaintiff can be said to be at no informational disadvantage. Cases within these circuits have, however, expressed significant concern about heightening pleading when there is profound informational asymmetry.<sup>132</sup>

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App'x 942, 953–55 (10th Cir. 2010) (expressing concern that defendants can take advantage of informational asymmetry; allegation that clinic director was deliberately indifferent to plaintiff's Hepatitis C was “thin,” but sufficient, in part because the relative responsibility of the clinic director depended in large part on the responsibility of the Bureau of Prisons director).

129. See *Jemison v. Mitchell*, 380 F. App'x 904, 906–07 (11th Cir. 2010) (in a prisoner claim alleging retaliation, finding claim sufficient where plaintiff alleged that officer filed false disciplinary report seven days after prisoner filed lawsuit); *Keating v. City of Miami*, 598 F.3d 753, 763–64, 766–67 (11th Cir. 2010) (in a First and Fourth Amendment claim brought against supervisory officials in the Miami Police Department, the court found the claim to be sufficiently pleaded where there were ample allegations of the defendants' personal involvement in abusive police tactics); *Edwards v. Fulton Cnty.*, 363 F. App'x 717, 718 (11th Cir. 2010) (in an equal protection case, the court found a complaint sufficient where it alleged that a defendant “personally made the decision to continue discriminatory pay practices after these practices were repeatedly brought to his attention”; the court took this allegation as true, because the complaint alleged that the defendant disregarded memoranda notifying him of pay discrepancies and instead continued the discrimination).

130. On one hand the First Circuit has rejected a district court opinion that had asked for the pleading of specific facts as to causation. *Sepulveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 29–30 (1st Cir. 2010) (Souter, J., sitting by designation). In so doing the court explicitly rejected an evidentiary standard for plausibility and conclusoriness. *Id.* at 30 (“A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss.”). The same circuit, however, found particular allegations insufficient because they lacked factual detail that could rebut the alternatives offered by the defendants. *United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 46–47 (1st Cir. 2011); see also *In re Karagianis*, No. 08–13704–JMD, 2009 WL 4738188, at \*3 (Bankr. D.N.H. Dec. 4, 2009) (“[W]hile Iqbal does not require a plaintiff's complaint to weave an eloquent narrative fit for a novel, the new standard at least requires some intelligible, factually-developed context to support the legal elements of the cause of action.”); *Cortelco Sys. of P.R., Inc. v. Phoneworks, Inc.*, No. 09-1371CCC, 2009 WL 4046794, at \*3 (D.P.R. Nov. 20, 2009) (in antitrust action, finding allegations that plaintiff “has been injured in business and property by the defendants' conspiracy” to be conclusory, and other allegations regarding defendant's criminal history, alter ego status, and defendant's intent to create a monopoly are “nothing more than conjecture, irrelevant statements or unsupported conclusions of law”).

131. See *Shomo v. State of N.Y.*, 374 F. App'x 180, 183 (2d Cir. 2010) (“Finally, Appellant's complaint arguably gave the State ‘fair notice’ of his Eighth Amendment, ADA and Rehabilitation Act claims, allowing it to engage in motion practice or prepare for trial by reviewing Appellant's medical history, medical needs, and the care provided to him.”); see also *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 323–25 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 901 (2011) (distinguishing *Twombly* and finding allegation of agreement in antitrust action sufficient because of numerous subsidiary factual allegations; also making clear that at the pleading stage plaintiffs do not have to allege facts that exclude defendants' independent self-interest as an explanation for parallel behavior; also making clear that plaintiffs do not have to “identify the specific time, place, or person related to each conspiracy allegation”); *Panther Partners Inc. v. Ikanos Commc'n, Inc.*, 347 F. App'x 617, 619–20 (2d Cir. 2009) (although finding that complaint was properly dismissed, rejecting the district court's suggestion that plaintiff would have to allege specific facts of exactly what defendant knew and when; stating it would instead suffice to allege general knowledge of a problem before a critical date).

132. See, e.g., *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119–20 (2d Cir. 2010) (where there is informational asymmetry that favors the defendant, the plaintiff is permitted to allege facts based on information and belief); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692–93 (2d Cir. 2009), *cert. denied*, *Ferring B.V. v. Meijer, Inc.*, 130 S. Ct. 3505 (2010) (expressing resistance to dismissing claim at pleading stage where issue revolved around scienter; even if pleadings on their face could not establish liability for factfinder, “the plaintiffs' pleadings could plausibly lead to additional

In sum, *Iqbal* and *Twombly* have created a raft of confusion among lower courts. Courts are not sure how to decide what is a conclusory allegation or how likely a claim for relief must be in order to qualify as plausible.<sup>133</sup> To some extent, however, courts have agreed that the presence of informational asymmetry should mitigate the harshness of the rules from *Iqbal* and *Twombly*, but few courts have tried to explain why that should be so.

#### IV

#### SOURCES OF CONFUSION

The lower courts' treatment of *Iqbal* is hardly a model of consistency. In some ways, this is a reflection of the opinion itself, which never articulates precisely what is meant by "conclusory" and to a lesser extent, "plausibility." Indeed, the decision's treatment of some of the plaintiff's allegations as factual and others as conclusory is particularly difficult to resolve.<sup>134</sup> In addition, to the extent that *Iqbal* announces a new pleading standard, it is to be expected that there will be difficulty adjusting, given the well-established *Conley* standard that governed pleading in the federal courts for several decades.

