

# Tulsa Law Review

---

Volume 45  
Number 2 *Supreme Court Review*

Volume 45 | Number 2

---

Winter 2009

## Confining Iqbal

Allan R. Stein

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Allan R. Stein, *Confining Iqbal*, 45 Tulsa L. Rev. 277 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol45/iss2/4>

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

## CONFINING IQBAL

Allan R. Stein\*

These are heady times for teachers of Civil Procedure. A recent *New York Times* story<sup>1</sup> alerted the world at large to the potentially dramatic shift in pleading law—perhaps the most obscure corner of the generally impenetrable Civil Procedure curriculum—brought about by the Supreme Court’s 2009 decision in *Ashcroft v. Iqbal*.<sup>2</sup> Civil Procedure professors were instantly sought out for comment by friends and students as if we were Jonathan Turley opining on O.J.’s culpability. Procedure wonks, accustomed to boring our colleagues to sleep whenever we discussed our work, found our expertise in demand in faculty lounges across the land. Not since Cliff Clavin’s invocation of *Pennoyer v. Neff*<sup>3</sup> have we been as close to a national conversation.<sup>4</sup>

I hate to spoil the party, but I am going to try to defuse some of the sense that the law has been fundamentally altered by *Iqbal*. This article will argue that although the decision may be read broadly and as a dramatic extension of prior law, it also lends itself to a much narrower construction. The substantive law controlling the defendants’ immunity in that case made the grant of defendants’ motion to dismiss for failure to state claim a particularly appropriate disposition. The case is thereby amenable to a limiting construction that may serve to constrain its impact beyond its peculiar context.

This is not to deny that there are big changes afoot in the law of pleading. Less than two years before the *Iqbal* decision, the Supreme Court in *Bell Atlantic Corporation v. Twombly*<sup>5</sup> destabilized a well-established regime of liberal notice pleading and invited courts to begin scrutinizing the pleadings for factual sufficiency. I, along with many procedure scholars,<sup>6</sup> consider that to be a very wrong-headed and dangerous approach.

---

\* Professor of Law, Rutgers Law School—Camden. I am grateful for the many wonderful suggestions of friends and colleagues, including Linda Bosniak, Perry Dane, Michael Dorf, Robin Effron, Jay Feinman, Steve Friedell, Harry Litman, David Shapiro, Rick Swedloff, Bob Williams, Tobias Wolff, and Jerry Valdostegui. Alex Gross provided research assistance.

1. Adam Liptak, *Sidebar: 9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. Times A10 (July 21, 2009).

2. 129 S.Ct. 1937 (2009).

3. 95 U.S. 714 (1877).

4. *Cheers*, “Where There’s a Will” (Natl. Broad. Co. Dec. 12, 1983) (TV series) (“I don’t want to pronounce judgment too hastily Coach, but well, yeah, I think there is a precedent in the case of *Pennoyer v. Neff* when it was found jurisprudence is the better part of diction.”); see generally *Jurisdiction is the Better Part of Diction*, <http://thelongestlistofthelongeststuffatthelongestdomainnameatlonglast.com/cliffclavin15.html> (last accessed Feb. 1, 2010).

5. 550 U.S. 544 (2007).

6. See generally Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. \_\_\_\_ (forthcoming Mar. 2010) (available at <http://ssrn.com/abstract=1448796>); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. Rev. 1217, 1225 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49

My objective here is a narrow one: *Iqbal* should not be read as the nail in the notice-pleading coffin. Prior to *Iqbal*, courts and scholars alike found *Twombly* itself somewhat quirky and inscrutable, not easily extended beyond its context.<sup>7</sup> There is no question that the most troubling aspect of *Iqbal* is that it seems to resolve the question of whether *Twombly* can be limited to a narrow class of cases.<sup>8</sup> My argument is that it does not. A holding that provides authority for a judge to scrutinize a complaint against the Attorney General of the United States and the Director of the FBI for some evidentiary basis before opening the door to discovery against them seems both eminently reasonable and of little precedential value in other cases not involving two of the highest officials in the federal government. Moreover, given qualified immunity, the equal protection claims asserted against those officials were particularly tenuous and amenable to summary disposition.

#### A BRIEF HISTORY OF PLEADING IN AMERICAN PRACTICE

To explain why many scholars think *Iqbal* is a significant decision, I need to briefly situate the decision within the evolution of pleading law. This story has been told many times by other scholars<sup>9</sup> and I have little to add to their account.

First, for those not paying attention in their first year, “pleadings” are the initial documents filed with the court that lay out the respective positions of the parties. Current practice provides for a maximum of seven pleadings,<sup>10</sup> but most litigation involves only two: a complaint and an answer. Plaintiff lays out the basis of his claim in the complaint and defendant indicates which defenses he will pursue in the answer.

The central question concerning pleading practice concerns the level of detail each party must present. For the last seventy years or so, pleading in American practice has been dominated by the standard of “notice pleading.” Under this standard, a pleading was considered adequate if it put the opposing party on sufficient notice of the nature of the claim or defense to enable that party to prepare its case. The pleading did not, under

B.C. L. Rev. 431, 433, 446–447 (2008); *but see* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 874 (2009) (arguing that *Twombly* was a modest departure from existing pleading standards, justified by high discovery costs and the low likelihood that plaintiff had asserted a meritorious claim); Charles B. Campbell, *A “Plausible” Showing after Bell Atlantic v. Twombly*, 9 Nev. L. J. 1, 21 (2008) (“By sweeping away *Conley’s* ‘no set of facts’ standard, *Bell Atlantic* opens the way for the more moderate interpretation of Rule 8(a)(2) . . . .”); Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 Or. L. Rev. \_\_\_\_ (forthcoming 2009) (available at <http://ssrn.com/abstract=1463844>) (asserting that *Twombly* and *Iqbal* increase efficiency fairness of modern civil practice); Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 Akron L. Rev. \_\_\_\_ (forthcoming 2010) (available at <http://ssrn.com/abstract=1469638>) (plausibility inquiry is not always necessary under *Twombly* and *Iqbal*, and courts have discretion to retain deficient claims pending discovery).

7. See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2006); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 Nw. U. L. Rev. Colloquy 117 (2007); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 Green Bag 2d, 423, 438 (2007).

8. See e.g. Clermont & Yeazell, *supra* n. 6, at 2 (“The headline need no longer equivocate: Pleading Left Bleeding. The U.S. Supreme Court has revolutionized the law on pleading.”); Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. \_\_\_\_ (forthcoming 2010) (available at <http://ssrn.com/abstract=1442786>) (“*Iqbal* . . . [effectively] eliminated any hope that *Twombly* might be narrowly confined to complex antitrust cases.”).

9. See e.g. Bone, *supra* n. 6, at 890–898; Campbell, *supra* n. 6, at 9–21; Steinman, *supra* n. 8, at 8–11.

10. Fed. R. Civ. P. 7(a) provides for a complaint, answer, answer to counterclaim, answer to crossclaim, third party complaint, answer to third party complaint, and, if the court so orders, a reply to the answer.

this standard, need to specify the precise nature of the claim or defense, nor did it need to identify the evidence in support of that claim or defense. The pleadings functioned largely as placeholders, preserving the prerogative of the parties to assert those positions later in the litigation.

The Federal Rules of Civil Procedure, first promulgated in 1938, were in part a reaction to highly technical rules of pleading imposed by the common law as well as under early statutory schemes known as the “Field Codes,” named after David Dudley Field, the attorney responsible for the first statutory reform in pleading law. Pleading at common law and under the Field Codes was highly technical and stylized. The parties had to specify the factual basis for its claim or defense and articulate the legal theory that it was pursuing. Pleadings could be struck for being too conclusory,<sup>11</sup> too detailed,<sup>12</sup> too equivocal,<sup>13</sup> or in the wrong form.<sup>14</sup>

Notwithstanding the complexity of Code and common law pleading, those systems offered a “gatekeeping” function not available under more liberal pleading regimes. The detail provided by the pleadings enabled a court to recognize legal deficiencies—wrongs for which the law did not recognize as actionable even assuming the truth of the factual averments—as well as factual deficiencies—the inability of the plaintiff to prove the truth of his assertions. That functionality, however, came at a cost. A party without access to the requisite proof would be barred from the courthouse without getting the benefit of discovery, and technical pleading mistakes could result in a dismissal.

Rule 8(a) of the Federal Rules of Civil Procedure simplified pleading practice considerably, but also sacrificed some of the functionality of the earlier pleading regimes. Under Rule 8(a), a “claim for relief” need only contain: “a short and plain statement of the grounds of the court’s jurisdiction . . . ; a short and plain statement of the claim showing that the pleader is entitled to relief . . . ; and a demand for the relief sought.” A set of official form complaints appended to the Rules suggested that a much abbreviated, conclusory set of allegations would suffice.<sup>15</sup>

Until *Twombly*, the classic statement of the sufficiency of a complaint under Rule 8(a) was found in *Conley v. Gibson*,<sup>16</sup> in which the Court held that a complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>17</sup> The Court reasoned that “ ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”<sup>18</sup> In other words, the Court had largely abandoned any “gatekeeping” function of the pleadings. Unlike pleading practice under the prior

---

11. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 Colum. L. Rev. 520 (1957); Charles E. Clark, *Handbook of the Law of Code Pleading* 150 (West 1928).

12. *Id.* at 150; Weinstein, *supra* n. 11.

13. *Id.*; Clark, *supra* n. 11, at 150.

14. *Id.*; Weinstein, *supra* n. 11.

15. See e.g. Fed. R. Civ. P. Form 11, Complaint for Negligence (“on *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff”).

16. 355 U.S. 41 (1957).

17. *Id.* at 45–46.

18. *Id.* at 47–48.

regimes, the federal courts could generally not, after *Conley*, determine either factual or legal sufficiency<sup>19</sup> by examining the pleadings in isolation.

