

## KEEP CALM AND PLEAD ON: WHY NEW EMPIRICAL EVIDENCE SHOULD TEMPER FEARS ABOUT PLEADING PLAUSIBILITY

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### I. INTRODUCTION

In the years since the Supreme Court decided *Bell Atlantic v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*,<sup>2</sup> the Court's unexpected take on pleading led a majority of civil proceduralists to treat these decisions with apprehension and disappointment.<sup>3</sup> Most considered the decisions a drastic departure from a century of precedent in favor of liberal notice-pleading standards that threatened to close the gates of justice to many meritorious, if inexactly pleaded, claims.<sup>4</sup> On the other hand, those that agreed with the decisions felt that they constituted a much needed check on wasteful litigation and expensive discovery battles based on no more than the most speculative of legal theories.<sup>5</sup>

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<sup>1</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>2</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>3</sup> See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

<sup>4</sup> See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (criticizing "plausibility" pleading and its effect on civil actions in general and civil rights cases in particular, where informational inequities abound).

<sup>5</sup> See, e.g., Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1091-92 (2009) ("Twombly must be viewed as part of a broader trend in which the Court recognizes the importance of imposing real and meaningful judicial scrutiny at the pleading stage, particularly as cases become more costly and complex to

Rarest of all are the commentators that predicted a tempered application of the cases' "plausibility" language.<sup>6</sup> This Comment aligns itself with this small group by focusing on recent empirical studies and case law surveys that show how little has changed since *Twombly* and *Iqbal*.

Perhaps it is best at the outset to say what this Comment does not do. This Comment does not take a position on whether the Supreme Court was right to make its changes in the two decisions. That is for another publication, and indeed, tomes could be made from the many articles written on the topic. Instead, this Comment has two main goals: first, to synthesize and analyze the most recent empirical data on the current state of pleading, which led to the conclusion that *Twombly* and *Iqbal* did not cause the much-feared seismic shift to pleading that many predicted; and second, to suggest reasons for these unexpected results. The goal of this Comment is to plan the appropriate next steps for pleading standards given the much needed, tempered reevaluation put forth below.

Part II of this Comment will explain the Supreme Court's decisions in *Twombly* and *Iqbal*. Beginning with *Twombly*, the first of the two to go before the Court, this Part will address the Court's attempt to effect change in the standard for sufficient pleading under Federal Rule of Civil Procedure 8 (Rule 8)—that is, in relevant part, that a complaint must now satisfy a "plausibility" standard. Part II will then go on to explain how the Court's decision in *Iqbal* solidified that standard's place in federal civil trials. Part III will draw from representative sets of academic, judicial, and legislative materials published in the wake of *Twombly* and *Iqbal* that express deep concern over, and confusion about, the decisions. By a significant measure, these voices represent the majority in the legal community. Part IV summarizes and synthesizes empirical studies conducted by the Federal Judicial Center, the Advisory Committee on Civil Rules, and a case law survey conducted by Andrea Kuperman, the Advisory Committee Clerk. Taken together, these Reports show that civil complaints are not affected by motions to dismiss any more than they were in the years leading up to *Twombly*. Finally, Part V will argue that the courts, collectively, are applying a tempered interpretation of

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litigate.”).

<sup>6</sup> See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010) (“Rather than decrying *Twombly* as a radical departure and seeking to overturn it, this Article instead emphasizes *Twombly*'s connection to prior law and suggests ways in which it can be tamed.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

*Twombly* and *Iqbal* and will suggest common trends among the circuit courts for applying “plausibility.” It will then suggest that these under-utilized findings demand more attention than they are currently receiving, and that the case law shows a consistency of application that future breaks from precedent or rule amendments would only upset.

## II. THE EMERGENCE OF PLAUSIBILITY: *TWOMBLY* & *IQBAL*

### A. *Conley v. Gibson*<sup>7</sup>

In 1957, the Supreme Court addressed the standards for sufficient pleading under Rule 8.<sup>8</sup> Although not the first case before the Court concerning pleading standards, *Conley v. Gibson* introduced the paradigmatic “no set of facts” language that would guide procedural precedent for decades to come.<sup>9</sup>

*Conley* involved a labor relations suit brought under the Railway Labor Act by African-American rail workers against their national union, its local branch, and the officers of both.<sup>10</sup> Facing allegations that they failed to adequately represent their African-American members against discriminatory firings, the union defendants raised a successful motion to dismiss at the trial level, which the Fifth Circuit affirmed.<sup>11</sup> Writing for the Court, however, Justice Black reversed the ruling, noting the following:

In appraising the sufficiency of the complaint we follow, of

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<sup>7</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>8</sup> Fed. R. Civ. P. Rule 8(a) reads:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

The Federal Rules were promulgated in 1938, largely in response to the perceived flaws inherent in previous pleading regimes: English common law pleading, with its writ system and issue pleading; and code pleading, which, in the United States, replaced the common law approach with fact pleading and recognized the civil action. See Peter Julian, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality”*, 104 Nw. U. L. Rev. 1179, 1184–87 (2010).

<sup>9</sup> *Conley*, 355 U.S. at 45; see Smith, *supra* note 5, at 1069 (describing the language from *Conley* as a “longstanding interpretation of the Federal Rules”).

<sup>10</sup> *Conley*, 355 U.S. at 42–43.

<sup>11</sup> *Id.* at 42–44.

course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.<sup>12</sup>

The opinion continued:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.<sup>13</sup>

Relying on that proposition, the Court ruled in the plaintiffs’ favor.<sup>14</sup>

From a substantive perspective, the decision was just one piece in the larger push for justice in the civil rights era.<sup>15</sup> From a procedural scope, though, *Conley* was one of the most pivotal cases of the twentieth century, and the Court’s “no set of facts” language was fundamental to the modern understanding of pleading.<sup>16</sup> Over the next half-century, the decision was one of the most frequently quoted procedural expressions, and many considered it to be the embodiment of the Federal Rules’ commitment to liberal pleading standards.<sup>17</sup>

#### B. *Bell Atlantic v. Twombly*

Coming before the Court in late 2006, *Bell Atlantic v. Twombly* presented the high court justices with the opportunity to address pleading standards for one of the first times since *Conley*—this time, in an antitrust context.<sup>18</sup> William Twombly and Lawrence Marcus represented a putative class consisting of local telephone and high-speed Internet service subscribers against a group of Incumbent Local Exchange Carriers (ILECs).<sup>19</sup> As the opinion explains, ILECs made up a system of regional service monopolies that resulted from the 1984 divestiture of AT&T’s local telephone business.<sup>20</sup> ILECs

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<sup>12</sup> *Id.* at 45–46 (emphasis added).

<sup>13</sup> *Id.* at 47 (quoting Fed. R. Civ. P. 8(a)(2)).

<sup>14</sup> *Id.* at 48.

<sup>15</sup> Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of Conley v. Gibson*, 52 *How. L.J.* 1, 6–7 (2008).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 1–2.

<sup>18</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>19</sup> *Id.* at 550.