Nonetheless, another distinct reason that interpreting *Iqbal* has posed significant difficulty is because the Court has, without clear acknowledgment, abandoned the historical understanding of the words "conclusory" and "plausible." Thus, it is not simply that the Court has ushered in a new pleading regime, but that the Court has done so without coming up with a new way of describing what purpose pleading is serving.

Let us start with the word "conclusory." If one looks at the use of the word in Supreme Court opinions prior to *Iqbal* and *Twombly*, one must draw two critical conclusions. First, prior to *Twombly* the Court generally reserved use of the term for those cases in which something other than the sufficiency of a pleading was at issue: summary judgment, standing, discovery, and criminal procedure. Second, and relatedly, when the Court had previously used the term, it distinguished between factual statements and conclusory assertions not at the

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findings that would satisfy" the standard for liability at trial); *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 187 (D.P.R. 2010) (noting and accounting for presence of informational asymmetry); *cf. Corona Realty Holding, LLC v. Town of N. Hempstead*, 382 F. App'x 70, 71–72 (2d Cir. 2010) (finding conclusory, in takings action, allegation that landmark designation caused the "value of the plaintiffs' property to be diminished, loss of income, the plaintiff to incur substantial legal fees; and to be otherwise damaged; and was all done to benefit the homeowners and the Town of North Hempstead and not for any legitimate reason").

133. The cost of this confusion may depend on the ability of pleaders to use the liberal amendment policies of the Federal Rules, *see* FED. R. CIV. P. 15, to cure pleading defects. There is some indication, for instance, that after *Iqbal*, judges are more likely to grant motions to dismiss without prejudice, thus preserving a litigant's ability to pursue amendment. *See* CECIL ET AL., *supra* note 4, at 13. But it remains to be seen whether litigants will actually be able to take advantage of the amendment process, particularly where they are asked to plead facts that can only be gleaned from information that cannot be obtained without discovery.

134. In particular, *Iqbal* treats paragraph 69 of the complaint as factual and paragraph 96 as conclusory, but it is difficult to discern the structural difference between the two paragraphs.

pleading stage, but at later procedural stages in which evidence was to be presented. Because pleading had not, since the advent of the Federal Rules, involved an assessment of the quality of a party's evidence, the word "conclusory" had meant little at the pleading stage. The most that can be said of the term at the pleading stage was that it was primarily used to describe entirely *legal* assertions. At the pleading stage, consistent with the intent of the drafters of the Federal Rules, the Court had declined to parse whether a factual allegation was "conclusory" or not. This can be shown by reviewing opinions from a number of different areas of the law.

In summary judgment opinions, for example, the Court has consistently maintained that "conclusory" statements in affidavits were to be disregarded.<sup>135</sup> For instance, in *Doe v. Chao*, in a dispute regarding whether claims under the Privacy Act required proof of actual damages, the Court referred to one of the claimant's "conclusory allegations" regarding the damages he suffered as the result of disclosure of his Social Security number.<sup>136</sup> At the summary judgment stage, the Court found that these statements were insufficient to establish an entitlement to actual damages.<sup>137</sup>

This point is amplified when one examines some of the Court's seminal standing cases, in which it took up the adequacy of certain plaintiffs' proof of actual injury at the summary judgment stage. In *Lujan v. National Wildlife Federation*, for example, the Court had to determine whether affidavits submitted at the summary judgment stage raised a genuine issue of fact as to whether members of the National Wildlife Foundation actually were aggrieved by particular agency action.<sup>138</sup> The Court did so by examining in detail the particular facts alleged in each of two affidavits.<sup>139</sup> The appellate court had interpreted the affidavits as presenting ambiguous evidence as to the injury suffered by the members, and had found that at summary judgment it could not read that ambiguity against them as the non-moving party.<sup>140</sup> The Supreme Court disagreed, noting that the appellate court had improperly permitted "general averments" in the affidavit to suffice for the specific facts necessary to resist summary judgment.<sup>141</sup> Significantly, the Court emphasized that, while

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135. *Doe v. Chao*, 540 U.S. 614, 617–18 (2004) (on summary judgment, referring to evidence of emotional distress as "conclusory" because based only on plaintiff's allegations that he was "torn . . . all to pieces" and "greatly concerned and worried"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000) (on summary judgment, distinguishing between affidavits and testimony of members of Friends of the Earth, and those in *Lujan* which were "conclusory"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885–89 (1990).

136. 540 U.S. at 617–18.

137. *Id.* at 621–22. The lower court opinion makes clear that the claimant in question had submitted an affidavit to support his claim of actual damages in the complaint. *Doe v. Chao*, 306 F.3d 170, 181–82 (4th Cir. 2002). Thus, both the lower court and the Supreme Court viewed the problem in terms of evidentiary sufficiency. *Id.*

138. 497 U.S. 871, 885–89 (1990).

139. *Id.* at 887–88.

140. *Id.* at 888.