Taken literally, the “no set of facts” standard of *Conley* would have drained the pleadings of even the modest “notice” functionality intended by the drafters and embraced by the *Conley* Court.<sup>20</sup> A complaint that alleged only that “the defendant wronged me” would technically suffice. It is not, therefore, surprising that the lower courts almost immediately made clear that the “no set of facts” language was not to be taken literally.<sup>21</sup> Unfortunately, that minor act of hyperbole by the *Conley* Court sowed the seeds of its demise.<sup>22</sup>

#### TWOMBLY AND THE REVIVAL OF FACT PLEADING

In 2007, the Supreme Court expressly overruled *Conley* in *Bell Atlantic Corporation v. Twombly*,<sup>23</sup> holding that a complaint *should* be dismissed for failure to state a claim unless plaintiff alleged “enough facts to state a claim to relief that is plausible on its face.” Citing the long line of cases that declined to follow the “no set of facts” standard,<sup>24</sup> the Court concluded that *Conley* was no longer good law.<sup>25</sup> The decision did not cite a single case in which the Court subjected a pleading to a test of plausibility (or any other test of factual sufficiency) pursuant to Rule 8.<sup>26</sup> One has the distinct sense that the Court threw out the baby with the bathwater. Rather than simply raising the level of detail required to provide adequate notice to defendant, the Court seemed to reject a notice pleading standard altogether. For the first time since the adoption of the Federal Rules of Civil Procedure, the Court invited the lower courts to scrutinize complaints for factual as well as legal sufficiency.

*Twombly* was brought as a consumer antitrust class action against the “Baby Bell” companies that inherited the local phone networks after the breakup of AT&T. Plaintiffs alleged in their complaint that the defendants had conspired with each other to prevent competition from other companies in the market for local phone and internet service by denying those competitors access to their switching networks. Plaintiffs also alleged that the defendants conspired with each other to allocate the market; all defendants had agreed not to compete with each other for customers already served by any of the other

---

19. If plaintiff alleged a non-actionable wrong in sufficient detail for the Court to recognize legal insufficiency, he could plead himself out of court. However, vague or ambiguous allegations make such a determination difficult. See e.g. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); accord Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998).

20. Cf. Hazard, *supra* n. 19, at 1685 (“Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment”). Note also that additional detail could be provided to the defendant pursuant to a motion for more definite statement under Fed. R. Civ. P. 12(e). Moreover, the filing of a frivolous claim would have violated Fed. R. Civ. P. 11, although the violation would not have been the basis for a dismissal of the pleading.

21. See e.g. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“*Conley* has never been interpreted literally”).

22. But see Campbell, *supra* n. 6 (asserting that reversal of *Conley* in *Twombly* did not herald the demise of notice pleading).

23. 550 U.S. at 545–546.

24. *Id.* at 562.

25. *Id.* at 563.

26. The only prior use of “plausibility” was in cases in which a heightened level of pleading was imposed by rule or statute. See Clermont & Yeazell, *supra* n. 6.

defendants. The Court, in a 7-2 opinion authored by Justice Souter, held that both claims were factually deficient and should be dismissed pursuant to defendants' 12(b)(6) motion without even requiring defendants to file an answer.

In a particularly confusing passage, Justice Souter drew a distinction between factual allegations, which the court must accept as true, and "purely conclusory assertions" that the court should scrutinize for plausibility:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . .

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.<sup>27</sup>

Insofar as plaintiffs had alleged that defendants entered into an agreement, and given the Court's concession that plaintiffs' allegations of fact must be accepted as true at this stage in the proceeding, in what sense was the allegation of conspiracy a mere "label" or "conclusion" not entitled to a presumption of truth? Was the problem that a "conspiracy" is simply a legal conclusion and not a description of historical events?<sup>28</sup> Would Souter have found the allegation of conspiracy adequate if it simply contained more detail about how the agreement was formed: e.g. "The defendants all stated that they would sell their widgets for \$20?" My hunch is that it would have made no difference. Without an identified evidentiary basis for such an allegation, there still would be no "reasonable expectation that discovery will reveal evidence of illegal agreement."<sup>29</sup>

I would assert that the Court's understanding of the difference between an allegation of fact and a mere conclusion lies not in the nature of the allegation or in the

---

27. *Twombly*, 550 U.S. at 555–556.

28. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. Pa. L. Rev. 473 (2010) (available at <http://ssrn.com/abstract=1452875>) (arguing that *Twombly*'s characterization of conspiracy allegation as a "conclusion" was consistent with prior practice of Court's not assuming the truth of legal conclusions for purposes of Rule 12(b)(6) practice).

29. *Twombly*, 550 U.S. at 556; but see Steinman, *supra* n. 8, at 30–35. Professor Steinman rejects the notion that *Twombly* should be read to require an offer of evidence in the complaint. Such a requirement, he asserts, would confuse the function of 12(b)(6) with Rule 56 summary judgment, would be inconsistent with the model forms, prior precedent, and would deprive plaintiffs of the opportunity to support their claim with evidence collected through discovery, as is guaranteed by Rule 56(f). He also notes the tension between such a reading and the permission given by Rule 11 for a party to allege facts that "will likely have evidentiary support after a reasonable opportunity for further discovery." Fed. R. Civ. P. 11. I do not disagree with any of those observations. However, if, as the Court stated, a complaint must create a "reasonable expectation that discovery will reveal evidence . . ." it is hard to understand how the *Twombly* Court was doing anything other than testing the complaint for factual—i.e., evidentiary—sufficiency. *Twombly*, 550 U.S. at 546.

level of factual detail alleged, but in plaintiff's access to proof.<sup>30</sup> A complaint that alleged, without any identified basis, that "defendants had an agreement to all sell their widgets for \$20" is no more or less an averment of fact than an averment that "plaintiff heard defendants say that they would all sell their widgets for \$20." Yet one suspects the Court would treat the former as a mere conclusion and the latter as an averment of fact.<sup>31</sup> The only justification for that different characterization is that plaintiff is suggesting a basis of proof<sup>32</sup> for the latter but not the former.

As others have pointed out, requiring an offer of proof in the complaint can be a particularly onerous requirement in the many cases in which there are information asymmetries.<sup>33</sup> A plaintiff who thinks that a defendant drug company marketed a drug without warning of dangers known to the company or a plaintiff who believes he was terminated from his job because of racial prejudice may have no evidentiary basis to prove those allegations until he is given access to discovery. After *Twombly*, whether or not the case goes forward will turn on the highly subjective question of whether a judge believes that the unsubstantiated allegations are plausible.<sup>34</sup>

Perhaps the best illustration of the dangers of a judge making a plausibility determination without the benefit of discovery or any factual record is found in *Twombly* itself. Commentators tend to lump together the two claims in *Twombly* as similar problems of inferring wrongful conduct from the "parallel conduct" of competitors.<sup>35</sup>

---

30. Cf. Campbell, *supra* n. 6, at 26 (suggesting that *Twombly* is consistent with the practice in antitrust cases of requiring pleadings to contain "allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial") (quoting Charles A. Wright & Arthur R. Miller et al, *Federal Practice and Procedure*, § 1216 at 227 (West 2009)); but see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 Notre Dame L. Rev. \_\_\_, 18 (forthcoming 2010) (available at <http://ssrn.com/abstract=1467799>) (arguing that distinction between legal conclusion and factual averment is based on the level of factual specificity alleged); Steinman, *supra* n. 8, at 7 ("an allegation is conclusory only when it fails to identify adequately [the real-world] acts or events that entitle the plaintiff to relief from the defendant"); Brown, *supra* n. 6, at 26 (an allegation is conclusory "when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible").

31. Cf. Brown, *supra* n. 6, at 30 (*Twombly* plaintiffs would have adequately averred a conspiracy had they alleged that "the CEOs of each of the [ILECS] reserved a private room at a high-priced restaurant in Bermuda in January 1996 and hatched their conspiratorial scheme [over] cigars and single-malt scotch."); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?* 82 St. John's L. Rev. 893, 917 (2009) (noting that *Twombly* conflates summary judgment standard with pleading standard).

32. Averments in the pleadings are not, of course, evidence. When I refer to "proof," I mean that the court is looking to the pleading for a description of the evidentiary basis that a plaintiff intends to rely upon to establish an entitlement to relief.

33. Bone, *supra* n. 30, at 33 (noting how factual scrutiny of a complaint at the pleading stage can result in dismissal of meritorious claims where defendant has exclusive access to information); Spencer, *supra* n. 6, at 493-494; Lonnie S. Hoffman, *supra* n. 6, at 1261; A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99, 160-161 (2008) (arguing that the application of the *Twombly* standard in civil rights cases is unfair since "claimants often lack direct evidence of an official municipal policy or of discriminatory motivation").

34. Cf. Hartnett, *supra* n. 28, at 499 ("Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, or a matter of common sense."). Professor Hartnett proposes that judges can soften the impact of *Twombly* by delaying the disposition of the Rule 12 motion until the parties have conducted discovery.

35. See Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 Wm. & Mary L. Rev. \_\_\_, (forthcoming 2010) (available at <http://ssrn.com/abstract=1522171>); Bone, *supra* n. 6, at 884-885 (plaintiffs' "allegations describe a state of affairs that is not merely consistent with lawful competition, but fits neatly within the normal baseline of conduct expected from a vigorously competitive telecommunications market"); Steinman, *supra* n. 8, at 14

However, the Court's dismissal of the second claim was far more problematic than its dismissal of the first claim. The Court denied the plausibility of the claim that there was a concerted refusal to provide network access to other phone and internet companies by noting that each defendant would have had an incentive to deny network access to competitors even in the absence of an agreement.<sup>36</sup> Thus, the historical events alleged by plaintiffs did not suggest any wrongdoing on defendants' part. It was *possible* that there was a conspiracy, but the complaint demonstrated no basis to draw such an inference. Although reasonable minds may differ as to whether that level of factual scrutiny at the pleading stage is desirable, it seems that courts would uniformly conclude that plaintiffs have failed to identify any suspicious facts in support of that claim.

Far more troubling is the Court's dismissal of the *second* claim that defendants agreed not to compete in each other's territory. In contrast to the first claim, one *would* expect competitors, in the absence of an agreement, to compete for each other's customers. Indeed, the complaint quoted a telephone company executive acknowledging that such competition "might be a good way to turn a quick dollar."<sup>37</sup> So the defendants' forbearance from seeking customers in adjacent markets at least suggests the existence of a conspiracy; that behavior *would* be economically rational if it was a *quid pro quo* for keeping potential competitors out of their own markets.<sup>38</sup> Yet the Court found even those allegations insufficient to establish plausibility:

[Defendant's behavior] was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. . . . The [defendant companies] were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.<sup>39</sup>

In other words, even though defendants' actions might look suspicious, the "natural explanation" is that these particular defendants were unusually wary of competition. There is thus no need to waste everyone's time with discovery and trial when the obvious explanation is staring us in the face. One can imagine a similar account of an allegation that a pharmaceutical company marketed a drug without warning of known dangers:

If history teaches us anything, it is that drug companies face enormous liability by failing to disclose known dangers of their products. Given the potential of large product liability awards, not to mention criminal penalties imposed by the FDA, it is simply not plausible to suggest that any rational company would purposely conceal such information. The natural

---

(noting that the *Twombly* complaint merely alleged non-actionable parallel conduct and a "bare assertion of conspiracy") (quoting *Twombly*, 550 U.S. at 556).