<sup>20</sup> *Id.* at 549.

enjoyed their regional monopolies until the Telecommunications Act of 1996, which obligated ILECs to share their networks with competitors, known as competitive local exchange carriers (CLECs).<sup>21</sup>

Under two circumstantial theories, the plaintiffs alleged violations of Section 1 of the Sherman Act,<sup>22</sup> a federal law that prohibits businesses from engaging in certain types of anticompetitive conduct.<sup>23</sup> First, the complaint alleged that the ILECs engaged in parallel business behavior in their respective regions against CLECs that frustrated and sabotaged the CLECs' operations so as to inhibit their growth.<sup>24</sup> Second, it alleged that the ILECs agreed not to compete with each other, as inferred from their common failure to pursue appealing business opportunities in neighboring markets.<sup>25</sup> The Supreme Court granted certiorari after the Southern District of New York and the Second Circuit disagreed over whether the allegations met the standard for factual sufficiency and could survive a motion to dismiss.<sup>26</sup>

Justice Souter, writing for the seven-member majority, reversed the Second Circuit's denial of the motion to dismiss and strongly addressed the Court's Rule 8 precedent.<sup>27</sup> Over Justice Stevens' forceful dissent, Justice Souter took a hardline approach to *Conley's* "no set of facts" language that, in the Justice's view, "has been questioned, criticized, and explained away long enough."<sup>28</sup> The opinion locates this criticism's source in *Conley's* lenient language that, if read literally, would allow wholly conclusory statements to survive a motion to dismiss and, essentially, allow plaintiffs to engage in expensive discovery fishing expeditions. Courts, the majority contended, have read *Conley* as pleading guidelines, rather than

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<sup>21</sup> *Id.* (citations omitted).

<sup>22</sup> *Id.* at 550; see Sherman Act, 15 U.S.C. § 1 (2006) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

<sup>23</sup> *Twombly*, 550 U.S. at 550.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 551.

<sup>26</sup> *Id.* at 552–53. The District Court dismissed the complaint, holding that parallel business conduct was insufficient on its own to state a claim under § 1 and adding that the plaintiff needed to plead additional factual allegations that tended to exclude the ILECs' independent self-interest as an explanation. *Id.* at 552 (citing *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003)). The Second Circuit reversed, holding that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive." *Id.* at 553 (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)) (emphasis in original).

<sup>27</sup> *Twombly*, 550 U.S. at 570.

<sup>28</sup> *Id.* at 562.

applying its literal requirements.<sup>29</sup> As such, Justice Souter goes on to write in no uncertain terms, “after puzzling the profession for 50 years, this famous observation has earned its retirement.”<sup>30</sup>

In its place, the Court adopted what appeared to be a “plausibility” requirement.<sup>31</sup>

The majority organized the Court’s Rule 8 precedent as follows:

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 . . . .<sup>32</sup>

As to how far above the speculative level factual allegations must reach, the opinion answered—in what seemed to be exclusively the antitrust context—by asking for *plausible* grounds to read an anti-competitive agreement into a complaint.<sup>33</sup> It then noted, though, “we do not require heightened fact pleading on specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>34</sup> With its opinion, the majority changed the direction of its pleading jurisprudence, but the scope of this redirection was not entirely clear.

The entire Court did not view this redirection favorably. Justice Stevens, with whom Justice Ginsburg joined in three of four parts, wrote a pointed dissent, calling Justice Souter’s opinion a “dramatic departure from settled procedural law.”<sup>35</sup> The crux of the dissent flowed from the historical motivations behind Rule 8 and *Conley*’s

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<sup>29</sup> *Id.* (“[A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.”) (collecting cases).

<sup>30</sup> *Id.* at 563. To add to the confusion this decision created, two weeks after Justice Souter “retired” *Conley*’s language, the Court seemed to reaffirm the standard that *Conley* represented in *Erickson v. Pardus*, 551 U.S. 89 (2007). In that case, the Court, quoting both *Twombly* and *Conley*, wrote, “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Id.* at 93 (internal quotation marks omitted). This apparent inconsistency led several courts to question whether *Twombly* did, in fact, abrogate *Conley* to the extent many predicted. See, e.g., *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir. 2010) (“*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2).”).

<sup>31</sup> See *Twombly*, 550 U.S. at 556.

<sup>32</sup> *Id.* at 555 (alteration in original) (citations omitted).

<sup>33</sup> *Id.* at 570.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 573 (Stevens, J., dissenting).

connection to notice pleading's history.<sup>36</sup> *Conley's* language, Justice Stevens wrote, "captures the policy choice embodied in the Federal Rules and binding on the federal courts."<sup>37</sup> In his view, the policy choice was to rework the procedural system from a stringent code-pleading standard riddled with procedural pitfalls to a notice-pleading system, which made it easier for plaintiffs to get their day in court.<sup>38</sup> According to the dissent, the majority opinion's call for the pleading of facts was antithetical to this choice.<sup>39</sup> Even worse, the majority's reading of *Conley* "express[es] an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate."<sup>40</sup> Justice Stevens argued that the majority was rewriting the federal pleading rules when the case's resolution did not require that and, further, did so outside of the deliberative procedures that the federal courts have for making such a change.<sup>41</sup> Ultimately, Justice Stevens viewed "plausibility" as a new heightened and misguided pleading standard.<sup>42</sup>

### C. *Ashcroft v. Iqbal*

Two years later, in *Ashcroft v. Iqbal*, the Court made its intentions in *Twombly* more explicit and elaborated how Rule 8 sufficiency-of-pleading issues should be addressed in the future. John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI), petitioned the Supreme Court after the Second Circuit affirmed the denial of their motion to dismiss Javaid Iqbal's complaint.<sup>43</sup> Iqbal, a Muslim and a citizen of Pakistan, was arrested in the United States as part of a large investigation relating to the September 11th terrorist attacks and was held in custody as a "high interest" detainee.<sup>44</sup> After deportation pursuant to his guilty plea, Iqbal brought suit against a bevy of federal officials, alleging deprivations of his constitutional

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<sup>36</sup> *Id.* at 573–77. The intent-of-the-rules-drafters argument in Stevens' dissent was adopted by many critics of the decision. *See infra* note 81 and accompanying text.

<sup>37</sup> *Twombly*, 556 U.S. at 583 (Stevens, J., dissenting).

<sup>38</sup> *Id.* at 579.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 580.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 582.

<sup>43</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

<sup>44</sup> *Id.* at 666–67. "High-interest" detainees were held under the most restrictive conditions allowable in federal prisons, which prevented these detainees from communicating with the general prison population. *Id.* at 667–68.

rights during his detainment.<sup>45</sup> As to Ashcroft and Mueller, the complaint alleged that Iqbal's harsh confinement was the result of an unconstitutional policy that the two men adopted on account of his race, religion, or national origin.<sup>46</sup>

Justice Kennedy, delivering the opinion of the Court, reversed the Second Circuit's decision and held that Iqbal's pleadings were insufficient.<sup>47</sup> The issue called on the Court to address ambiguities in its *Twombly* decision. Returning to that opinion, Justice Kennedy derived a two-step process from Justice Souter's earlier analysis for determining a complaint's sufficiency under Rule 8: first, the court need not accept as true any allegations contained in the complaint that are merely legal conclusions; second, sufficient complaints must state a plausible claim for relief.<sup>48</sup>

As to the first working principle, Justice Kennedy read out of *Twombly* that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."<sup>49</sup> The Justice added, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."<sup>50</sup> The court must weed through a complaint, searching for its "nub"—the well-pleaded, nonconclusory factual allegations—and isolate those for a determination of their sufficiency.<sup>51</sup> As to the second principle, the court will determine a complaint's sufficiency by assessing whether the claims have been nudged "across the line from conceivable to plausible."<sup>52</sup> This "context-specific task" that draws on "judicial experience and common sense" requires enough well-pleaded facts to "permit the court to infer more than the mere possibility of misconduct."<sup>53</sup>

The allegations in Iqbal's complaint, according to the majority that did not include Justice Souter, failed to nudge across the line to plausibility.<sup>54</sup> As per the first step, the majority engaged in the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 666.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 678–79.