141. *Id.*

general allegations might suffice at the complaint stage, the purpose of Rule 56 “is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”<sup>142</sup>

The *Lujan* Court’s implicit suggestion that conclusory allegations—which it seemed to equate with “general allegations”<sup>143</sup>—are permissible at the complaint stage is only reinforced by the Court’s distinguishing its earlier decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.<sup>144</sup> The *SCRAP* case, also involving standing, was decided at the motion to dismiss stage, the *Lujan* Court pointed out.<sup>145</sup> In *SCRAP*, the defendants challenged standing, arguing that the plaintiffs’ allegations of injury were “vague, unsubstantiated, and insufficient.”<sup>146</sup> The Court disagreed, emphasizing the motion to dismiss standard and noting that “[w]e cannot say on these pleadings that the appellees could not prove their allegations.”<sup>147</sup> As the *Lujan* Court interpreted it, *SCRAP*’s acceptance of vague and general allegations of injury to support standing was acceptable at the Rule 12 stage because there, unlike summary judgment, “general allegations embrace those specific facts that are necessary to support the claim.”<sup>148</sup>

The *Lujan* Court’s distinction between the conclusory allegations acceptable at the motion to dismiss stage and those unacceptable at the summary judgment stage was renewed even more recently in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>149</sup> *FOE*, like *Lujan*, was decided at summary judgment, but unlike *Lujan* the Court found that injury in fact had been adequately supported.<sup>150</sup> Focusing on testimony provided in affidavits and at deposition, the Court concluded that there was sufficient evidence from which to conclude that “Laidlaw’s discharges, and the affiant members’ reasonable concerns about the effects of those discharges, directly affected those affiants’ recreational, aesthetic, and economic interests.”<sup>151</sup> The affidavits and testimony offered by the plaintiffs in *FOE*, in contrast to that presented to the Court in *Lujan*, provided more than “mere general averments and conclusory allegations.”<sup>152</sup>

The line that the Court has drawn in summary judgment cases is similar to that drawn in other contexts in which evidentiary standards, rather than pleading rules, are in play. In the discovery context, for instance, where “good cause” is sometimes required to justify particularly invasive examinations, the

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142. *Id.*

143. *Id.* at 889.

144. 412 U.S. 669 (1973).

145. 497 U.S. at 889.

146. 412 U.S. at 683–84.

147. *Id.* at 689–90.

148. 497 U.S. at 889 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

149. 528 U.S. 167, 181–84 (2000).

150. *Id.* at 183.

151. *Id.* at 183–84.

152. *Id.* at 184.



Court has drawn the same line between “conclusory” allegations being permissible at the complaint stage but not as a substitute for evidentiary sufficiency. One example is *Schlagenhauf v. Holder*, in which the negligence of a Greyhound bus driver was relevant to claims between several parties.<sup>153</sup> One of the parties being sued by Greyhound for damages caused in an accident asserted as part of its answer that the bus driver was not mentally or physically able to drive when the accident occurred, and then petitioned for an order to have the driver examined by several physicians.<sup>154</sup> Pursuant to Rule 35, such an order could only be made on a showing of “good cause.”<sup>155</sup> Significantly, the Supreme Court agreed with lower federal courts that had treated “good cause” as more than a “mere formality,” something that could not be met “by mere *conclusory* allegations of the pleadings,” but instead required an affirmative evidentiary showing.<sup>156</sup> While the Court declined to require a showing on the merits of the movant’s case, it did require “sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.”<sup>157</sup>

One can even look outside the context of civil procedure or standing to observe that, at least prior to *Iqbal* and *Twombly*, the Court has historically treated “conclusory” as a derogative only in those instances where some evidentiary showing was at stake. Thus, in the context of criminal procedure, the Court has held that the “conclusory allegations” of both police officers and informants are insufficient to establish the probable cause necessary to support issuance of an arrest or search warrant.<sup>158</sup> And in the habeas corpus context, the Court made clear that the presence of “conclusory[] or palpably incredible” allegations in a habeas petition does not relieve a court of the power to investigate them, but it does permit district courts to decline to require the presence of a habeas petitioner at an evidentiary hearing.<sup>159</sup> In contrast, allegations that are “improbable” but not “incredible” and that if true would justify relief are sufficient to justify an evidentiary habeas hearing.<sup>160</sup> Relatedly, in the immigration context, the Court has found that conclusory allegations are insufficient to meet a particular statute’s requirements of an evidentiary showing of extreme hardship.<sup>161</sup>

The significance of the “conclusory” label for evidentiary showings is

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153. 379 U.S. 104, 107 (1964).

154. *Id.*

155. FED. R. CIV. P. 35(a)(2)(A).

156. 379 U.S. at 118 (emphasis added).

157. *Id.* at 119.

158. *Illinois v. Gates*, 462 U.S. 213, 276–77 (1983).

159. *Machibroda v. United States*, 368 U.S. 487, 495–96 (1962).

160. *Id.* at 496; *see also* *United States v. MacCollom* 426 U.S. 317, 326–27 (1976) (plurality opinion) (in habeas context, finding that in forma pauperis petitioner was not entitled to transcript because his allegations of ineffective assistance of counsel were “conclusory” and “naked” of any factual allegations—petitioner only said he had been denied effective assistance of counsel without any additional elaboration).