36. *Twombly*, 550 U.S. at 566.

37. *Id.* at 568 n. 13.

38. *But see* Bone, *supra* n. 6, at 885 (arguing that "there is nothing necessarily odd" about noncompetitive conduct in the telecommunications industry).

39. *Twombly*, 550 U.S. at 567–568.



explanation for the defendant's failure to warn was that they simply were not aware of the risk of injury suffered by plaintiff.

In both examples, the court assumes a defendant would pursue a strategy of long-term rationality in lieu of short-term expediency. One has the sense in both cases that the judge may have reached a contrary conclusion if he had a different history teacher or a slightly different take on human behavior or economics. In both cases, the courts' preference for the innocent explanation over the culpable explanation seems quite arbitrary and significantly influenced by the courts' predispositions.

Testing a complaint for "plausibility" thus has two deep process flaws. First, plausibility is a very amorphous standard. Although Justice Souter locates "plausibility" on the standard-of-proof continuum somewhere between "possibility" and "probability,"<sup>40</sup> the innocent account of defendants' non-competitive behavior does not seem to be a significantly better explanation than the culpable one. If I were a bookie, I would lay fairly even odds. If Justice Souter would do the same, that belies his assertion that the judge is not testing for probability.

The imprecision of the standard is compounded by the second, deeper process flaw: the judge at the pleading stage has no evidentiary record to inform his assessment of plausibility. To go back to my bookie example, before I would lay odds on whether a defendant acted out of long-term prudence or short-term expedience, I would want to know a lot more information about the trade practices in the particular industry, enforcement patterns, the risk of apprehension, the potential profitability of illegal behavior, not to mention the financial exigencies of the defendants and their psychological proclivities. To allow a judge to make those determinations based on his own sense of history and human behavior without the benefit of an adversarial presentation of the facts is the precise definition of prejudice: he is pre-judging, without regard to the evidence.

If there is any silver lining to *Twombly*, it is that the decision is so analytically incoherent as to limit its extension to other cases. The Court seems to endorse the notice objective of pleading under the rules,<sup>41</sup> yet it obviously was demanding more. The Court accepts the obligation of the courts to assume the truth of plaintiffs' factual averments,<sup>42</sup> yet it rather arbitrarily labels averments that it chooses not to find plausible as mere "conclusions."<sup>43</sup> The Court asserts that it is not imposing "a probability requirement at the pleading stage,"<sup>44</sup> yet its disposition of the second claim seems to impose at least that high a burden. Perhaps the most encouraging aspect of Justice Souter's opinion is that he found a particularly strong need for an early determination of the factual sufficiency of antitrust complaints where the scope and expense of discovery were particularly high<sup>45</sup> (while denying that he was imposing a heightened burden of pleading in such cases).<sup>46</sup> There was thus reason to hope that the case might be limited to its facts.

---

40. *Id.* at 545.

41. *Id.* at 555.

42. *Id.*

43. *Id.* at 557.

44. *Twombly*, 550 U.S. at 566.

45. *Id.* at 558-559.

46. *Id.* at 569 n. 14.

That hope was further raised when, shortly after issuing the decision in *Twombly*, the Court reversed the lower court's grant of defendants' 12(b)(6) motion in *Erickson v. Pardus*.<sup>47</sup> Plaintiff alleged that he contracted Hepatitis C while incarcerated in Colorado and sought treatment from prison officials. The officials placed Erickson on a yearlong treatment program but suspended treatment after concluding that Erickson was using illegal drugs during his treatment. Erickson sued, alleging that the refusal of prison officials to treat the Hepatitis C caused irreversible damage to his liver, thereby threatening his life if left untreated. He brought the claim as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.<sup>48</sup>

The district court dismissed Erickson's complaint and the Court of Appeals affirmed on the basis that Erickson had made "only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the [ ] treatment program."<sup>49</sup> The Supreme Court reversed the grant of defendants' 12(b)(6) motion.<sup>50</sup> Reiterating its commitment to notice pleading under Rule 8, the Court concluded that a complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."<sup>51</sup> That standard was easily satisfied here, and the dismissal of his claim "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure" as to warrant a summary reversal without remand.<sup>52</sup>

The lower courts, predictably, found *Twombly* to be quite inscrutable,<sup>53</sup> particularly in light of *Erickson*. The Third Circuit concluded that plausibility was now an element of Rule 8 and should not be confined to antitrust cases, but that the decision "leaves us with the question of what it might mean."<sup>54</sup> The Second Circuit in *Iqbal v. Hasty* bemoaned that

[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly* . . . . [T]he Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson* . . . was decided half a century ago. The nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals . . . .<sup>55</sup>

Several studies found the rate of dismissals pursuant to Rule 12(b)(6) was not significantly affected in the wake of *Twombly*.<sup>56</sup>

47. 551 U.S. 89 (2007).

48. *Id.* at 89–93.

49. *Id.* at 92–93 (quoting *Erickson v. Pardus*, 198 Fed. Appx. 694, 698 (10th Cir. 2006)).

50. *Id.* at 94.

51. *Id.* at 93 (quoting *Twombly*, 550 U.S. at 555).

52. *Erickson*, 551 U.S. at 90.

53. *Cf.* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 6–9 (2009).

54. *Phillips v. Co. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).

55. 490 F.3d 143, 155 (2d Cir. 2007).

56. Kendall W. Hannon, Student Author, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811 (2008); *cf.* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* 59 Am. U. L. Rev. 553 (forthcoming 2010) (available at <http://ssrn.com/abstract=1487764>) (an empirical study suggesting that the granting of 12(b)(6) motions increased from 46% to 48% after *Twombly*, but went up to 56% after *Iqbal*).

And then the other shoe dropped.

#### THE *IQBAL* DECISION

*Ashcroft v. Iqbal*<sup>57</sup> was a *Bivens*<sup>58</sup> action brought on behalf of two Pakistani and Egyptian citizens who, in the wake of 9/11, had been arrested for reasons apparently unrelated to terrorist activities.<sup>59</sup> Plaintiffs sought damages from the Attorney General and the Director of the FBI.<sup>60</sup> Prior to Supreme Court review, the claim by the Egyptian plaintiff was settled, leaving only the claim by Iqbal.<sup>61</sup> Iqbal was arrested in November 2001,<sup>62</sup> less than two months after the attacks on the World Trade Centers, and was detained in maximum security conditions in Brooklyn for 150 days before being released into the general prison population<sup>63</sup> and then deported to Pakistan for immigration law violations.<sup>64</sup> The complaint alleged that plaintiffs had been subjected to harsh conditions of confinement solely because of their race, religion, or national origin.<sup>65</sup> The 284-paragraph complaint named 35 individual defendants, including claims against the Attorney General and Director of the FBI in their personal capacity, and sought redress for a wide range of abusive practices, from the use of excessive violence<sup>66</sup> to denial of adequate medical care<sup>67</sup> to denial of the right to read the Koran.<sup>68</sup> However, only eight paragraphs of the complaint specifically refer to Attorney General Ashcroft and FBI Director Mueller, and those allegations are frustratingly vague:

10. Defendant JOHN ASHCROFT is the Attorney General of the United States. As Attorney General, Defendant ASHCROFT has ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws. He is a principal architect of the policies and practices challenged here. He authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

11. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation (FBI). As FBI Director, he was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here.

69. The policy of holding post-September-11<sup>th</sup> detainees in highly restrictive conditions of

57. 129 S.Ct. 1937.

58. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). A “*Bivens* action” refers to a claim brought as an implied constitutional cause of action, as opposed to one brought as a statutory claim, for instance under 42 U.S.C. § 1983.

59. Iqbal, the Pakistani, was charged with immigration law violations. The complaint does not allege the reasons for the Egyptian’s arrest, but the trial court identified Elmaghraby was “charged with violating 18 U.S.C. § 1029 (producing/trafficking in a counterfeit device).” *Elmaghraby v. Ashcroft*, 2005 WL 2375202, \*1 n. 1 (E.D.N.Y. Sept. 27, 2005).

60. *Id.*

61. *Hasty*, 490 F.3d at 147.

62. See Pl.’s 1st Amend. Compl. at ¶ 80, *Elmaghraby*, 2005 WL 2375202 (available at 2004 WL 3756442).

63. *Id.* at ¶¶ 9, 81.

64. *Hasty*, 490 F.3d at 178 (Cabranes, J., concurring) (noting that Iqbal was “apparent[ly] subsequent[ly] deport[ed]”).

65. Pl.’s 1st Amend. Compl., *supra* n. 62, at ¶ 3.

66. *Id.* at ¶¶ 111–126.

67. *Id.* at ¶¶ 82, 178, 187–190.

68. *Id.* at ¶¶ 153, 158.

confinement until they were cleared by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

73. Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC.

74. Nonetheless, Defendants ASHCROFT, MUELLER, and ROLINCE never imposed deadlines for the clearance process, and many detainees were held in the ADMAX SHU even after they were approved for release to the general population unit by the FBI.

96. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest.

97. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI willfully and maliciously designed a policy whereby individuals such as Plaintiffs were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

195. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 were aware of, approved of,<sup>69</sup> and willfully and maliciously created these unlawful conditions of confinement.

The complaint thus fails to specify the precise “practices” or “conditions” of confinement that are attributable to the actions of Ashcroft and Mueller, as opposed to conditions that were either unauthorized or were the result of policies adopted lower down in the administrative chain of command.<sup>70</sup> Plaintiffs may have meant that Ashcroft and Mueller were directly responsible for all abusive practices (including punching Iqbal in the stomach and denying him medical care) because they expressly ordered all of the conditions of confinement; that Ashcroft and Mueller had supervisor liability because they knew of all of the conditions of confinement and failed to correct them; or that some, but not all, of the conditions of confinement were a result of the actions of Ashcroft and Mueller. That ambiguity opened the door for the Court’s narrow construction of the complaint.

The only specific policies attributed to the actions of Ashcroft and Mueller were the allegations of paragraphs 69, 74, and 96: that they designed the policy of holding detainees in the maximum-security facilities without individualized hearings until cleared of suspicion by the FBI and that they subjected detainees to these conditions of

69. *Id.* at ¶¶ 10–11, 69, 73–74, 96–96, 195.