<sup>49</sup> *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

<sup>50</sup> *Id.* at 678–79.

<sup>51</sup> *Id.* at 680 (citing *Twombly*, 550 U.S. at 565–66).

<sup>52</sup> *Id.* (citing *Twombly*, 550 U.S. at 570).

<sup>53</sup> *Id.* at 679 (citation omitted).

<sup>54</sup> *Id.* at 680. Justice Kennedy's opinion was joined by Chief Justice Roberts and

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weeding-out process by separating the conclusory from the nonconclusory allegations. The majority labeled Iqbal's allegations that Ashcroft was "the principal architect' of [this] invidious policy" and that he "knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh . . . confinement ' . . . solely on account of [his] religion, race, and/or national origin,'" as nothing more than "formulaic recitations of the elements" of a constitutional discrimination claim and thus could not be accepted as true.<sup>55</sup> Next, the Court isolated and assessed the remaining nonconclusory allegations that were entitled to assumptions of truth.<sup>56</sup> Those allegations stated:

[T]he [FBI] under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11. . . . [and] [t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.<sup>57</sup>

The question, as per the second step, was whether these nonconclusory allegations were plausible, and not merely conceivable. The majority accepted as true the allegation that Arab Muslim men were being detained, and Ashcroft and Mueller approved of the policy.<sup>58</sup> Nonetheless, although these allegations were consistent with petitioners' theory of an unconstitutional discriminatory policy, the Court held Iqbal's claims to be implausible in light of "more likely explanations."<sup>59</sup> The Court found an obvious alternative explanation whereby anybody involved with the Arab Muslim September 11th perpetrators would likely also happen to be Islamic Arabs.<sup>60</sup> To the majority, it was 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 [constitutionally permissible] disparate, incidental impact on Arab

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Justices Scalia, Thomas, and Alito. Interestingly, Justice Souter, who penned the *Twombly* decision, filed a dissenting opinion here, in which Justices Stevens, Ginsburg, and Breyer joined. *Id.* at 665.

<sup>55</sup> Ashcroft v. Iqbal, 556 U.S. 662, 680–81 (2009) (quoting the complaint).

<sup>56</sup> *Id.* at 681.

<sup>57</sup> *Id.* (quoting complaint) (internal citations omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Muslims.”<sup>61</sup> Interestingly, though, the majority acknowledged that if they were required to read the allegation as true, the complaint would survive the motion to dismiss.<sup>62</sup> Therefore, the Court concluded that, under *Twombly*’s standard, the complaint failed to “nudge Iqbal’s claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”<sup>63</sup>

Conversely, the dissenting Justices, led by Justice Souter, considered these allegations to be outside the realm of mere legal conclusions when read in the appropriate context of the full complaint.<sup>64</sup> While Justice Souter agreed that the two statements singled out by the majority do not state a plausible entitlement to relief, “[t]he fallacy of the majority’s opinion . . . lies in looking at the relevant assertions in isolation.”<sup>65</sup> Had it read the complaint holistically, giving due attention to the subsidiary allegations, the majority would not have been left with merely these two statements.<sup>66</sup> According to Justice Souter, the majority had improperly isolated the parts of the complaint that list the elements of the claim and labeled them as bare conclusions. Yet Iqbal’s complaint goes beyond merely a formulaic recitation of the elements of a constitutional discrimination claim because the elements are preceded by a description of “a particular, discrete, discriminatory policy detailed in the complaint.”<sup>67</sup> Taking the complaint as a whole, the allegations should have been assumed true.<sup>68</sup> Furthermore, the allegations were plausibly true, and not merely consistent with illegal conduct.<sup>69</sup> The dissent stated that, contrary to the conduct in *Twombly*, which was “consistent with conspiracy, but just as much in line with” rational business strategy, here Iqbal’s allegations of discriminatory policy and Ashcroft’s knowledge and deliberate indifference could not be consistent with legal conduct.<sup>70</sup> As such, the complaint should have

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<sup>61</sup> *Iqbal*, 556 U.S. at 682.

<sup>62</sup> *Id.* at 686 (“Were we required to accept this allegation as true, respondent’s complaint would survive petitioners’ motion to dismiss. But the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.”).

<sup>63</sup> *Id.* at 680 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

<sup>64</sup> *Id.* at 696–97 (Souter, J., dissenting).

<sup>65</sup> *Id.* at 698.

<sup>66</sup> *Id.*

<sup>67</sup> *Iqbal*, 556 U.S. at 698.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 696.

<sup>70</sup> *Id.* at 696–97.

been deemed plausible on its face.<sup>71</sup>

Plainly, the *Iqbal* Court's attempt to address the ambiguities in *Twombly* was not very successful. The majority did respond to several arguments that attempted to define the decision's scope. First, answering Justice Stevens' question in *Twombly*, the Court refused to limit its decision in that case to pleadings made in the antitrust context, noting that *Twombly* was based on the Court's interpretation and application of Rule 8.<sup>72</sup> Second, the trial court's case management and discovery controls do not temper the application of the plausibility standard, even in cases like *Iqbal*'s where the trial judge made clear his desire to limit discovery for the petitioners.<sup>73</sup> But as Justice Souter's dissent illustrates, the application of a "plausibility standard" was still somewhat nebulous, especially considering the Justice's belief that the majority "misapplie[d] the pleading standard" that he penned in *Twombly*.<sup>74</sup> The end result was two decisions that attacked head-on over a half-century of procedural precedent and created additional problems that were not fully reconciled.

### III. THE SUBSEQUENT PANIC: RESPONDING TO *TWOMBLY* AND *IQBAL*

While *Twombly* and *Iqbal* left significant procedural questions hanging in the air, it opened the floodgates to a legal community in search of answers. Yet, as is the case with most legal ambiguities, answers were not easy to come by.<sup>75</sup> The lingering uncertainty about proper pleading standards and access to courts bred anxiety among legal scholars,<sup>76</sup> the judiciary,<sup>77</sup> commentators,<sup>78</sup> and practitioners<sup>79</sup>

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<sup>71</sup> See *Id.* at 696–97.

<sup>72</sup> *Id.* at 684.

<sup>73</sup> *Iqbal*, 556 U.S. at 684–85.

<sup>74</sup> *Id.* at 688 (Souter, J., dissenting).

<sup>75</sup> See, e.g., *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) ("We are not alone in finding the opinion confusing.") (citing *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007)).

<sup>76</sup> See sources cited *supra* note 3.

<sup>77</sup> In fact, not long after *Iqbal*, Justice Ginsberg publically remarked: "[i]n my view, the [*Iqbal*] Court's majority messed up the Federal Rules." Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., Remarks for Second Circuit Judicial Conference (June 12, 2009), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_06-12-09.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_06-12-09.html).