161. *Immigration & Naturalization Serv. v. Jong Ha Wang*, 450 U.S. 139, 141–43 (1981).

confirmed by the Court's procedural due process jurisprudence as well. In some of the seminal pre-judgment attachment and seizure cases—*North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>162</sup> and *Mitchell v. W. T. Grant Co.*,<sup>163</sup> for instance—a critical issue was the sufficiency of the affidavit that had to be filed by the creditor seeking attachment or seizure of particular property. In both of these cases, the Court rested its holding as to the sufficiency of pre-judgment procedures on whether they permitted the seizures to be based on “conclusory” affidavits.<sup>164</sup> Thus, although conclusory allegations were sufficient at the complaint stage, more than conclusory assertions have historically only been necessary when a court is being asked to take action implying some evidentiary showing or finding.

That “conclusory” factual assertions were considered sufficient at the pleading stage, at least prior to *Twombly* and *Iqbal*, is further evidenced by pleading cases themselves. To the extent that the Court discussed the word “conclusory” in the context of pleadings, it was always with the understanding that conclusory allegations would suffice at the pleading stage. Thus, in *Swierkiewicz v. Sorema N. A.*, the defendant had argued that finding plaintiff's complaint sufficient would “allow[] lawsuits based on conclusory allegations of discrimination to go forward,” imposing a burden on courts and employers.<sup>165</sup> The Court's response was telling: it did not deny that its ruling permitted complaints with conclusory allegations to survive dismissal, but instead noted that Rule 8(a) can only be changed by amending federal rules or by Congress.<sup>166</sup> And in *Gladstone Realtors v. Village of Bellwood*, the Court found a discrimination complaint sufficiently pleaded although it was “more conclusory and abbreviated than good pleading would suggest.”<sup>167</sup>

Finally, the premise that conclusory factual allegations were sufficient at the pleading stage can also be seen in many of the separate concurring and dissenting opinions filed in particular cases. For instance, the occasional Justice criticized the majority when it resolved constitutional questions on the pleadings, precisely because the only information available was based on “conclusory” allegations and not the factual evidence that would be developed through a hearing.<sup>168</sup> Indeed, the Court even had an understanding that it would

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162. 419 U.S. 601 (1975).

163. 416 U.S. 600 (1974).

164. *Di-Chem*, 419 U.S. at 606–07 (noting that pre-judgment seizure procedures were insufficient where statute only required “conclusory” allegations not based on any personal knowledge of the facts); *Mitchell*, 416 U.S. at 605–06 (1974) (upholding pre-judgment attachment where affidavit is more than merely conclusory).

165. 534 U.S. 506, 514–15 (2002).

166. *Id.*

167. 441 U.S. 91, 124–26 (1979).

168. *Papasan v. Allain*, 478 U.S. 265, 299 (1986) (Powell, J., concurring and dissenting in part) (criticizing Court for accepting “conclusory” allegations that unequal spending on school districts created disparity); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 319 (1963) (Stewart, J., dissenting) (recognizing that, although “conclusory allegations” are sufficient for procedural purposes at the pleading stage, there should be an evidentiary requirement to justify an order relating to the

be unfair in certain contexts to ask more of plaintiffs at the pleading stage because of the informational asymmetry that is present in so many cases challenging governmental conduct.<sup>169</sup> But allegations that were deemed so conclusory so as to be disregarded were true legal conclusions: they simply stated the elements of a cause of action and no more, with no facts whatsoever.<sup>170</sup> In this light, an allegation was factual and non-conclusory so long as it could be proven or disproven by historical facts.<sup>171</sup>

One can go through the same exercise with “plausible,” which the Court in *Twombly* and *Iqbal* says is something more than “possible” but less than “probable.” Indeed, scholars already have reviewed the differences between the meaning of the word “plausible” as it was used in summary judgment decisions and as it is used in *Twombly* and *Iqbal*.<sup>172</sup> But even outside of the summary judgment context, the Court has never used the word “plausible” as it does in *Twombly* and *Iqbal*. In fact, as a historical matter, a claim or theory was “plausible” precisely when it was “conceivable” or “possible.” This is brought to light most forcefully by considering equal protection challenges, in which the Court has routinely treated “plausible” synonymously with “possible” or “conceivable.”<sup>173</sup> The Court has used the word in similar ways in the context of

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constitutionality of a statute); *Griffin v. Illinois*, 351 U.S. 12, 32–33 (1956) (Harlan, J., dissenting) (objecting to resolution of constitutional question, whether indigent defendants are entitled to free transcript of criminal proceedings for direct appeal, based solely on conclusory allegation of indigence).

169. *See C. I. R. v. Shapiro*, 424 U.S. 614, 624–30 (1976) (in Anti-Injunction Act proceeding involving tax collection, holding that it was sufficient for taxpayer to allege in conclusory fashion that there were not circumstances under which Government would prevail—the Court reasoned that where Government has not provided a basis for its tax assessment, the taxpayer cannot plead any specific facts because they reside with the Government).