70. *Cf.* Steinman, *supra* n. 8, at 52 n. 278 (*Iqbal* complaint fails to specify what the defendants “actually agreed to do”).

confinement solely on account of their race, religion and/or national origin.<sup>71</sup>

The complaint named Ashcroft and Mueller in only five counts: a Fifth Amendment due process claim based on plaintiffs' confinement in a maximum security prison; a First Amendment religious discrimination claim based on the discriminatory treatment he suffered as a Muslim; a Fifth Amendment equal protection claim based on the government's racial discrimination;<sup>72</sup> a Religious Freedom Restoration Act claim; and a racial conspiracy claim under 42 U.S.C. § 1985(3).<sup>73</sup> The defendants moved pursuant to Rule 12(b)(6) to dismiss all claims.<sup>74</sup> The trial court dismissed the statutory claims.<sup>75</sup> The Court of Appeals dismissed the procedural due process claim on the ground that the illegality of placing prisoners in restrictive conditions was not sufficiently clear at the time of Iqbal's detention to overcome defendants' qualified immunity.<sup>76</sup> That left only the equal protection claims on defendants' appeal to the Supreme Court.

The 5-4 opinion by Justice Kennedy held that the claim against Ashcroft and Mueller for the one policy that the complaint clearly attributes to their own actions—that of detaining Arab Muslim men charged with immigration violations in maximum security facilities until cleared of terrorist suspicions by the FBI—would only be actionable only in very limited circumstances.<sup>77</sup> Plaintiffs must prove that such a policy was implemented because of racial animus on the defendants' part and not because of any “neutral, investigative reason[:]”

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose . . . . Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences” . . . . It instead involves a decisionmaker's undertaking a course of action “‘because of,’ not merely ‘in spite of,’ [the action's] adverse effects upon an identifiable group.” It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.<sup>78</sup>

As I will discuss below, this is somewhat perplexing. Contrary to Justice Kennedy's description of the claim as one charging “invidious discrimination,” the plaintiff has, in fact, alleged that the government has adopted a race-based policy for “no legitimate penological interest.” That may imply a discriminatory purpose, but it may

---

71. See Pl.'s 1st Amend. Compl., *supra* n. 62, at ¶¶ 69, 74, 96.

72. The race discrimination claim was complicated by the fact that Iqbal is not an Arab. *Hasty*, 490 F.3d at 148 n. 2. The Court of Appeals concluded that Iqbal could still maintain a race-based challenge on the theory that his complaint could be construed as alleging that “unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.” *Id.* The Supreme Court did not discuss the matter.

73. *Hasty*, 490 F.3d at 149–150 n. 3.

74. See *Elmaghraby*, 2005 WL 2375202 at \*2 n. 3.

75. *Hasty*, 490 F.3d at 151.

76. *Id.* at 167–168.

77. *Iqbal*, 129 S. Ct. at 1948.

78. *Id.* at 1948–1949 (citations omitted).

also mean that that defendants have employed a discriminatory criterion without a compelling justification. It is not at all clear why Kennedy concluded that proof of invidiousness was part of plaintiff's burden of proof for such a claim.<sup>79</sup> The courts typically apply strict scrutiny to the government's use of racial classifications, even when that use is apparently benign as in the affirmative action cases.<sup>80</sup> Yet Justice Kennedy seems to employ a rational-relation test for constitutionality here; he seems to conclude that if the defendants had a reasonable, race-neutral reason for using race or religion as a measure of the dangerousness of detainees, then it is not actionable.

Had the Court applied strict scrutiny, the necessity of using a racial classification would have presumably entered the litigation by way of defense. Plaintiff would have stated a *prima facie* case by showing the fact that a racial classification was employed and defendant would have had the burden of demonstrating that such a use was justified. Plaintiff may have lost in the end, but he may have survived the motion to dismiss for failure to state a claim.

By using the disparate impact standard, the Court facilitated its disposition under Rule 12(b)(6): once the Court concludes that invidious motive was an essential element of plaintiff's claim, it could test for the factual sufficiency of that allegation under *Twombly*.<sup>81</sup> As in *Twombly*, there was an innocent account that provided more convincing explanation of defendants' behavior than racial animus—defendants were focusing their investigation and detention policy on persons who had a greater likelihood of a connection to al Qaeda:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim – Osama bin Laden – and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.<sup>82</sup>

Plaintiff alleged no other basis for a conclusion that defendants acted out of a discriminatory motivation, and the absence of such a basis meant that the complaint

---

79. Plaintiff clearly did not help his cause in this regard. Instead of arguing that no showing of discriminatory animus is required where the government has employed a racially-based classification, his brief to the Court of Appeals argues that he *had* adequately alleged discriminatory animus to survive a Rule 12(b)(6) dismissal. See Br. for Pl. Appellee Javaid Iqbal at 108, *Hasty*, 490 F.3d 143 (available at 2006 WL 5234423) (“an allegation of discriminatory motive is sufficient to survive a motion to dismiss under Rule 12(b)(6)”). The closest he comes to the argument that this was not a disparate impact case was his assertion that plaintiff's complaint was not simply that those persons deemed to be of “high interest” *happened* also to be Muslim and of similar race and national origin. It was that they were deemed to be of “high interest” and confined in the ADMAX SHU *solely because* of their race, national origin, and religion. *Id.* at 1–2.

80. See *Gratz v. Bollinger*, 539 U.S. 244, 270–271 (2003).

81. See *Twombly*, 550 U.S. 544.

82. *Iqbal*, 129 S.Ct. at 1951–1952 (citation omitted).

failed to make a “showing that the pleader is entitled to relief” under Rule 8(b) and must be dismissed pursuant to defendant’s 12(b)(6) motion.<sup>83</sup>

As I mentioned above, the most troubling aspect of *Iqbal* is the Court’s rejection of plaintiff’s suggestion that *Twombly* should be read as limited to the antitrust and/or complex litigation context. The Court unequivocally rejected this suggestion:

Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8 . . . . That Rule in turn governs the pleading standard “in all civil actions and proceedings in the United States district courts.” . . . Our decision in *Twombly* expounded the pleading standard for “all civil actions,” . . . and it applies to antitrust and discrimination suits alike.<sup>84</sup>

To the consternation of Justice Souter, the *Iqbal* Court treats the complaint as though it were only complaining of discriminatory acts of commission by the defendants alleged in paragraph 69 and ignored the potential liability of defendants incurred by virtue of their failure to supervise adequately the discriminatory actions of their subordinates.<sup>85</sup> Indeed, Justice Souter goes as far as to assert that the Court has, by implication, eliminated supervisory liability altogether for all *Bivens* claims.<sup>86</sup> Justice Souter did not explain why a failure to supervise could establish discriminatory intent on defendants’ part, and his opinion seems, to Justice Kennedy, to miss the point. Justice Kennedy did not constrain the existence of supervisory liability generally, but only in regard to claims of intentional discrimination; insofar as Ashcroft and Mueller were only charged with intentional discrimination, that intentionality must be their own, not that of their subordinates. That intentionality presumably could be established either through their own discriminatory policy or through knowledge of and indifference to their subordinate’s discriminatory conduct.<sup>87</sup> However, unlike the allegations against other supervisory defendants, plaintiffs had not even alleged that Ashcroft and Mueller had knowledge of the specific acts of wrongdoing by the lower level officials, let alone knowledge that these acts had a discriminatory motive.<sup>88</sup>

The dissent by Justice Souter, the author of *Twombly*, seems somewhat disingenuous. Rejecting defendant’s argument that the claims against the Attorney General and Director Mueller were not plausible, Justice Souter insisted that defendants

---

83. See Fed. R. Civ. P. 8, 12.

84. *Iqbal*, 129 S. Ct. at 1953 (citations omitted).

85. *Id.* at 1957–1958 (Souter, J. dissenting).

86. “Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.” *Id.* at 1957 (Souter, J. dissenting).

87. The majority opinion might be read as foreclosing such proof in Justice Kennedy’s statement that “respondent believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. We reject this argument.” *Id.* at 1949 (emphasis added). However, a careful reading of that paragraph demonstrates that Justice Kennedy was simply emphasizing the need to demonstrate discriminatory intent on the part of defendants. Their mere knowledge of discriminatory intent by subordinates would not “amount to” a violation of the Constitution because the supervisor’s tolerance of their misconduct does not establish that his tolerance itself was motivated by discriminatory intent. That does not mean, however, that tolerance of wrongdoing is not actionable if driven by a discriminatory motive, and it does not mean that knowledge of a subordinate’s discriminatory behavior is not probative the supervisor’s motive. Indeed, Justice Kennedy conceded that “[t]he allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners’ part.” *Id.* at 1952.

88. Plaintiffs’ had made such specific allegations against the prison warden. See Pl.’s 1st Amend. Compl., *supra* n. 62, at ¶ 77.

(and presumably the majority) had completely distorted the “plausibility” determination required by *Twombly*:

Ashcroft and Mueller argue that these allegations fail to satisfy the “plausibility standard” of *Twombly*. They contend that Iqbal’s claims are implausible because such high-ranking officials “tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.” . . . But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.<sup>89</sup>

Whether the Court’s presumption that Attorney General Ashcroft had clean hands was less justified than Justice Souter’s presumption that the Baby Bells had a natural aversion to competition is rather questionable. But what is clear beyond any question is that plaintiffs’ averments in both cases were not in the same legal universe as “claims about little green men, or the plaintiff’s recent trip to Pluto.”<sup>90</sup> Did Justice Souter really think that the allegations of conspiracy in *Twombly* were “sufficiently fantastic to defy reality as we know it[?]”<sup>91</sup> A simple acknowledgment that he had not adequately thought through the implications of *Twombly* would have been far more convincing.<sup>92</sup>

Notwithstanding that Justice Souter doth protest too much, there is a subtle but potentially troubling distinction in the role that plausibility served in *Twombly* and how it is at least described in *Iqbal*. The requirement *Twombly* imposes upon the pleader is to aver evidence from which a finder of fact could infer the pleader’s legal entitlement.<sup>93</sup> Where plaintiff avers direct evidence of a fact—“I saw the light turn green”—that is the end of the matter. There is no need for a plausibility determination.<sup>94</sup> The court must engage in a plausibility analysis *only* when the pleader avers evidence that simply *implies* the fact in question—“the light must have been green because all of the traffic was moving through the intersection.”<sup>95</sup> The court must then determine whether the evidence averred creates a plausible inference. This is simply a corollary to the proposition that the pleader must aver evidence; if an averment does not tend to establish the truth of the proposition for which it is offered, it is not evidence.<sup>96</sup> Thus, plausibility in *Twombly*

89. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) (emphasis added) (citations omitted).