<sup>78</sup> See, e.g., Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10. This article, which read *Iqbal* as "mak[ing] it much easier for judges to dismiss civil lawsuits right after they are filed," quotes Thomas C. Goldstein, an appellate lawyer with Akin Gump Strauss Hauer & Feld in Washington: "*Iqbal* is the most significant Supreme Court decision in a decade for

alike. When the legal community published on the issue, fear and panic became the common theme.

The overarching concern is that the Supreme Court's decisions regress pleading standards to the earlier, painfully strict fact or code pleading process.<sup>80</sup> *Twombly* and *Iqbal* signaled for many critics a move away from the simplicity for which Rule 8 asked—a move that they believe was not intended by the Rule's drafters.<sup>81</sup> The drafters' intentions, critics often mention, were guided by two procedural decisions: to reshape civil litigation to allow more access to courts and to promote a complaint's adjudication based on its merits, rather than to require dismissal for mere procedural slip-ups.<sup>82</sup> Such priority changes brought about by the Federal Rules were guided by the philosophy that justice could only be served by allowing citizens to fully enforce their rights.<sup>83</sup> This concept echoed the baseline democratic tenet upon which civil rights, distributive justice, and equal opportunity rested.<sup>84</sup> Thus, many critics fear that a "plausibility" standard attacks the most basic policy goals that Rule 8 seeks to protect.

Fearing that the Rule's fundamental principles were under attack, the backlash was powerful. One author wrote, "[t]he Supreme Court should put a notice on all federal courthouse doors: STOP- ENTRANCE BY INVITATION ONLY!"<sup>85</sup> Another stated

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day-to-day litigation in the federal courts." *Id.*

<sup>79</sup> See Vince Warren on Access to Justice in Federal Courts (NYU Law), CCRJUSTICE.ORG, <http://ccrjustice.org/learn-more/videos/vince-warren-access-justice-federal-courts-new-york-university-school-law> (Jan. 2010).

<sup>80</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20 (2010) ("[T]he pleading requirement has become one of notice-plus. In reality, that is a form of fact pleading by another name."). In many ways, this baseline principle is guided by, and sometimes merely reiterates, Justice Stevens' dissent in *Twombly*. *C.f.* Clermont & Yeazell, *supra* note 3, at 832–33 (arguing that the Court did not readopt fact pleading, but created an unprecedented test for "factual convincingness").

<sup>81</sup> Miller, *supra* note 80, at 19 ("By establishing plausibility pleading, *Twombly* and *Iqbal*, have transformed the function of a complaint from *Conley*'s limited role by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended."); see also Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) ("[T]he Court's new standard is a direct challenge to the liberal ethos of the Federal Rules.").

<sup>82</sup> See Miller, *supra* note 80, at 4–5; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 956–61 (1987).

<sup>83</sup> Miller, *supra* note 80, at 5.

<sup>84</sup> *Id.*

<sup>85</sup> David A. Green, *Friend or Foe: The Supreme Court's "Plausible Claim" Standard*

tersely, “notice pleading is dead,” adding that the Court’s decision was “an unwarranted interpretation of Rule 8.”<sup>86</sup> Yet another portended that the Court’s “brave new procedural world,” if adopted by the lower courts, would lead to “a procedural revolution,” and that the Court invented a “new and foggy test” for judging the sufficiency of a complaint that has “destabilized the entire system of litigation.”<sup>87</sup> These critics’ voices found support in nascent statistical studies which suggested that their nightmares were becoming reality, as rates of granting motions to dismiss appeared to rise.<sup>88</sup>

Branching from this core philosophical concern were voices within specific substantive areas that feared significant frustration of claimants. The most vociferous opponents emerged from civil rights<sup>89</sup> and labor and employment<sup>90</sup> litigation areas. In these areas, critics lamented the added power these decisions gave to federal trial judges, whom some scholars and practitioners already believed to be making pleading very burdensome for plaintiffs.<sup>91</sup> This was a response, no doubt, to the lack of clarity in *Twombly* and *Iqbal*, and the hypothetical scenarios in which civil rights plaintiffs do not have the necessary information at hand to survive a 12(b)(6) motion are

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*Provides Another Barrier for Plaintiffs in Employment Discrimination Cases*, 39 S.U. L. REV. 1, 1 (2011) (emphasis in original).

<sup>86</sup> Spencer, *supra* note 81, at 431, 433.

<sup>87</sup> Clermont & Yeazell, *supra* note 3, at 823, 838.

<sup>88</sup> By 2010, these studies suggested a greater frequency of dismissal under *Twombly* and *Iqbal* than under *Conley*. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (finding that after *Conley*, *Twombly*, and *Iqbal*, respectively, Rule 12(b)(6) motions were increasingly granted); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010) (finding dismissals increased from 54.2 percent to 64.6 percent in disability cases after *Twombly*); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009) [hereinafter Seiner, *The Trouble with Twombly*] (finding a higher rate of dismissals in Title VII cases after *Twombly*); but see Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (stating that *Twombly* has had “almost no substantive impact” except in civil rights cases).

<sup>89</sup> See, e.g., Hatamyar, *supra* note 88, at 556 (finding a significant increase in the rate of dismissal in a sample of Westlaw cases, especially for civil rights cases); Hannon, *supra* note 88, at 1837 (examining Westlaw cases and finding that the courts do not seem to be dismissing cases at a significantly higher rate, except for civil rights cases, where the rate of granting dismissal jumped by eleven percent).

<sup>90</sup> See, e.g., Schneider, *supra* note 3.

<sup>91</sup> *Id.* at 521. For commentary on the general frustrations that discrimination claims face, see Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131–32 (2009).

not hard to imagine. Early empirical studies seemed to justify these concerns. These studies, compiled by academics and law students, revealed a disproportionate increase in the dismissal of civil rights cases in the months following the Court's decisions.<sup>92</sup> For example, one law student's study, which sampled data from 3,287 district court cases, found that post-*Twombly* civil rights suits were 39.6% more likely to be dismissed than other suits.<sup>93</sup> The strengthened gate-keeping power with which *Twombly* and *Iqbal* furnished judges appeared to be making an immediate impact in exactly the way these critics envisioned.

Indeed, concern reached a fever pitch when members of Congress took action to address these perceived problems. In October 2009, the House of Representatives called a hearing, held by the Judiciary Committee, tellingly titled "Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*."<sup>94</sup> Swiftly on the heels of the hearing, Senator Arlen Specter proposed a bill that echoed the Judiciary Committee's concerns. Titled the "Notice Pleading Restoration Act of 2009" (the "Act"), the Act was designed to negate *Twombly* and *Iqbal*'s effect by reinstating *Conley*'s "no set of facts" language.<sup>95</sup> The Act would have provided that "Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson* . . ."<sup>96</sup> In Senator Specter's introduction to the Act, he indicated that one of his major concerns with the Supreme Court's decisions was "that the Court had closed the courthouse doors to plaintiffs with meritorious claims and limited the private enforcement of public law."<sup>97</sup> The same year, a similar bill was introduced in the House. The Open Access to Courts

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<sup>92</sup> See Seiner, *The Trouble with Twombly*, *supra* note 88, at 1014 ("[A] higher percentage of decisions . . . granted a motion to dismiss in the Title VII context when the courts relied on *Twombly*."); Hannon, *supra* note 88, at 1815 ("The rate of dismissal in civil rights cases has spiked in the four months since *Twombly*.").

<sup>93</sup> Hannon, *supra* note 88, at 1838 (listing the data and explaining her methodology).