170. *See O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) (finding “conclusory” allegations that “petitioners ‘have engaged in and continue to engage in, a pattern and practice of conduct . . . all of which has deprived and continues to deprive plaintiffs and members of their class of their’ constitutional rights and, again, that petitioners ‘have denied and continue to deny to plaintiffs and members of their class their constitutional rights’ by illegal bond-setting, sentencing, and jury-fee practices”); *Black Unity League of Ky. v. Miller*, 394 U.S. 100, 100–01 (1969) (per curiam) (terming conclusory allegations of “harassment” by the Kentucky Un-American Activities Committee; plaintiffs failed to respond to motion to dismiss and Court held that “in this procedural context the trial court could take appellants’ conclusory allegations as insubstantial and could dismiss the complaint for failure to allege sufficient irreparable injury to justify federal intervention at this early stage”); *W. E. B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 310–13 (1967) (dismissing claim for injunctive relief where Congress had provided procedures for challenging sanctions of the Subversive Activities Control Board and where complaint only contained “no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to ‘harass’ appellants and that harassment was the intended result of the Attorney General’s announcement that he had filed a petition with the SACB”); *Schilling v. Rogers*, 363 U.S. 666, 676–77 (1960) (holding allegation that administrative action was “arbitrary and capricious” was conclusory).

171. *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091–95 (1991) (in securities fraud action, recognizing that “conclusory” statements about the value of a stock—alleged to be false and misleading—are “factual” in the sense that they can be proven or disproven by historical facts).

172. Brunet, *supra* note 10, at 3–8.

173. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959).

habeas claims.<sup>174</sup>

This discussion is not meant to suggest that the Court is precluded from using words differently at different times. Nor is it meant to suggest that the Court is precluded from abandoning a prior meaning of a word in the same context, as it may be doing here. But doing so without acknowledgment creates the potential for substantial confusion, especially when the Court, as it has in *Twombly* and *Iqbal*, insists that it is creating no new law or heightened pleading.

## V

### PLEADING AS INFORMATION-FORCING

Even if the Court has departed from past pleading practice without sufficient explanation or definition, lower courts nonetheless must strive to discern some principle in the *Twombly* and *Iqbal* decisions. Some lower courts appear to have found guidance on the continuum between notice pleading and something analogous to an information-forcing rule. Notice pleading rules focus courts on the defendant's perspective: they ask whether the pleading permits a defendant to prepare a defense or a responsive pleading. Once a pleading satisfies this minimum threshold, it will be sufficient even if the plaintiff could provide more detail. Information-forcing pleading rules, in contrast, focus courts on the plaintiff's willingness and ability to provide additional detail beyond that which provides adequate notice to the defendant. For courts, information-forcing rules might serve as a proxy for the merits of a plaintiff's claim, a way of achieving fairness between the litigants, or promoting an efficient resolution of the controversy. The question is whether there exists sufficient justification for resolving pleading problems by reference to an information-forcing principle, a question that neither *Iqbal* nor *Twombly* ever addressed head-on.

Whatever our basis for believing that information-forcing is important—efficiency, fairness, or accuracy—it is important to look to other information-forcing regimes to determine whether information-forcing in the pleading context is a sensible change in doctrine. This is because, while notice pleading “forced” some information from the plaintiff, *Twombly* and *Iqbal* arguably force a whole lot more, and it is instructive to look to other contexts to determine whether the increased compulsion is justifiable. Information-forcing rules in the pleading context do not easily fit into traditional justifications. Their efficiency depends in part on the nature of the information and whether there are information asymmetries that are leveraged by the rule. There is little evidence that they will promote better decisionmaking in the judicial context.

If one is to apply information-forcing principles in the pleading context, it

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174. See *Engle v. Isaac*, 456 U.S. 107, 122–23 (1982) (equating plausible with “colorable” in a habeas case); *Hopper v. Evans*, 456 U.S. 605, 613–14 (1982) (referring to “plausible” claim that defendant would have pursued a different strategy if he had received effective assistance of counsel).

may make sense to limit its application with at least two requirements. The first requirement is that the information be exclusively in the hands of the pleader. This kind of limited information-forcing rule might at least place the incentive to provide additional information on the proper party at the proper procedural stage.<sup>175</sup> Where the informational asymmetry favors the responding party, on the other hand, there is little justification for applying an information-forcing principle to the pleader. The second requirement is that there be a good reason to impose an information-forcing rule at the pleading stage rather than at a later stage in the proceedings. For instance, imagine where there is no informational asymmetry in either direction—where both parties have equal access to information. In that circumstance it is hard to justify forcing the plaintiff to disclose the information prior to discovery, at the pleading stage. Even for information squarely in the hands of the plaintiff, one still should ask whether disclosure through pleading, as compared to disclosure through discovery, will advance interests in fairness, efficiency, or accuracy.

#### A. A Loose Taxonomy of Information-Forcing

The classic justification for information-forcing rules, stemming from Ayres and Gertner's analysis of contract law,<sup>176</sup> is that they provide an incentive for the party with the best access to private information to disclose it to a contracting party or third parties. Arguments for such rules have been extensive both within and without contract theory,<sup>177</sup> and have not been limited to privately-held information.<sup>178</sup> In the area of intellectual property some substantive rights are mediated by rules that encourage the party with the best access to information

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175. Under a notice-pleading regime, information asymmetry between the parties is generally remedied through discovery, so it still bears consideration whether to change the procedural stage at which courts attempt to create incentives to relieve informational asymmetry.

176. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–100 (1989); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1623 (1989); see also Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 501–02 (2008) (discussing information-forcing theories of contract law, prompted by *Hadley v. Baxendale* (1854) 9 Ex. 341, 156 Eng. Rep. 145).