90. *Id.*

91. *Id.*

92. Even if Justices Souter and Breyer had joined the dissent in *Twombly*, there still would have been five votes for the majority position there. Their apparent change of heart in *Iqbal* would not have made much difference had it come earlier. See *Twombly*, 550 U.S. 544 (decided with a 7-2 majority, with only Justices Stevens and Ginsburg dissenting).

93. *Twombly*, 550 U.S. at 556.

94. Cf. Hartnett, *supra* n. 28, at 483 (“no justice interprets *Twombly* to empower a judge to disregard factual allegations simply because the judge finds them implausible”).

95. Cf. *Id.* at 484–485 (“*Twombly*’s insistence that the inference of conspiracy be ‘plausible’ is equivalent to the traditional insistence that an inference be ‘reasonable’ .”).

96. See Fed R. Evid. 401, 402 (deeming evidence inadmissible when it does not have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less



served the relatively modest function of testing whether the pleader has in fact averred evidence.<sup>97</sup>

Justice Kennedy in *Iqbal* describes the holding of *Twombly* as creating a two-part inquiry: a pleading must allege facts and not conclusions and the allegations must be “plausible.”

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.<sup>98</sup>

Notice the subtle difference: plausibility is not simply a measure of whether the plaintiff has created a permissible inference; rather, it is a freestanding inquiry into whether the pleader’s claims *in toto* are plausible. Thus, even in a case in which plaintiff has averred direct evidence of his entitlement to relief, the court would still consider whether he has made out a plausible claim. If there was tension in *Twombly* between the Court’s concession that averments of fact must be accepted as true and its scrutiny of “conclusions” for plausibility, that tension approaches an outright contradiction in *Iqbal*. What does it mean for a court to accept as true the factual allegations that give rise to an actionable claim but then further require the complaint to state a plausible claim? Is that not tantamount to rejecting the truth of the plaintiff’s factual averments?

I suspect that this expansion of the plausibility inquiry was not intentional. Separating the two questions in *Iqbal* itself simply appears redundant.<sup>99</sup> As in *Twombly*, the Court’s characterization of the allegation of intentional discrimination as a “legal conclusion” has nothing to do with it not being an allegation of fact, i.e. the fact of defendants’ motive.<sup>100</sup> What is missing is an offer of proof: on what basis does plaintiff intend to prove defendants’ discriminatory motive? The second inquiry into the “plausibility” of the allegation thus simply restates the first inquiry: on what basis can plaintiff prove that defendants had a discriminatory motive? Since plaintiff lacks an adequate evidentiary basis, his allegation is considered conclusory and thus implausible.

#### OFFICIAL IMMUNITY—THE ELEPHANT IN THE ROOM

Justice Kennedy emphasizes that to sustain their claims against Ashcroft and Mueller, plaintiff must show that defendants violated a “clearly established legal

---

probable than it would be without the evidence”).

97. There may, as Justice Souter suggests, be a second function to the plausibility scrutiny; in extreme cases “that defy reality as we know it[.]” a judge might find a plaintiff’s offer of proof “so fantastic” as to not warrant an assumption of truth. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). However, neither *Iqbal* nor *Twombly* involved such a process, and Justice Souter does not cite any cases in which the court simply disbelieved plaintiff’s factual assertions in evaluating the propriety of dismissal under Rule 12(b)(6).

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

99. Cf. Bone, *supra* n. 30, at 22–23 (arguing that two inquiries amount to same question of whether the claim is plausible).

100. Cf. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 468 (1986) (“state of mind is undoubtedly a fact”).

duty.”<sup>101</sup> This is a consequence of defendants’ qualified immunity. As federal executive officials, defendants are immune from damages claims for all actions taken in course of their duties except for actions that violated clearly established legal obligations.<sup>102</sup> This factor, I assert, colored every other aspect of the decision, from the Court’s statement of the equal protection constraints on defendant’s conduct to their understanding of Rule 8(b) and the role of Rule 12(b)(6).

Official immunity is a doctrine of federal common law.<sup>103</sup> It has the two-fold objective of encouraging participation in public service and protecting the public by insulating important officials from the distraction of defending unfounded lawsuits.<sup>104</sup> Unlike other limitations on liability such as *res judicata* or accord and satisfaction, the immunity defense is expressly designed to relieve the defendant from the burden of litigation and not simply the cost of a damage award.<sup>105</sup>

There is a long history of the courts adapting procedural practices to serve the unusual need for an expedited assessment of the qualified immunity defense. Thus, in *Saucier v. Katz*, the Court found that a federal officer was entitled to summary judgment on the question of whether his alleged use of excessive force against a political protestor violated a clearly established duty.<sup>106</sup> Although one would normally expect that type of context-dependent determination to be made by a jury after trial, that remedy would have undermined a central function of qualified immunity—to relieve defendant from the burden of litigating:

The approach the Court of Appeals adopted—to deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”<sup>107</sup>

It is for the same reason that the trial court’s denial of defendants’ motion to dismiss in *Iqbal* on the ground of official immunity qualified for interlocutory appellate review pursuant to the “collateral order” doctrine.<sup>108</sup> Pursuant to the “final judgment rule,”<sup>109</sup> the Court of Appeals normally has jurisdiction over a case only when the lower court’s disposition “leaves nothing for the court to do but execute the judgment.”<sup>110</sup> The courts have construed this statutory requirement quite strictly in the interest of consolidating appellate proceedings and avoiding unnecessary appeals on questions that might be mooted by subsequent developments in the lower court proceeding.<sup>111</sup>

101. To be clearly established, the obligation must have been set forth either by a Supreme Court decision or, at minimum, by the controlling authority in the jurisdiction where the conduct occurred or a “consensus of cases of persuasive authority.” *Wilson v. Layne*, 526 U.S. 603, 604 (1999).

102. *Iqbal*, 129 S. Ct. at 1945–946.

103. *Spalding v. Vilas*, 161 U.S. 483, 493–499 (1896) (basing official immunity on the common law and public policy).

104. *Harlow v. Fitzgerald*, 457 U.S. 800, 813–819 (1982).

105. *Saucier v. Katz*, 533 U.S. 194, 200–201 (2001).

106. *Id.* at 209.

107. *Id.* at 202 (citation omitted).

108. *Iqbal*, 129 S. Ct. at 1945–1947.

109. 28 U.S.C. § 1291 (2006) provides that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .”

110. *Caitlin v. U.S.*, 324 U.S. 229, 233 (1945).

111. *See e.g. Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) (finding that denial of a

Outside of very limited statutory<sup>112</sup> and Rule-based<sup>113</sup> provisions for interlocutory appeals, there is only one judicially-crafted<sup>114</sup> exception to the final judgment rule: the collateral order doctrine. Pursuant to that doctrine, the Court of Appeals may review a decision that “appears to fall in that small class which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be . . . deferred until the whole case is adjudicated.”<sup>115</sup> Ever since first carving out the exception in 1949,<sup>116</sup> the Court has systematically narrowed its application.<sup>117</sup> The list of important rulings that might appear to satisfy that standard but do *not* qualify as collateral orders is large: discovery orders,<sup>118</sup> *res judicata* defenses,<sup>119</sup> jurisdictional defenses,<sup>120</sup> and settlement agreements.<sup>121</sup> One of the *only* remaining grounds for appeal pursuant to the doctrine is the lower court’s denial of a motion to dismiss because of official immunity. The need to quickly extricate a governmental defendant from baseless litigation is more important than the policies advanced by the final judgment rule.

It makes little sense for the Court to rig the substantive liability rules, interlocutory appeals standards, and summary judgment practice, all to provide officials with an opportunity to extricate themselves from the litigation at the outset if all it takes to keep that official in the litigation is a conclusory pleading that the official acted in deliberate disregard of his legal obligations. Indeed, the Court of Appeals for the District of Columbia at one point imposed a heightened pleading requirement to defeat a qualified immunity defense specifically for this reason.<sup>122</sup> In *Crawford-El v. Britton*, the Supreme Court rejected imposing a heightened *burden of proof* on plaintiffs seeking to overcome a qualified immunity defense but *expressly suggested* requiring supplemental pleading with specificity before a plaintiff was given access to discovery:

When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant’s or a third party’s answer under Federal Rule

---

motion to dismiss based on a settlement agreement “does not come within the narrow ambit of collateral orders”).

112. See 28 U.S.C. § 1291; 28 U.S.C. § 1651(a) (2006) (“All Writs Act”).

113. See Fed. R. Civ. P. 54(b), 23(f) (providing for interlocutory review of class certification decisions). The authority of the Court to expand rule-based interlocutory practice was enhanced by the 1990 enactment of 28 U.S.C. § 2072(c), which gives the Supreme Court the rule-making authority to define what constitutes a final judgment.

114. The Court justified the collateral order exception as a construction of “final judgment” within the meaning of 28 U.S.C. § 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

115. *Id.* at 546.

116. *Id.*

117. See generally Adam N. Steinman, *Reinventing Appellate Practice*, 48 B.C. L. Rev. 1237 (2007).

118. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

119. *Will v. Hallock*, 546 U.S. 345 (2006).

120. See e.g. *Lauro Lines, S.R.L. v. Chasser*, 490 U.S. 495 (1989) (denying motion to dismiss based on forum selection clause); *Chapple v. Levinsky*, 961 F.2d 372 (2d Cir. 1992) (transfer of venue order); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (denying a *forum non conveniens* motion).

121. *Digital Equip. Corp.*, 511 U.S. at 865.

122. *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425, 1435 (D.C. Cir. 1987).

of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.<sup>123</sup>

The Court thus approved imposing a heightened pleading practice in cases in which qualified immunity was at issue *even after* it generally disapproved of raising the pleading standards on an *ad hoc* basis five years earlier in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.<sup>124</sup>

As I will show below, the presence of qualified immunity in *Iqbal* had an enormous impact on how the Court measured plaintiff's burden of proof, but it also clearly colored the Court's decision to extend *Twombly* beyond the antitrust context. Plaintiff's principal argument for limiting the reach of *Twombly* was that there was particular need in antitrust and other complex litigation for the pleadings to serve a "gatekeeping" function.<sup>125</sup> Unless defendants in those cases could extricate themselves from the litigation at the pleading stage, they could be subjected to the expense of unwieldy discovery. In cases in which defendant did not face the same discovery burden, the courts should be more willing to let a factually thin claim proceed, at least until tested by a motion for summary judgment.<sup>126</sup>

Whatever merit that argument may have had in private litigation, it was a hard argument to make in the context of *Iqbal*, as the Court clearly recognized:

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery" . . . . There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic."<sup>127</sup>

Thus, *Iqbal* was the *worst possible case* in which to test the proposition that *Twombly* should be limited to complex litigation. Not only is the whole point of qualified immunity and the collateral order doctrine to extricate governmental defendants from needless litigation at the earliest possible moment, but the *particular* defendants here, the Attorney General of the United States and the Director of the FBI, were perhaps the two most important government officials in dealing with "a national and international

---

123. 523 U.S. 574, 597–598 (1998).