<sup>94</sup> *Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009). During the hearing, civil rights organizations' representatives testified about *Iqbal*'s effect on access to courts, including employment discrimination cases and civil rights cases.

<sup>95</sup> Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

<sup>96</sup> *Id.*

<sup>97</sup> 156 CONG. REC. S11, 037-05 (daily ed. Dec. 22, 2010) (statement of Sen. Arlen Specter).

Act of 2009 was proposed, which provided that: “[a] court shall not dismiss a complaint under subdivision (b) (6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.”<sup>98</sup> Both bills were referred to the Judiciary Committees but no further action was taken. Nonetheless, these proposals were symbolic of the deep concerns that these cases engendered from all facets of the legal community.

#### IV. ADVISORY COMMITTEE AND FEDERAL JUDICIAL CENTER STUDIES

##### A. *Advisory Committee Reports, 2007–2012*

In 2007, immediately after *Twombly*, the Advisory Committee on Civil Rules also took notice that the Court’s two decisions were retiring *Conley*’s “no set of facts” language. The Advisory Committee<sup>99</sup> is charged with carrying out “continuous study of the operation and effect of the general rules of practice and procedure.”<sup>100</sup> The Court’s engagement with Rule 8 was an issue that fell directly within the Committee’s province.

After *Twombly*, the Advisory Committee sought to address “[t]he basic question [of] whether—and if so, when—to begin crafting formal rules amendments to channel, redirect, modify, or even retract whatever changes in notice pleading flow from . . . *Twombly*.”<sup>101</sup>

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<sup>98</sup> Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009).

<sup>99</sup> A quick note about the structure of these entities is instructive:

The Judicial Conference of the United States consists of the Chief Justice of the United States, Chairman, the Chief Judge of the United States Court of Appeals for the Federal Circuit, the Chief Judge of the Court of International Trade, the chief judges of the other twelve United States courts of appeals and twelve district judges chosen for a term of three years by the judges of each circuit at an annual judicial conference of the circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system. The Judicial Conference created the Committee on Rules of Practice and Procedure (Standing Committee) and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy, Civil Rules and Criminal Rules) . . . . An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules and relevant legal commentary.

Thomas E. Baker, *Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 328–29 (1991).

<sup>100</sup> *Id.* at 239 (quoting 28 U.S.C. § 2073(b) (1988)).

<sup>101</sup> Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil

Nonetheless, the Committee thought it best at that moment to “keep a close watch on the evolution of practice as courts seek to digest and implement [*Twombly*].”<sup>102</sup> Contrary to the calls for immediate reform from other sections of the legal community, the Committee decided on a patient approach that would promote two goals: first, “to get a better sense of how others understand *Twombly*, and how it has had whatever impact it has had in the very short term of its present life. [Second,] to consider the alternative opportunities that may be available to amend present rule texts.”<sup>103</sup>

The Advisory Committee returned to the issue post-*Iqbal* and after a two year hiatus. The Committee’s December 2009 Report (the “2009 Report”) revealed the results from some of the earliest empirical work done on the issue, which was a compilation of statistics on the frequency of motions to dismiss, and the rate of granting these motions.<sup>104</sup> The 2009 Report noted that “the preliminary data suggest that things have not changed much—the monthly rate of granting motions to dismiss made on any ground was 13.15% of the monthly rate of filing cases during the 4 months before the Court decided *Twombly*, while the rate during the 4 months after the *Iqbal* decision was 13.78%.”<sup>105</sup> On these findings, the Committee rightly held fast to its commitment to patient investigation: “The questions are simply too important and too difficult to be resolved by rapid response.”<sup>106</sup> In a moment of calm insightfulness, and possibly acknowledging the commentators’ responses, the Committee cautioned that “[f]aith challenged reacts vigorously,” recognizing that a rash response would not help the situation.<sup>107</sup>

In May of the following year, the Committee came to the conclusion that “it does not seem that any dramatic changes have occurred” to pleading, even though impressions were still tentative.<sup>108</sup>

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Rules Advisory Committee, December 17, 2007, 1, 12, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2007.pdf> [hereinafter Advisory Committee Report, December 17, 2007].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee, December 8, 2009, at 2, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2009.pdf> [hereinafter Advisory Committee Report, December 8, 2009].

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 3.

<sup>107</sup> *Id.*

<sup>108</sup> Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee, May 17, 2010, at 2, *available at*

In this 2010 Report, more empirical work was provided that largely showed statistical inactivity, but it also pointed to possible issues within civil rights cases. The Report explained the new data points: “The Administrative Office has carried on a continually updated study of docket information for all civil actions filed in the federal courts, beginning two years before the *Twombly* decision. The study counts all motions to dismiss, divided among several case categories, and the dispositions.”<sup>109</sup> The largely positive results were as follows: “The findings show some increase in the rate of motions, and—for most case categories—no more than slight increases in the rate of granting motions.”<sup>110</sup> But it also drew attention to the civil rights categories for employment cases and miscellaneous cases:

The monthly average in employment cases for nine months before the *Twombly* decision was 1,147 cases, 527 motions to dismiss (46% of cases), 169 motions granted (15%), and 108 motions denied (9%). For nine months after *Iqbal*, the monthly average was 1,185 cases, 533 motions to dismiss (45%), 185 motions granted (16%), and 80 motions denied (7%). The monthly average in other civil rights cases for nine months before *Twombly* was 1,334 cases, 903 motions to dismiss (68% of cases), 264 motions granted (20%), and 158 motions denied (12%). For nine months after *Iqbal*, the averages were 1,362 cases, 962 motions to dismiss (68%), 334 motions granted (25%), and 114 motions denied (8%). These figures show a substantial increase in the percent of motions granted. But they cannot show the explanation . . . .<sup>111</sup>

These preliminary Reports had holes, however. As the 2009 Report acknowledged, the “Administrative Office data base . . . does not permit distinctions between motions addressed to the pleadings and motions to dismiss based on other grounds. Neither do the data reveal what happens after a motion to dismiss is granted—whether defects are cured by amendment . . . .”<sup>112</sup> Nonetheless the findings stood as an important signpost for the early direction of the conversation: patience was needed, but potential emerging problems—particularly in civil rights cases—were not to be treated

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<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf>  
[hereinafter Advisory Committee Report, May 17, 2010].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 2–3.

<sup>112</sup> Advisory Committee Report, December 8, 2009, *supra* note 104, at 2.

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*B. Federal Judicial Center Report*<sup>113</sup>

Where the Advisory Committee felt its statistical data was under-inclusive, it requested that the Federal Judicial Center (FJC) study the filing and resolutions of motions to dismiss for failure to state a claim in much broader terms.<sup>114</sup> Casting a far wider net, the FJC set out to analyze the procedural dispositions of cases from 2006 to 2010.<sup>115</sup> Over that range, the study compared motion activity in twenty-three federal district courts, which included orders that do not appear in legal reference systems like Westlaw.<sup>116</sup> The project, published in March 2011, put forth a larger data pool on the issue than any other statistical study on the effects of *Twombly* and *Iqbal* to date.<sup>117</sup>

The FJC Report's findings are significant. It revealed a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim.<sup>118</sup> In general, there was no increase in the

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<sup>113</sup> JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) [hereinafter FJC REPORT].

<sup>114</sup> *Id.* at vii.