177. See John S. Applegate, *Bridging the Data Gap: Balancing the Supply and Demand for Chemical Information*, 86 TEX. L. REV. 1365, 1400–01 (2008) (discussing information-forcing rules in the context of environmental regulation, all of which give incentive to manufacturers and other regulated entities to provide privately-held information or information difficult for regulators to acquire); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1188 (2008) (discussing potential for information-forcing rules in context of use and disposition of genetic material); Russell Korobkin, “No Compensation” or “Pro Compensation”: *Moore v. Regents and Default Rules for Human Tissue Donations*, J. HEALTH L., Winter 2007, at 1, 17 (proposing information-forcing default rule in tissue donation context).

178. Sean Williams, for instance, has urged that information-forcing rules be encouraged in employment law, giving an employer the incentive to inform employees about the nature of at-will employment, even though such information is not privately held. Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 779 (2009).

to disclose privately held information.<sup>179</sup> These information-forcing rules are meant, among other things, to decrease transaction costs for third parties.<sup>180</sup>

Arguments for information-forcing rules also have been made in the context of regulation and preemption, with some academics and the Supreme Court expressing concern about the effect that finding preemption will have on industry incentive to provide relevant information to regulatory agencies.<sup>181</sup> There are important differences between contract law and command and control regulation. Default rules that promote information-disclosure in contract law might help fill gaps, but will not make or break contract formation because parties will presumably contract around whatever the default rule is. Command and control environmental regulation is more coercive and, through information-forcing default rules, may force bargaining and negotiation that would not otherwise occur.<sup>182</sup>

In any event, these information-forcing rules are primarily about aligning incentives to disclose information with the best ability to disclose. Their goal is to reduce transaction costs by creating a legal regime in which the cheapest discloser has the strongest incentive to do so. They do so by creating a penalty default rule in which the party with the best and cheapest access to information is penalized for failing to disclose it (or at least prohibited from taking advantage of the informational asymmetry later on). These kinds of information-forcing rules may have the most purchase in the pleading context.

As one becomes further removed from the area of contract law, it becomes harder to speak of true information-forcing rules, but there are close analogs which also may bear on the pleading question. Some of these analogs are not

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179. See Kevin Emerson Collins, *The Reach of Literal Claim Scope into After-Arising Technology: On Thing Construction and the Meaning of Meaning*, 41 CONN. L. REV. 493, 506 (2008) (discussing information-forcing aspect of disclosure doctrine in patent application); Christopher A. Cotropia, *Modernizing Patent Law's Inequitable Conduct Doctrine*, 24 BERKELEY TECH. L. J. 723, 753–62 (2009) (discussing information-forcing aspects of patent law's inequitable conduct doctrine—information is forced from the party with the best access to information).

180. See Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 70–71 (2005) (discussing value of information-forcing rules in patent context—rules that create an incentive for patent seekers to discover and disclose additional information prior to obtaining approval for a patent application); R. Polk Wagner, *Reconsidering Estoppel: Patent Administration and the Failure of Festo*, 151 U. PA. L. REV. 159, 194–209 (2002) (explaining the importance of using information-forcing rules during patent examination to maintain the “integrity” of patent law’s links among “innovation, disclosure, and patent scope”).

181. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1202–03 nn.11–12 (2009) (rejecting preemption in part because of role of state tort law in forcing information from manufacturers); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 519–20 n.330 (2008) (arguing for information-forcing approach in preemption law that would encourage regulated entities to provide regular and comprehensive information regarding product safety to the FDA). For perspective on current role of information in environmental regulation, see generally David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379 (2005); Bradley C. Karkkainen, *Default Rules in Private and Public Law: Extending Default Rules Beyond Purely Economic Relationships: Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861 (2006).

182. Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 968–70 (2003).

predominantly about efficiency of information transfer, but about improving the process of decisionmaking. For example, forcing people or legal institutions to confront and identify particular kinds of information may cause them to better integrate that information into their own decisions. For these kinds of disclosure rules, the generator and discloser of the information is also the entity thought to be influenced by the information. It is information for the purpose of self-communication. Relatedly, some analogs to information-forcing rules improve decisionmaking process by communicating to the public so that the public can participate in the deliberative process of lawmaking.

Examples of these kinds of rules abound in the legislative context. For instance, scholars have sometimes treated various canons of statutory interpretation as information-forcing. Textualism, the canon of constitutional avoidance, clear statement rules, nondelegation doctrine, and the rule of lenity may all be characterized as information-forcing in nature—they force legislators to speak clearly and unambiguously to effectuate the goals of the legislation and they minimize ambiguity in legislation.<sup>183</sup> Some interpretative doctrines with information-forcing features—the clear statement rule, for instance—may be viewed as “collaborative,” inasmuch as they encourage dialogue between courts and Congress.<sup>184</sup> For clear statement rules, the argument goes, the Court informs the legislature of what areas will be subject to the rule, the legislature then decides whether to regulate in that area and what the basis of its regulatory power is, and then the court reviews the sufficiency of the legislature’s statement and reason for regulating.<sup>185</sup> Similar arguments could be made about information-forcing rules in the context of preemption.<sup>186</sup>

And, some statutes formalize deliberative information-forcing rules—the Unfunded Mandate Reform Act’s requirement that Congress give consideration to the cost that federal legislation will impose on states, for instance, or the National Environmental Protection Act’s requirement of

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183. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 564–66 (2005) (acknowledging rules as information-forcing in theory, but arguing that they are not plausible because of heterogeneity of judiciary).

184. Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 827–28 (2005). The collaborative nature of clear statement rules can be seen in the different aspects of the doctrine. First, the court identifies a zone of sensitivity, that is, an area close to the boundary of legislative power, and specifies that the legislature must signal with some degree of clarity that it is aware it is entering this zone. The court may also require that the legislature identify the theory that would sustain its exercise of power within this zone, including any particular findings necessary under that theory. Second, the legislature decides to enter the zone and attempts to signal it is doing so, together with any required specification of theory and findings. Third, the court reviews the legislative signal and, if appropriate, its explanation and findings in order to determine whether they meet the requirements of the clear statement standard.

185. *Id.* at 828.

186. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 256–58 (2007) (arguing for imposition of information-forcing rules in preemption context to encourage “mobilization and robust exchanges between federal agencies and state and public stakeholders”).

environmental impact statements for federal agency action.<sup>187</sup> These kinds of information forcing rules are, in a sense, intended to increase costs on Congress by forcing it to be explicit about the consequences and intent of proposed legislation. In so doing, they may improve the substantive content of legislative decisionmaking, separate and apart from transaction cost benefits. For instance, the Unfunded Mandates Reform Act (UMRA) has been associated with a decrease in legislation containing unfunded mandates and also has been thought to improve legislative deliberation.<sup>188</sup> The UMRA also has decreased transaction costs for regulated state and local governments by providing them with better and earlier notice of unfunded mandates.<sup>189</sup>

The final set of analogs to information-forcing rules may function to improve the quality of primary decisionmaking by the public. *Miranda* is such an information-forcing rule, with the goal of improving the decisionmaking process of criminal suspects who may otherwise unknowingly waive their Fifth Amendment right against self-incrimination. Failure to warn liability accomplishes some of the same goals with respect to consumer decisions. Certain liability rules in the insurance context also are designed to improve consumer decisionmaking.<sup>190</sup> And some proposals have been made in the context of regulation of sexual relations that are based on information-forcing theories, for the purpose of improving decisionmaking by private citizens.<sup>191</sup>

## B. Pleading as Information-Forcing

Given these different purposes for information-forcing rules (efficiency, process, and for primary decisionmaking), how does one evaluate the turn to information-forcing principles in the pleading context? It should be obvious that, at the pleading stage, it is unlikely that information-forcing rules imposed

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187. 42 U.S.C. §§ 4321–4347 (2006) (NEPA); see Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 17–19 (2009) (describing process imposed by UMRA). Krishnakumar proposes that a similar process be required for legislation that might entrench on groups traditionally protected by Carolene Products footnote 4.

188. *Id.* at 19–21.

189. *Id.* at 21.

190. Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1432 (2007) (noting that reasonable expectations doctrine in insurance regulation [insurers are required to cover liabilities within reasonable expectations of consumers] is information-forcing).

191. Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 631 (2005) (proposing the criminalization of “reckless sex” in part because of its information-forcing effect—creating an incentive for first-time sexual partners to communicate about unprotected sex reduces likelihood that there will be sex without consent); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004) (proposing information-forcing default rules in context of adultery laws to promote discussions among sexual partners of monogamy and its alternatives). Universities have attempted to accomplish similar goals through adoption of policies requiring explicit consent for sex between students. Antioch College is perhaps most famous for this, but other campuses have similar codes. Antioch College Student Handbook 14–15, available at <http://antiochcollege.org/assets/files/StudentHandbook-4.pdf> (visited Mar. 13, 2011).



on the pleader will affect primary behavior. By the time that a pleader has instituted an action, relevant primary behavior has already transpired. Imposing such rules might create incentives on those with better access to information to take steps to guard that information, but this is likely not the kind of incentive the law wants to create.

As for the process-based argument for information-forcing, some might claim that requiring more detail from the pleader will ensure that a court has better access to the information necessary to resolve litigation, and that more detail is a better signal for the merits of the pleader's case.<sup>192</sup> And while it might seem intuitive that additional detail will lead to better filtering, there is no empirical data to support the proposition. It is possible that, instead of filtering for merit, imposing a blanket information-forcing rule on plaintiffs may serve simply to distinguish between plaintiffs with access to information and plaintiffs without such access. Thus, to believe that blanket information-forcing will filter for merit requires some reason to think that access to information is a good proxy for having a meritorious case.<sup>193</sup>

An efficiency-based information-forcing principle, however, could do some work in the pleading context. In general, information-forcing rules based solely on the information-generating justification are to be preferred when alternative means of revealing the same information are more costly.<sup>194</sup> One could see how, for certain kinds of allegations—nature, time and place of injury, identity of defendants, etc.—placing the burden on the plaintiff may be consistent with an information-forcing rule focused on efficiency concerns. In the context of pleading, one might also prefer information-forcing rules where one is concerned that the pleader has withheld specific allegations for strategic reasons. A similar argument has been made in the context of legislative gaps. Scott Baker and Kimberly D. Krawiec have argued that where the legislature leaves a statute incomplete for strategic reasons that suggest attempts to avoid canons like the nondelegation doctrine, courts should be highly suspicious and willing to strike the statute down.<sup>195</sup> Baker and Krawiec distinguish strategic

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192. In other work, I have challenged this assumption by showing that it is unlikely that application of the *Twombly* and *Iqbal* pleading standards will improve the ability of courts to filter for merit at the motion to dismiss stage. Reinert, *supra* note 4. While I do not claim that this work is dispositive, Stephen Choi has come to similar conclusions after studying the Private Securities Litigation Reform Act. Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that despite Congress's intent, the PSLRA likely deterred the filing of a substantial number of meritorious cases).