124. 507 U.S. 163 (1993).

125. *Iqbal*, 129 S. Ct. at 1953.

126. *Id.*

127. *Id.* (citations omitted).

security emergency unprecedented in the history of the American Republic.”<sup>128</sup> It can hardly come as a surprise that the Court was not prepared to subject them to the burden of litigating on the basis of nothing more than plaintiffs’ conjecture. They deserved at least as much protection as corporations charged with antitrust violations.

#### WHY DID THE COURT REQUIRE PROOF OF DISCRIMINATORY INTENT?

I want to now return to a problem I flagged earlier: given plaintiffs’ allegation that defendants used race and religion to determine the conditions of confinement for immigration detainees, why does the Court demand proof of defendants’ discriminatory intent? Why does the Court appear to treat the case as a problem of disparate impact rather than one in which the government has expressly used a suspect classification?

I think there are two possible accounts, one far more troubling than the other for pleading purposes. I ultimately conclude, however, that imposing the burden of proving invidious intent was probably justified given qualified immunity.

The problem, I think, flows from an arguable ambiguity in Kennedy’s opinion: what did he mean when he required proof of defendants’ discriminatory intent? There are two quite distinct possibilities. First, he could have meant that plaintiff must prove that the defendants intended to impose a policy based on racial or religious classification. “Intent” would be a bit of a misnomer in this sense. The question is really about the policy itself, not about defendants’ state of mind. Did Ashcroft and Mueller direct their subordinates to hold Arab Muslim detainees in maximum security until cleared of suspicion by the FBI? Or, did defendants merely instruct their subordinates to hold *suspicious individuals* in maximum security until cleared by the FBI, and it just turned out they were all Arab Muslims?<sup>129</sup> This is the more troubling meaning of intent.

This would be deeply troubling because plaintiff *has* offered proof that the official policy directed by defendants employed a racial or religious criterion. He has averred that thousands of Arab Muslims have been placed in these conditions *when their arrests had no connection to terrorism*. Paragraph 52 of the complaint asserts that

within the New York area, all Arab Muslim men arrested on criminal or immigration

128. *Id.* (citation omitted).

129. Part of the opinion supports the reading that plaintiff failed to demonstrate that the policy promulgated by defendants was race conscious: “All [the complaint] plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.” *Id.* at 1952. “It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.” *Id.* at 1951.

However, earlier the Court emphasizes the need to show bad motive on defendants’ part and not simply that they promulgated a discriminatory policy:

Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” . . . It instead involves a decisionmaker’s undertaking a course of action “ ‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.” . . . It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

*Iqbal*, 129 S. Ct. at 1948–1949 (citations omitted).

charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as ‘of interest’ to the post-September-11th investigation.<sup>130</sup>

Whether or not the government had a good, non-invidious reason for detaining these individuals, it would seem almost impossible for that to happen without taking the suspects’ race or religion into account.<sup>131</sup> And if race and religion were taken into account in deciding whom to detain, it strains credibility to suggest that this could have happened on such a large scale without being at least tacitly approved of by defendants. That does not prove that defendants were *motivated* by a discriminatory intent—they could have believed that there was a higher probability of uncovering the al Qaeda network by focusing on the Arab Muslim population. But it would tend to prove that race was taken into consideration in the government’s detention policy. A plaintiff in an employment discrimination case could *get to the jury* to prove intentional racial discrimination with those kind of numbers, let alone survive a 12(b)(6) motion, even if the employer had an alternative innocent explanation.<sup>132</sup>

There is, however, one twist here that could render plaintiff’s evidence somewhat less probative of the official policy. An equally plausible account of the concentration of Arab Muslims in detention is that defendants ordered the detention of citizens of Arab or Muslim *countries*. Most of those individuals, not surprisingly, turned out to be Arab and/or Muslims. While race, religion, and national *origin* are suspect classifications, *nationality* is not.<sup>133</sup> This may be one reason why Justice Kennedy viewed the case as a disparate impact problem: the impact on racial and religious minorities could have been the consequence of race and religion neutral criteria.<sup>134</sup> Indeed, there may have been an

---

130. Pl.’s 1st Amend. Compl., *supra* n. 62, at ¶ 52. Although this allegation might have also been deemed “conclusory” to the extent that plaintiff was not in a position to know why all the detainees were arrested, the Court does not seem to challenge the evidentiary basis for the allegation that thousands of Arab Muslims had been detained. The Court does not discuss the allegation of ¶ 52 at all.

131. A Justice Department report released in 2003, prior to the district court ruling in *Iqbal*, concluded that the overwhelming number of detainees in New York were Pakistani men and that the FBI made little effort to differentiate between detainees’ ties to terrorism versus those picked up on unrelated charges. Off. of the Inspector Gen., U.S. Dept. of Just., *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 69 (William S. Hein & Co., Inc. 2004); see Dawinder S. Sidhu, *First Korematsu and now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 *Buff. L. Rev.* \_\_\_, 11 (forthcoming 2010) (available at <http://ssrn.com/abstract=1478787>); cf. Michael C. Dorf, *Iqbal and Bad Apples* (Cornell Leg. Stud. Research Paper No. 09-025, Oct. 7, 2009) (available at <http://ssrn.com/abstract=1484978>) (arguing that *Iqbal* is consistent with the government’s now discredited contention in the Abu Ghraib scandal that the misconduct was the result of rogue, lower level officers and did not represent official policy).

132. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000); cf. Sidhu, *supra* n. 131, at 69–71 (reading *Iqbal* as rejecting the plausibility that defendants took race into consideration in promulgating the detention policy and noting that plaintiff’s proof would have been sufficient to survive summary judgment).

133. See Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 *Geo. Immigr. L.J.* 313, 339–340 (2000) (“Distinctions in federal law among aliens on the basis of their country of current nationality are not constitutionally suspect.” (citation omitted)); accord *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (upholding Presidential order that all Iranian students in the U.S. report to the INS and demonstrate the lawfulness of their presence in the country on the grounds that the order was not arbitrary and had a rational basis).

134. *But see* Michael C. Dorf, *Equal Protection Incorporation*, 88 *Va. L. Rev.* 951, 1002 n. 155 (2002) (arguing that discrimination based on nationality ought to be constitutionally suspect when based on underlying racial prejudice).

argument (apparently not asserted by these defendants)<sup>135</sup> that the government's decision on how and when to detain persons charged with immigration violations fell within the executive's plenary power over immigration and was outside of judicial scrutiny all together.<sup>136</sup>

Nevertheless, proof of the fact of Arab Muslim detention surely has a tendency to establish a race-based policy; a reasonable finder of fact would be more likely to accept that there was a race-based policy after seeing evidence of its racial impact. Accordingly, if the Court meant that plaintiff failed to set forth a plausible claim that defendants in fact deployed a race-based policy, the burden of proving plausibility has risen exponentially. Plaintiff may not have proved that policy beyond a reasonable doubt, but they surely created a reasonable inference of its existence.

The other meaning of "discriminatory intent" is one that describes a state of mind, or motive. Plaintiff's burden, under this construction, was not simply to prove that defendants ordered the use of race-based detention policy, but that they did so out of racial animus, and not for a legitimate purpose. Here, I think, the Court would have been more justified in concluding that plaintiff offered no evidence of bad intent. While Ashcroft and Mueller *might* be racists, their imposition of a race-based policy was not probative of an invidious motive in these circumstances.

The problem with that construction, however, is that courts do not typically require a plaintiff to establish an invidious motive in cases in which the government has deployed a race-based policy.<sup>137</sup> Indeed, those policies may be prohibited even where government can demonstrate a completely benign motive, as in the affirmative action cases, absent a compelling governmental interest.<sup>138</sup>

So, does that mean that Kennedy was, in fact, dismissing the case because plaintiffs failed to offer plausible evidence of a race-based policy and not because they lacked evidence of racial animus? Not necessarily. There are circumstances under which the government's use of a racial classification for investigative purposes is not necessarily considered suspect. It is clear that government cannot act on the assumption that members of a particular race share a proclivity for certain kinds of criminal activity. It would hardly support the issuance of a search warrant for the police to note that the target of the search is Italian, even if they could show that many individuals previously convicted of organized criminal activity were Italian. The "suspicion" is based on little more than a stereotype and is at the core of an illicit use of race.<sup>139</sup>

---

135. Defendant Hasty, the warden of the prison, did assert such an argument. *Hasty*, 490 F.3d at 174. He was not a party to the Supreme Court appeal. One problem with such an argument is that the conditions of confinement were not clearly related to the regulation of immigration. *Id.*; see *Wong Wing v. U.S.*, 163 U.S. 228, 233 (1896) (striking down federal immigration law subjecting Chinese citizens deemed to be in the U.S. illegally to "hard labor for a period of not exceeding one year, and thereafter removed from the United States" (citation omitted)). Although acknowledging an expansive power of the federal government to regulate immigration, the *Wong Wing* Court reasoned that the harsh conditions the immigrants were subjected to took the statute out of the immigration domain and constituted a form of punishment subject to constitutional scrutiny. *Id.* at 237-238.

136. *Hasty*, 490 F.3d at 174.

137. *Gratz*, 539 U.S. at 270; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

138. *Gratz*, 539 U.S. at 270; *Adarand Constructors*, 515 U.S. at 227.

139. See Sidhu, *supra* n. 131, at 72.

There are circumstances, however, where the government's use of race or religion as an investigatory tool is not based on a stereotype, but on some other factor that objectively correlates with those categories. In those cases, it is not at all clear that the use of race as an investigatory tool is constitutionally illegitimate or even suspect.<sup>140</sup> Indeed, there is an argument that it does not constitute use of a racial category at all.<sup>141</sup>

This, indeed, seems to be a plausible construction of Justice Kennedy's analysis in *Iqbal*. He, in effect, may have assumed the category allegedly used by the Justice Department for determining whom to detain pending investigation was "people from the same national and religious community as al Qaeda." That is the population that has the highest probability of having connections with known terrorists. The correlation of that category with Arab Muslims is merely coincidental, much in the way that using nationality might correlate with race or religion. Thus, this is a disparate impact case, not a suspect classification case, and plaintiff must plead and prove that defendants acted out of an invidious motivation in order to prevail.