<sup>115</sup> *Id.* This date range, the Report notes, filters out unwanted cases, keeping only those that “neither anticipat[ed] the decision in *Bell Atlantic Corp. v. Twombly* nor respond[ed] to the decision in *Ashcroft v. Iqbal* in the absence of appellate court guidance.” *Id.* at 5.

<sup>116</sup> *Id.* at vii. The Report was systematic in its choice of the twenty-three federal district courts:

We selected the 23 federal district courts to be included in the study by identifying the 2 districts in each of the 11 circuits with the largest number of civil cases filed in 2009. We also included the U.S. District Court for the District of Columbia. On occasion we were unable to obtain access to some of the courts' codes necessary to identify all of the relevant motions. In such cases, we chose the court in the circuit with the next greatest number of civil filings. These 23 district courts account for 51% of all federal civil cases filed during this period.

*Id.* at 5. Within these district courts, the Report's researchers were able to obtain considerable data sets. Instead of using computerized legal reference systems, the study turned to the courts' CM/ECF records to compile a fuller set of cases with relevant motions. *Id.* This provided a more complete assessment than reference systems because it more closely resembled excavation of files from the physical docket sheets. *Id.* Furthermore, while the Report was able to assess far more cases than any other study to date, its authors chose to exclude cases filed by prisoners and pro se parties, and controlled for differences in motion activity across federal district courts and across types of cases and for the presence of an amended complaint. *Id.* at vii.

<sup>117</sup> See sources cited, *supra* note 88 (collecting earlier studies).

<sup>118</sup> FJC REPORT, *supra* note 113, at vii.

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rate of grants of motions to dismiss without leave to amend.<sup>119</sup> There was also, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases.<sup>120</sup> Only in cases challenging mortgage loans on both federal and state law grounds did the study find an increase in the rate of grants of motions to dismiss without leave to amend, and many of these cases were removed from state court to federal court.<sup>121</sup> The FJC Report noted that there was no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then.<sup>122</sup> It added that there was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case.<sup>123</sup>

The FJC Report further explained the results. The initial findings showed a dramatic, albeit expected, increased rate of filing motions to dismiss. Motions to dismiss for failure to state a claim were filed in 6.2% of all cases in 2009–10, an increase of 2.2% over the filing rate for such motions in cases in 2005–06.<sup>124</sup> Adjusted estimates from the data indicate that the probability of a motion to dismiss being filed in an individual case increased from a baseline of 2.9% of the cases in 2006 to 5.8% of the cases in 2010.<sup>125</sup> In civil rights cases other than employment discrimination, the likelihood of a motion to dismiss increased 0.4% from 2005–06 to 2009–10,<sup>126</sup> an increase that does not reach conventional levels of statistical significance.<sup>127</sup> The percentage of cases with one or more motions to dismiss for failure to state a claim was higher in each month of 2009–10 than in each month of 2005–06.<sup>128</sup> “Moreover,” the FJC Report notes, “in 2009–10 there appeared to be a modest increase over time in the percentage of cases with such motions.”<sup>129</sup> The trend line for the percentage of cases in 2005–06 with motions to dismiss was flat

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<sup>119</sup> *Id.* at vii, 14.

<sup>120</sup> *Id.* at vii.

<sup>121</sup> *Id.* This category of cases tripled in number during the relevant period in response to events in the housing market.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> FJC REPORT, *supra* note 113, at 8.

<sup>125</sup> *Id.* at 10.

<sup>126</sup> *Id.* at 9.

<sup>127</sup> *Id.* at 8.

<sup>128</sup> *Id.* at 10.

<sup>129</sup> *Id.* at 10.

over time, at just under 4%.<sup>130</sup>

According to the FJC Report, however, judges are barely deciding these motions differently than they would have in the pre-*Twombly-Iqbal* era. The FJC Report recorded whether an order denied the motion to dismiss in its entirety, granted all of the relief requested by the motion, or granted some but not all relief requested by the motion.<sup>131</sup> If the court allowed amendment of the complaint with regard to at least one claim that was dismissed, the analysts coded the motion as granted with leave to amend.<sup>132</sup> It first appears that motions to dismiss for failure to state a claim were more likely to grant all or some of the relief requested in 2010 than in 2006.<sup>133</sup> In 2010, 75% of the orders responding to such motions granted all or some of the relief requested by the motion, compared with almost 66% of the orders in 2006.<sup>134</sup> But closer inspection reveals that the increase extends only to motions granted with leave to amend, with no increase found in motions granted without leave to amend.<sup>135</sup>

### C. Memorandum of Circuit Court Cases<sup>136</sup>

In addition to the strong numerical picture the FJC's study paints, a memorandum reviewing relevant case law was compiled by the Advisory Committee's clerk, Andrea Kuperman. Kuperman's voluminous survey primarily focuses on circuit court decisions, with a collection of district court cases in the appendix, and spans over seven hundred pages. Right from the beginning, Kuperman makes an important observation:

[T]he case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency. Instead, the appellate courts are taking a context-specific approach to applying *Twombly* and *Iqbal* and are instructing the district courts to be careful in determining whether to dismiss a complaint . . . . The approach taken by many courts may

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<sup>130</sup> FJC REPORT, *supra* note 113, at 10.

<sup>131</sup> *Id.* at 12.

<sup>132</sup> *Id.* at 13.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 13.

<sup>136</sup> Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Comm. & Standing Rules Comm., Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (Mar. 29, 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal\\_memo\\_March\\_2011.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_March_2011.pdf).

suggest that *Twombly* and *Iqbal* are providing a new framework in which to analyze familiar pleading concepts, rather than an entirely new pleading standard.<sup>137</sup>

This observation falls in line with the FJC's findings, but gives those numbers a much-needed human glow. In the many cases that Kuperman reviewed, the major trend in judicial thought process at the circuit level corroborates the numbers from the district court level.<sup>138</sup>

One of Kuperman's most interesting findings comes from a 2010 First Circuit decision authored by then-retired Justice Souter, sitting by designation.<sup>139</sup> In *Sepúlveda-Villarini v. Department of Education of Puerto Rico*, two public school teachers sued the Puerto Rico Department of Education, its Secretary, and the school director for failure to accommodate an employee's disability as required by Title I of the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794.<sup>140</sup> One teacher alleged that five years after he suffered a stroke, the school took away accommodations made for him until that point, and required him to take on a larger-than-usual number of students.<sup>141</sup> He claimed "that the new arrangement [was] an unreasonable refusal to accommodate, resulting in emotional consequences with physical

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<sup>137</sup> *Id.* at 3–4.

<sup>138</sup> Kuperman's findings also implicitly bolster the FJC's findings by pointing to eight courts of appeal that have since reversed a number of early district court decisions to dismiss actions. *See, e.g.,* *Gee v. Pacheco*, 627 F.3d 1178 (10th Cir. 2010) (reversing dismissal of pro se prisoner's claims of violations under 42 U.S.C. § 1983); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) (reversing dismissal of antitrust claims); *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371 (11th Cir. 2010) (reversing dismissal of claims under the Privacy Act); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104 (2d Cir. 2010) (reversing in part, finding that plaintiff stated a claim for breach of contract and defamation); *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010) (reversing in part, finding that plaintiff stated a claim for racial discrimination); *Sanchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009) (reversing the dismissal of the Fourth Amendment claims by a prisoner against two correctional officers and a doctor); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) (reversing dismissal of claim that defendants violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA)); *Siracu-sano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009) (reversing dismissal of complaint alleging violation of federal security laws), *aff'd*, 131 S. Ct. 1309 (2011); *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) (reversing dismissal of claimed violation of the Fair Debt Collection Practices Act), cert. denied, 130 S. Ct. 1505 (2010).