193. It might be suggested that access to information could be a function of good (or some) attorney representation, which itself may be a function of merit. This is a possibility, but requires further empirical study.

194. Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and The Many Faces of Property*, 85 TEX. L. REV. 1799, 1841 (2007) ("Information-forcing rules are always transaction-cost-saving mechanisms. They are desirable inasmuch as alternative ways for revealing the information are more costly.").

195. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 666–67 (2004) (on information-forcing grounds, proposing rule of statutory construction that penalizes legislatures who strategically leave statute incomplete; as opposed to legislatures who leave statute

withholding of information from cognitive limitations—essentially incomplete information among the legislature itself—and in the latter suggest that courts should presume the good faith of the legislature and engage in traditional statutory interpretation.<sup>196</sup> But where Congress has left a gap to avoid political costs, shift responsibility for negative consequences, or obscure interest-group rent-seeking, courts should be more skeptical.<sup>197</sup>

Baker and Krawiec suggest a framework that might apply in the pleading context. For legislation, they propose courts ask the following questions: (1) has the legislature purposefully left the statute incomplete; (2) if so, is the reason for the incompleteness a reasonable desire to harness agency or court expertise or to avoid transaction costs of lawmaking; and (3) if not, is strategic incompleteness likely to provide a benefit to legislators that outweighs the costs of delegating to others law-interpreting power.<sup>198</sup> The latter test will be satisfied if there are high costs for legislation that does not work and few benefits to legislators if legislation works or if powerful interest groups take opposing sides on the issue.<sup>199</sup> In the pleading context, a court might ask whether a pleader obtains any strategic benefit by withholding from the defendant information to which it has access. To do so, it may be necessary to ask whether the strategic benefit obtained because of the procedural stage: that is, if the pleader will ultimately disclose the information in discovery, is there any strategic advantage to not disclosing it at the pleading stage?

It is important to recognize that information-forcing rules should not be proposed solely for their own sake. Pleading rules still must be tailored to the purposes of the Federal Rules—in the language of *Twombly* and *Iqbal*, they must assure that complaints plausibly state a claim for relief. Thus, it is useful, even after deciding that a particular kind of allegation, because of informational asymmetry, is amenable to an information-forcing regime, to conduct another evaluation to decide whether it makes sense to apply information-forcing at the pleading stage rather than the discovery stage. This is a second and independent requirement implicit in this article's proposal. Determining whether pleading, as opposed to discovery, is the proper stage for forcing information from a party may depend on some of the strategic considerations discussed above or other factors. For instance, in some circumstances, although information may typically be of the kind that we would expect a plaintiff to plead—that is, the responsibilities of different defendants in causing the plaintiff harm—the specific circumstances of a case may make it impossible for a plaintiff to provide such information at the pleading stage.<sup>200</sup> Moreover, we might have substantive

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incomplete for non-strategic reasons).

196. *Id.*

197. *Id.* at 672.

198. *Id.* at 684–85.

199. *Id.*

200. *See, e.g.,* *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1155 (E.D. Cal. 2009) (not requiring that plaintiff make separate allegations as to each defendant where plaintiff was not in room where defendants executed search).

commitments to certain kinds of claims—civil rights claims, for example—which should cause hesitation when imposing information-forcing rules. The point here is only that to the extent courts add information-forcing rules to the notice pleading regime that predated *Twombly* and *Iqbal*, it should be with some consciousness of the ways in which information-forcing rules function in other contexts.

Importantly, to some extent this proposal—that heightened pleading under *Twombly* and *Iqbal* be limited to circumstances in which plaintiffs are at an informational advantage and where there is a good reason to require disclosure of that information at the pleading stage—is consistent with the way in which some lower courts have resolved the conundrum posed by the Supreme Court’s changes in pleading. When a lower court excuses the presence of thin pleadings because of informational asymmetry, it is essentially doing precisely what is proposed here: taking account of when it makes sense to force information from the plaintiff at the pleading stage. Where the plaintiff cannot provide the information because it is unavailable to her, it makes little sense to apply a pleading standard beyond that mandated by notice pleading.

## VI

### CONCLUSION

There is much to quarrel with in the proposal here. For those who support the Court’s recent turn to heightened pleading, it is arguably inconsistent with *Iqbal* and *Twombly*, which both suggest blunt instrumentation in evaluating pleadings. At the same time, however, *Iqbal* speaks of the importance of context in pleading determinations, and it is sensible to take account of the context of informational equity discussed here.

For those, including this author, who believe that the turn away from notice pleading is a mistake, the proposal made here may appear to cede too much ground. But it is well to remember that the ground is shifting as we speak. Lower courts are standing on the fault lines, and absent a return to the notice pleading regime that prevailed before 2007, a principled ground for applying the teachings of *Iqbal* and *Twombly* is preferable to ad hoc applications of “judicial experience and common sense.”