A similar logic was employed in *Brown v. City of Oneonta*.<sup>142</sup> The police in that case had conducted a city-wide sweep to examine the hands of all black people in the community after the victim of an assault described the perpetrator has a young black man with a knife cut on his hand.<sup>143</sup> A civil rights claim asserted on behalf of the black residents on the city was dismissed for failure to state a claim.<sup>144</sup> Notwithstanding the undisputed fact that the police employed a race-conscious strategy, the court concluded that plaintiffs "have not identified any law or policy that contains an express racial classification."<sup>145</sup> The court's reasoning was that the state's use of race was for a rational, non-invidious reason. Race simply happened to correlate with the race-neutral justification that the perpetrator had dark skin:

Plaintiffs do not allege . . . that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black Oneonta residents be questioned whenever a violent crime is reported. In short, plaintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault—a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a

---

140. See generally Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 242–243 (1983) ("The use of race to identify a particular perpetrator . . . does not disadvantage any racial group and thus does not require strict scrutiny.").

141. See Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. Chi. Leg. Forum 163, 175–176 (2002) (discussing *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 563–564 (1976), which upheld right of Border Patrol agents to stop and question suspected illegal aliens on basis of race).

142. 221 F.3d 329 (2d Cir. 2000), cert. denied 534 U.S. 816 (2001).

143. *Id.* at 334.

144. *Id.* at 335–336.

145. *Id.* at 337.



legitimate classification within which potential suspects might be found.<sup>146</sup>

Cases like *City of Oneonta* are in significant tension with other non-invidious uses of race, such as the affirmative action cases, where the courts have held that a benign motive does not legitimate the government's employment of a racial criterion.<sup>147</sup> Even benign uses of suspect classifications must be justified by a compelling state interest.<sup>148</sup> Part of the Court's account of strict scrutiny in this context is that an apparently benign use of a racial criterion may in fact be infected by racial attitudes. As the Court stated in *Bush v. Vera*, "we subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign . . . or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification."<sup>149</sup>

Accordingly, there is something disturbingly circular about a court's decision to subject a racial classification to mere rational-relation scrutiny on the ground that the use of race was for a legitimate, non-racial reason. How did the *Oneonta* court know that race played no role in the decision to examine every black person in town? If the police would not have subjected a comparable group of white suspects to that treatment, shouldn't that invalidate the strategy, even if it were rational?<sup>150</sup>

Nonetheless, there is sufficient legal authority for treating this kind of "coincidental" use of a racial category as a disparate impact problem to cover Ashcroft and Mueller with qualified immunity. As long as there was no clearly established authority to subject this kind of policy to strict scrutiny, these defendants could not be held liable under a strict scrutiny analysis.<sup>151</sup> *Iqbal* is, of course, distinguishable from the cases in which suspects have been temporally detained for questioning on the basis of race. Mr. *Iqbal* was placed in highly restrictive and uncomfortable maximum security conditions for 150 days. A coherent equal protection approach would presumably raise the level of constitutional scrutiny with the degree of burden imposed on the victim of discrimination.<sup>152</sup> But conversely, the unprecedented national security crisis to which defendants were responding would presumably weigh heavily on the "compelling governmental interest" side of the scales. The ultimate resolution of how those factors balance cannot be said to be "clearly established."

A similar analysis suggests that, even *had* the Court employed a strict scrutiny framework, it was not "clearly established" that taking the race of individuals charged

---

146. *Id.* at 337–338; *cf. Monroe v. City of Charlottesville, Va.*, 579 F.3d 380, 389–390 (4th Cir. 2009) (affirming dismissal of the plaintiff's equal protection claim arising out of police officers asking random African-American men for DNA samples in connection with a search for a serial rapist).

147. See R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing under the Equal Protection Clause*, in *Constitutional Law Stories* 223 (Michael C. Dorf ed., 1st ed, Foundation Press 2004).

148. *Gratz*, 539 U.S. at 270.

149. 517 U.S. 952, 984 (1996).

150. *Accord Monroe v. City of Charlottesville*, 471 F. Supp. 2d 657 (W.D. Va. 2007) (finding that a policy of questioning all black suspects was unconstitutional where there was no policy of questioning all white suspects); Alschuler, *supra* n. 141, at 181–182.

151. *Cf. Farag v. U.S.*, 487 F. Supp. 2d 436, 469 (E.D.N.Y. 2008) (finding that federal officers would enjoy qualified immunity for using race as a factor in deciding whether to detain Arab airline passengers because illegality of taking race into consideration as an element of probable cause was not clearly established).

152. *Cf. Alschuler, supra* n. 141, at 265–267 (arguing that the greater the burden on targets of racial profiling, the greater the need for justification).

with immigration law violations into consideration in determining the conditions of confinement for those individuals did not serve a compelling governmental interest in the context of 9/11. The leading Supreme Court decision closest to the facts of *Iqbal* is the notorious decision in *Korematsu*<sup>153</sup> in which the Supreme Court upheld the forced relocation of thousands of Japanese Americans living in California into camps during World War II. The Court held that the use of race to identify threats to national security survived strict scrutiny under the equal protection clause.<sup>154</sup> However widely repudiated by judges, scholars, and even Congress,<sup>155</sup> that decision has never been squarely overruled by the Supreme Court<sup>156</sup> and lower court decisions do not clearly undermine the use of race as proxy for investigatory suspicion in other contexts.<sup>157</sup>

In a passage evocative of Justice Kennedy's opinion in *Iqbal*,<sup>158</sup> Justice Black insisted that notwithstanding the government's use of race to determine who should be placed in relocation camps, such a choice was based on a coherent defense strategy and did not arise out of racial animus:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire.<sup>159</sup>

Given the qualified immunity defense, even if, today, a court would be inclined to say that use of race as a proxy for suspicion of terrorism is not narrowly tailored to advance the government's interest, it would be hard to argue that defendants' *knew* that *Korematsu* was bad law for the war on terrorism.<sup>160</sup>

Thus, in light of the qualified immunity defense and the distinct possibility that using race and religion as an investigatory tool *could* be considered a compelling governmental interest in the wake of 9/11, Justice Kennedy's description of the burden of proof on plaintiffs to establish an invidious motive on Ashcroft's and Mueller's part seems correct. That is the only way that those defendants could have *clearly* violated plaintiffs' right to equal protection.

Let me make clear that I am not endorsing such a use of "racial profiling." I am not even claiming that it is legal. I am simply asserting that, for purposes qualified immunity,

153. 323 U.S. at 224.

154. Justice Black clearly applied strict scrutiny to the policy: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216.

155. See e.g. Civil Liberties Act of 1988, 50 U.S.C. § 1989(a) et seq. (1988) ("a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II" and that these actions "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership").

156. See Pamela Karlan & Richard Posner, *The Triumph of Expedience*, Harper's Mag. 31 (May 2001).

157. See generally *City of Oneonta*, 221 F.3d 329; *Faraq*, 587 F. Supp. 436; *U.S. v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) (upholding the questioning of criminal suspect when race was one element of the police's basis for the questioning).

158. Cf. Sidhu, *supra* n.131, at 74 ("The *Iqbal* Court's justification of the targeting of Arab Muslims—that the perpetrators of the 9/11 attacks were themselves Arab Muslims—mirrors the same rationalization articulated by the Court in *Korematsu* . . .").

159. *Korematsu*, 323 U.S. at 223.

160. But see Sidhu, *supra* n.131, at 75 (arguing that the wide repudiation of *Korematsu* created a clearly established constitutional prohibition on using race as a proxy for suspicion).

there was no clearly established prohibition on its use in the war on terrorism three months after the attack on the World Trade Centers.

As I suggested earlier, had the Court applied strict scrutiny rather than a rational relation test, it would have been harder for the Court to authorize dismissal under 12(b)(6) (although it may have done so post-answer pursuant to a Rule 12(c) motion for judgment on the pleadings). The defendants' justification for employing a race-based criterion would have presumably constituted an affirmative defense, and it would have been incumbent on defendants to set forth and defend such a practice. But note that qualified immunity is itself an affirmative defense, and plaintiffs are not normally required as part of their burden under Rule 8(a) to plead facts sufficient to overcome that defense.<sup>161</sup> Thus the Court was already "jumping the gun" in some sense by requiring the complaint to negate that defense at all. I suspect that had the Court applied strict scrutiny, they could have reasoned that the existence of an arguably compelling justification for defendants' actions is all that it would take to defeat plaintiff's claim. Thus, there was no need to wait for the assertion of the affirmative defense in order to determine the viability of plaintiff's claim.

#### CONFINING *IQBAL*

Whether the adage that hard cases make bad law is true, it seems in this instance that a relatively easy one was the culprit. Plaintiff's evidence of actionable wrongdoing by defendants in *Iqbal* appears much weaker than in *Twombly*, and the reasons for providing an early exit strategy to them were more compelling. A careful reading of *Iqbal* suggests three implications of the decision that ought to constrain its general application.

First, even assuming that *Iqbal* should be read as extending the reach of *Twombly* broadly, it is clear that it should have little or no impact on even similar *Bivens* actions. Had the claim in *Iqbal* been for injunctive relief, plaintiff would have faced no qualified immunity defense.<sup>162</sup> That, in turn, would have fundamentally altered his burden of proof. Similarly, had the plaintiff been asserting anything other than a discrimination claim, the defendants' state of mind would have been far less relevant. Thus, had the plaintiff asserted a valid due process<sup>163</sup> or Eighth Amendment claim, defendants would have been liable for their imposition of illegal policies regardless of their intent (assuming that defendant's behavior violated a clearly established legal obligation).

Second, notwithstanding the fact that Justice Kennedy teased apart the requirement of plausibility from the prohibition on conclusory allegations, the case need not be read to imply that courts ought to generally scrutinize pleadings for plausibility. The Court

---

161. See Fed. R. Civ. P. 8(a); *Crawford-El*, 523 U.S. at 586–587 (qualified immunity is an affirmative defense that does not need to be negated in order for a complaint to state a claim).

162. See *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 734 (1980) (suggesting that executive officers have no immunity in actions for prospective relief).