<sup>139</sup> *Sepúlveda-Villarini v. Dep't of Educ. of P. R.*, 628 F.3d 25 (1st Cir. 2010).

<sup>140</sup> *Id.* at 26–27.

<sup>141</sup> *Id.* at 27.

symptoms requiring treatment.”<sup>142</sup> Similarly, the other teacher alleged that, after receiving accommodations from the school for several years after suffering a throat condition, she too was forced to take on an increased class size.<sup>143</sup> The district court dismissed both claims.<sup>144</sup>

The First Circuit vacated the orders that held the complaints to be insufficient.<sup>145</sup> After setting forth the appropriate pleading standard that included language from *Twombly* and *Iqbal*, as well as *Conley*, the court decided that the district court erred by demanding “more than plausibility.”<sup>146</sup> From the two sets of alleged facts—first, that the school provided accommodations for several years, and, second, that the school changed these accommodations—each complaint was sufficient.<sup>147</sup> Justice Souter explained:

To be sure, this sequence of alleged facts does not describe a causal connection in terms of the exact psychological or physiological mechanism by which each plaintiff’s capacity continues to be overwhelmed. But reading the allegations with the required favor to the plaintiff means accepting the changes in class size as the only variable, from which one would infer that there probably is some causal connection between the work of a doubled class size and the physical and emotional deterioration of the disabled teacher.<sup>148</sup>

He further explained that “*Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff’s favor.”<sup>149</sup> The opinion concluded:

None of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact, but its teaching here is not that the inference of causation is implausible (taking the facts as true), but that it is possible that other, undisclosed facts may explain the sequence better. Such a possibility does not negate plausibility, however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence. *A plausible but inconclusive inference from pleaded facts will survive*

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 27–28.

<sup>144</sup> *Id.* at 27–28.

<sup>145</sup> *Sepúlveda-Villarini*, 628 F.3d at 30.

<sup>146</sup> *Id.* at 29.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 30 (citation omitted).

*a motion to dismiss*, and the fair inferences from the facts pleaded in these cases point to the essential difference between each of them and the circumstances in *Twombly*, for example, in which the same actionable conduct alleged on the defendant's part had been held in some prior cases to be lawful behavior.<sup>150</sup>

With this, the court instituted a tempered framework for “plausibility” that the circuit continued to abide by in future cases.<sup>151</sup>

Similarly, the Second Circuit's reading of “plausibility” provided a tamer application than one of its district court applied.<sup>152</sup> In *Ideal Steel Supply Corporation v. Anza*, the plaintiff, Ideal Steel, brought an action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962–1968, against its competitor.<sup>153</sup> After years of complicated litigation, the district court dismissed one plaintiff's § 1962(a) claim on the ground that the complaint did not sufficiently allege facts to show that the defendants' alleged racketeering activity was the proximate cause of the plaintiff's

<sup>150</sup> *Id.* (emphasis added) (citation omitted).

<sup>151</sup> *See, e.g., Román-Oliveras v. P. R. Elec. Power Auth.*, 655 F.3d 43 (1st Cir. 2011). There, the court echoed Justice Souter:

We hasten to add that we offer no view on the merits of his claim. The question at this stage of the case is not “the likelihood that a causal connection will prove out as fact.” *Sepúlveda–Villarini*, 628 F.3d at 30. Rather, “the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor.” *Id.*; *see also Twombly*, 550 U.S. at 563 n.8, 127 S. Ct. 1955 (“[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.”). Here, the pleaded facts support “[a] plausible but inconclusive inference” of discrimination based on disability, *Sepúlveda–Villarini*, 628 F.3d at 30, and [Plaintiff] is therefore entitled to proceed with his ADA claim.

*Id.* at 50.

<sup>152</sup> *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310 (2d Cir. 2011).

<sup>153</sup> *Id.* at 313. In relevant part, Ideal alleged claims under two different provisions of RICO—section 1962(c) and section 1962(a). *Id.* at 314. Section 1962(c) makes it unlawful for any person employed by or associated with an enterprise

“to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c) (2006). Section 1962(a) makes it “unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise . . . .”

*Id.* at § 1962(a).

injury.<sup>154</sup>

The Second Circuit reversed the dismissal, noting that the lower court's demanded level of specificity at the pleading stage was "not justified by *Twombly*."<sup>155</sup> There, the higher court viewed the lower court's mischaracterization and misapplication of *Twombly* as grounded in the lower court's overly stringent reading of the allegations.<sup>156</sup> After reminding the lower court that *Twombly* only requires "[f]actual allegations [that are] enough to raise a right to relief above the speculative level . . . *i.e.*, enough to make the claim 'plausible,'" the opinion found "nothing implausible" in the plaintiff's allegations.<sup>157</sup> For that reason, the court concluded, the dismissal was in error.

The Sixth Circuit, in *Harvard v. Wane County*, applied *Twombly* and *Iqbal* in a similar vein.<sup>158</sup> In that case, an infant, through her guardian, brought a § 1983 action against employees of the Wayne County Jail.<sup>159</sup> The mother alleged that the defendants were deliberately indifferent to the infant's serious medical needs after the child was born in the jail.<sup>160</sup> The mother alleged that she went into labor while she was detained and, after hours without medical assessment by prison officials, began the birthing process in her

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<sup>154</sup> *Ideal Steel*, 652 F.3d at 313.

<sup>155</sup> *Id.* at 324.

<sup>156</sup> *See id.* at 323–24.

<sup>157</sup> *Id.* (internal quotation marks omitted).

<sup>158</sup> 436 Fed. App'x 451 (6th Cir. 2011). In fact, the Sixth Circuit has reiterated this application on other occasions, as have its sister circuits. *See, e.g.*, *Pulte Homes, Inc. v. Laborers' Int'l Union*, 648 F.3d 295, 302 (6th Cir. 2011) (reversing district court's dismissal because it applied "too high a standard" for sufficiency); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("There was, however, nothing more for [Plaintiffs] to plead . . . . A smoking gun—such as an email documenting that the conspiracy was ongoing—would aid [Plaintiff's] case, but its absence does not render implausible that a business continued to adhere to the conspiratorial plan. The district court gave improper weight to the absence of reaffirmation.") (internal citations omitted). The "smoking gun" language comes up in other circuits, as well, and serves as a reminder that "plausibility" did not conflate pleading and discovery. *See, e.g.*, *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) ("Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.").

<sup>159</sup> *Harvard*, 436 F. App'x at 451–52.

<sup>160</sup> *Id.*

cell.<sup>161</sup> When she was finally treated by EMS, the child was born with no heart rate or respiration.<sup>162</sup> The child was resuscitated, but suffered severe mental retardation and cerebral palsy.<sup>163</sup> The Sixth Circuit affirmed the district court's denial of the defendant's 12(b)(6) motion.<sup>164</sup> In explaining its standards for motions to dismiss, the Sixth Circuit stated that the plausibility standard does "not alter the basic rule that plaintiffs must plead only the basic elements of a claim, [plaintiffs need] not develop all of the facts necessary to support the claim."<sup>165</sup> Under this application, the plaintiff's allegations were sufficient under the standard.<sup>166</sup>

Of course, the case law includes the inevitable decisions that take aggressive approaches to "plausibility," but those instances are the minority.<sup>167</sup> Instead, the survey reveals a relatively stable, tempered application of "plausibility" pleading that comports with both the FJC's and Advisory's Committee's statistical data.