163. See *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (sustaining 1st, 4th and 5th Amendment claims brought against Attorney General Ashcroft in his personal capacity for establishing a policy of detaining citizens under the material witness statute without evidence of criminal wrongdoing); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (denying motion to dismiss by former Justice Department attorney who had authored memoranda authorizing the Bush administration's detention and treatment of enemy combatants).

reiterates the principle that averments of fact must be accepted as true.<sup>164</sup> Thus, where a plaintiff has averred direct evidence of wrongdoing, courts are obligated to accept the truth of those allegations. Courts should scrutinize only inferential averments of evidence for plausibility.<sup>165</sup>

And third, *Iqbal* need not be read as establishing a uniform standard of “plausibility” for testing the sufficiency of all conclusory allegations under Rule 12(b)(6). Even though the *Iqbal* Court construed *Twombly* as a construction of Rule 8 applicable to all civil actions and not limited to antitrust litigation,<sup>166</sup> the Court does not state that there is a *uniform* standard of factual sufficiency under Rule 8. Indeed, the Court acknowledged that “plausibility” was, of necessity, a highly context-dependent judgment: “Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>167</sup>

The Court of Appeals in *Iqbal*, while sustaining the denial of defendants’ motion to dismiss, read *Twombly* as providing a “flexible plausibility standard[:]”

After careful consideration of the Court’s opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.<sup>168</sup>

The Supreme Court expressly acknowledged that reading of *Twombly*,<sup>169</sup> but it never disavowed it. The closest the Court comes to rejecting a flexible standard was its statement “that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.”<sup>170</sup> This might be read to imply that the requirement of pleading with sufficient specificity to survive a Rule 12(b)(6) motion has no connection to the cost of letting the parties proceed to discovery. But the Court’s rationale for rejecting discovery management as an adequate substitute for pleading specificity in both *Twombly* and *Iqbal* was that discovery management does not work:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>171</sup>

In fact, the only aspect of the Court of Appeals’ reasoning that the Supreme Court took issue with was the lower court’s conclusion that these defendants’ could be

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

165. Cf. Steinman, *The Pleading Problem*, *supra* n. 8, at 5 (“As long as a complaint contains non-conclusory allegations for every element of a claim for relief, it passes muster regardless of whether the judge might label the allegations implausible.”).

166. *Iqbal*, 129 S. Ct. at 1953.

167. *Id.* at 1950.

168. *Hasty*, 490 F.3d at 157–158.

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

170. *Id.* at 1953.

171. *Id.* at 1953 (quoting *Twombly*, 550 U.S. at 559).

adequately protected by limited discovery and the opportunity for an early summary judgment determination.<sup>172</sup>

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.<sup>173</sup>

In other words, the special circumstances of qualified immunity in *Iqbal* made it particularly appropriate for the trial court to identify factual sufficiency in the complaint.<sup>174</sup> In both *Twombly* and *Iqbal* there were special circumstances that put greater pressure on the Court to provide an early exit opportunity for the defendant, and the Court expressly acknowledged those pressures. In *Twombly* it was the unmanageability of discovery in complex litigation; in *Iqbal*, it was the demands of the qualified immunity doctrine to extricate a high government official from the burden of litigation. In these circumstances, there was a greater need for the courts to scrutinize the strength of any proffered inferences.

Under this reading, “plausibility” is a term of flexible meaning that varies not only with the Court’s intuitions about a plaintiff’s likelihood of success, but with the necessity of making that determination prior to discovery. Thus, where there is a less compelling need to make an early determination of factual sufficiency, courts ought to be more tolerant of the proffered inference. Purely conclusory allegations should never suffice, but in some cases the courts should accept an inference that has a lesser tendency to establish to truth of the matter than in other cases. In other words, on a scale ranging from “possible” to “probable,” the courts in some cases should accept evidence suggesting something closer to possibility (a weak inference), and in other require the evidence to establish something closer to probability (a strong inference).<sup>175</sup>

Take for example the pharmaceutical hypothetical I posited in my discussion of *Twombly*. Plaintiff alleges that he has been injured by defendant’s drug and that defendant failed to warn of that injury, a fact which was known to them prior to marketing the drug. The plaintiff is implicitly asking the court to draw two inferences essential to his case: that his injury was caused by the drug and that defendant was aware of that risk. However, lots of people who never took defendant’s drug suffer the injury that plaintiff suffered, suggesting that his injury after ingesting the drug might well be a coincidence. And despite even thorough testing, it is quite possible that plaintiff’s drug reaction had never been reported before. A skeptical judge might therefore be tempted to

---

172. *Iqbal*, 129 S. Ct. at 1953.

173. *Id.* at 1954.

174. *Id.* at 1953.

175. *Accord* Effron, *supra* n. 35, at 21 (“Lower courts already have begun to use the cost of litigation aspect of *Twombly* to justify the application of a heightened pleading standard by noting that discovery costs were high in comparison to the plausibility of the allegations in the complaint.”); *cf.* Keith Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 S. Ct. Econ. Rev. 39, 42–54 (2008); *Smith v. Duffy*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.) (suggesting that both *Twombly* and *Iqbal* were the products of special circumstances not present in this case, “[s]o maybe neither *Twombly* nor *Iqbal* governs here.”).

find the proffered inferences implausible. In such a case, a flexible plausibility standard suggests that the judge should be less skeptical, and more open to the inferences, at least in the absence of compelling reasons why deferring factual scrutiny until summary judgment would be unfair.

The biggest obstacle to this understanding of plausibility is that it would represent the imposition of heightened burden of pleadings in particular categories of cases, an approach arguably outlawed by the Court's decisions in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*<sup>176</sup> and *Swierkiewicz v. Sorema N.A.*<sup>177</sup> The Court in those cases held that it is inappropriate for courts to single out particular categories of cases for a heightened pleading standard.<sup>178</sup> *Leatherman* curtailed the practice of requiring heightened pleading in Civil Rights cases<sup>179</sup> and *Swierkiewicz* did the same for Title VII complaints.<sup>180</sup> Any such differential treatment must be authorized by the rule-making process, not by judge-made exceptions.<sup>181</sup> The irony of having those cases serve to expand *Twombly* is that both cases were designed to protect plaintiffs from being singled out for a heightened pleading burden. They achieved equality by lowering the ceiling; their use in this context would be to achieve equality by raising the pleading floor.<sup>182</sup>

I must admit to having a “tail wagging the dog” reaction to such an argument: do we really need to raise the burden of pleading on everyone in order to redress a compelling need to determine factual sufficiency in a small number of cases? It seems like a foolish consistency. The deeper lesson of *Leatherman* is that courts should not rewrite the Federal Rules of Civil Procedure without the constraints of the rule-making process. The Court seems to have violated that injunction in *Twombly*. It would only compound that mistake if the Court were to require the new standard to apply to

176. 507 U.S. 163 (1993).

177. 534 U.S. 506 (2002).

178. *Swierkiewicz*, 534 U.S. at 513; *Leatherman*, 507 U.S. at 168–169.

179. *Leatherman*, 507 U.S. at 168.

180. *Swierkiewicz*, 534 U.S. at 164.

181. *Leatherman*, 507 U.S. at 168.

182. A similar floor-raising strategy is evident in the Court's treatment of Fed. R. Civ. P. 9 in *Iqbal*. *Iqbal*, 129 S. Ct. at 1954. Rule 9 requires that in averring certain enumerated matters, a pleader must aver those matters “with particularity.” See e.g. Rule 9(c) (requiring denials that a condition precedent has occurred be stated “with particularity”); Rule 9(g) (requiring that special damages “be specifically stated”). The problem for the Court in *Iqbal* was that not only is intent not on the list of matters that must be stated with particularity, but Rule 9(b) specifically exempts such allegations from such a heightened pleading requirement: “[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” Nonetheless, the Court held that plaintiff's averment of defendants' intent to discriminate was not stated with sufficient specificity to survive a 12(b)(6) challenge. *Iqbal*, 129 S. Ct. at 1954.

The Court reasoned that it was not subjecting that averment to heightened scrutiny. *Id.* Rather, it was enforcing the requirement of Rule 8(a) that a complaint set forth a “statement of the claim showing that the pleader is entitled to relief.” *Id.* In other words, all averments of a complaint must set forth a plausible basis; those matters that require pleading with greater specificity under Rule 9 require a pleader to go even further in specifying the basis for those averments. Ironically, the Court has not imposed particularly onerous pleading requirements on plaintiffs stating certain statutory claims that must be plead with specificity. See e.g. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). (to satisfy the requirements of the Private Securities Litigation Reform Act that complaints must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind,” a pleading must simply allege facts from which a reasonable jury was at least as likely to infer a culpable state of mind as an innocent state of mind); cf. Stephen B. Burbank, *Pleading and the Dilemmas of General Rules*, 2009 Wis. L. Rev. 535, 551–552 (suggesting that *Twombly* can be read to impose more demanding pleading standards than that imposed under PSLRA).

everyone in order to pretend that the standard in *Twombly* was not changed.

The best answer to the uniformity challenge, I think, is that the uniformity required by *Leatherman* and *Swierkiewicz* is an illusion.<sup>183</sup> The courts must, and in fact do, distinguish the level of specificity required in a complaint depending on many variables. Even after *Leatherman* and *Swierkiewicz*, some courts demanded that various aspects of antitrust,<sup>184</sup> civil rights,<sup>185</sup> copyright,<sup>186</sup> defamation,<sup>187</sup> and environmental<sup>188</sup> claims be stated with greater specificity than was required in simple negligence actions. And even post-*Twombly* the Court reiterated its commitment to notice pleading and, in *Erickson v. Pardus*, accepted uncritically conclusory assertions by plaintiffs.<sup>189</sup> As the Second Circuit recognized, the best account of that apparent inconsistency is that the plausibility standard established by *Twombly* is, in fact, a flexible one. Only in exceptional cases should it require courts to engage in serious factual scrutiny.

---

183. Professor Fairman convincingly demonstrated this reality well before *Twombly* and *Iqbal*. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 *Ariz. L. Rev.* 987 (2003) [hereinafter Fairman, *Myth*]; Christopher M. Fairman, *Heightened Pleading*, 81 *Tex. L. Rev.* 551 (2002); see e.g. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (plaintiff in securities fraud case must allege how his economic loss was caused by defendant's alleged fraud; mere allegation that he paid an "artificially inflated purchase price" does not provide defendant with sufficient "notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation . . .").

184. See Fairman, *Myth*, *supra* n. 183, at 1013–1021.

185. See *id.*, at 1028–1032; *Judge v. City of Lowell*, 160 F.3d 67, 72–73 (1st Cir. 1998); *Blue v. Koren*, 72 F.3d 1075, 1082–1083 (2d Cir. 1995).

186. See Fairman, *Myth*, *supra* n. 183, at 1036–1042.

187. *Id.* at 1042–1047.

188. *Id.* at 1021–1027.

189. *Erickson*, 551 U.S. at 93–94.