## V. ANALYSIS

### A. *The Value of Empirical Data*

As a whole, empirical evaluations of procedural standards are underemphasized in the debate about pleading standards. Yet the value of these studies cannot be overstated. They offer the most thorough analysis of pleading standards under Rule 8, and they provide disinterested feedback that is needed to guide the conversation. Numbers play a rare part in legal discourse, but they do have a place here. In rare circumstances, statistical data is the best guidepost for next steps, particularly where the prevailing attitude misrepresents the realities of the situation. Without doubt, *Twombly*

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<sup>161</sup> *Id.* at 452.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 452.

<sup>165</sup> *Harvard*, 436 F. App'x at 457 (quoting *Hebron v. Shelby Cnty. Gov't*, 406 F. App'x 28, 30 (6th Cir. 2010)).

<sup>166</sup> *Id.* at 457–58.

<sup>167</sup> *See, e.g., New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050–51 (6<sup>th</sup> Cir. 2011) ("This new "plausibility" pleading standard causes a considerable problem for plaintiff here because defendants Scag and Louisville Tractor are apparently the only entities with the information [necessary to make the allegation] . . . . The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that no discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant or a third party, as it is here.").

and *Iqbal* will never be held as the model of clarity, and commentators were right to express deep concern for the potential implications. It appears now, though, that this anxiety has gathered too much momentum—toward “plausibility’s” *speculative* effects, rather than its *actual* effects.

And where statistical data is given attention, the wrong studies are being privileged. In particular, independent studies conducted by Professors Colleen McNamara<sup>168</sup> and Patricia Hatamyar,<sup>169</sup> and law student Kendall W. Hannon<sup>170</sup> have gained the most attention. These studies, all of which preceded the FJC’s Reports, are under-inclusive and surveyed case law that was still only in its budding stages.<sup>171</sup> Professor Hatamyar’s statistical pool was derived from a random selection of 1,200 district court cases, taken from the two years before and after *Twombly*, as well as the four months after *Iqbal*.<sup>172</sup> Hatamyar, herself, cautioned that “the short time span and smaller number of *Iqbal* cases counsel caution in interpreting the data.”<sup>173</sup> Professor McNamara used an even smaller sample size of 196 district court cases that cited *Iqbal* within the first six months following the decision’s publication, using the commercial legal database Westlaw to compile the list.<sup>174</sup> Kendall Hannon’s study engaged in the largest data pool, with 2,212 cases citing *Conley* and 1,075 citing *Twombly*, but was published before the Court decided *Iqbal*.<sup>175</sup>

The FJC’s pool of cases was significantly larger. The study examined motion activity in 2006 and 2010 and, importantly, compiled cases based on their orders made available through the federal district court records rather than only opinions published in computerized legal reference systems.<sup>176</sup> The analysts selected cases from twenty-three district courts, with two districts from each of the eleven circuits with the most civil cases filed in 2009, including the United States District Court for the District of Columbia.<sup>177</sup> The

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<sup>168</sup> Colleen McNamara, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401 (2011).

<sup>169</sup> Hatamyar, *supra* note 88.

<sup>170</sup> Hannon, *supra* note 88.

<sup>171</sup> For these studies’ results, see discussion *supra* Section III.

<sup>172</sup> Hatamyar, *supra* note 88, at 555–56.

<sup>173</sup> *Id.* at 556.

<sup>174</sup> McNamara, *supra* note 168, at 420 (explaining selection methodology in further detail).

<sup>175</sup> Hannon, *supra* note 88, at 1834–35.

<sup>176</sup> FJC Report, *supra* note 113, at 5.

<sup>177</sup> *Id.*

result was a staggering 49,443 cases with 12(b)(6) motions filed within ninety days of filing the case in 2005-06, and 52,925 cases with the same posture in 2009-10.<sup>178</sup> Kendall Hannon's 3,287-case pool—the largest of the three—is only roughly 3% of the FJC's total. The FJC, with its greater resources and staff, was able to cover an exponentially larger number of cases in order to determine a more complete picture of “plausibility” application throughout the federal court system. But the picture is useless unless commentators take time to look at it. Given the wealth of new information the FJC has made available, and the indication that little has changed, the legal community should use this information as the new starting-point for determining whether change is needed.

*B. How the Courts are Reading “Plausibility”*

Before either the FJC's reports or Kuperman's memo were published, Professor Adam Steinman predicted that the lower courts would read the Supreme Court's decisions in a way that preserved pre-*Twombly* precedent.<sup>179</sup> First, Professor Steinman noted the decisions could not have overruled pre-*Twombly* authority, as such a rejection can only occur through the rule amendment process, not through judicial interpretation of Rule 8; it is simply not within the Court's power to effectuate that type of change.<sup>180</sup> Second, even if Rule 8 could be reasonably interpreted to require a stricter pleading standard, the fifty years of procedural precedent would insulate the Rule from such interpretation.<sup>181</sup> Specifically, *Twombly* only abrogates one line from all the cases—the “no set of facts” language.<sup>182</sup> Third, Justice Souter's analysis of the “no set of facts” language was inexact.<sup>183</sup> The language was, in practice, subject to a different, more sensible reading than matched what Justice Souter endorsed in *Twombly*. Professor Steinman explains, *Conley*'s “no set of facts” language did not preclude dismissal as long as *any* set of facts could entitle the plaintiff to relief (the straw man that *Twombly* purported to strike down). Rather, this phrase merely confirmed that speculation about the *provability* of a claim is typically not a proper inquiry at the pleadings phase; provability is relevant only when it appears ‘beyond

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<sup>178</sup> *Id.* at 9.

<sup>179</sup> Steinman, *supra* note 6, at 1320–21.

<sup>180</sup> *Id.* at 1320.

<sup>181</sup> *Id.* at 1320–21.

<sup>182</sup> *Id.* at 1321.

<sup>183</sup> *Id.* at 1321.

doubt' that the plaintiff cannot prove her claim.<sup>184</sup>

The end result, Professor Steinman writes, is that "plausibility" pleading will not be a dramatic departure from the days of *Conley* because "lower courts have, essentially, a duty to reconcile *Twombly* and *Iqbal* with pre-*Twombly* case law."<sup>185</sup>

The FJC Report's empirical findings have largely proved Professor Steinman's predictions to be correct. And Kuperman's case studies reveal how that is happening. The lower courts are playing an important role in shaping "plausibility" pleading as a tempered standard by making *Twombly* and *Iqbal* compatible with previous case law. Her cases identify several aspects of the two decisions that are playing recurring roles in the reconciliation process.

Uncertainty in a complaint is proving to be less troublesome to litigants. First, a line in *Twombly* that garnered attention has ended up being a source of taming "plausibility": "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (*even if doubtful in fact*)."<sup>186</sup> The line has become commonplace in circuit courts' expressions of the Rule 8 precedent,<sup>187</sup> and implies an allowance of far more uncertainty at the pleading stage than as first feared. By offering the assumption of truth to doubtful facts, plaintiffs are resorting to this expression to help nudge their claims away from merely threadbare assertions.

To further this reading, many courts have focused their analyses on the statement that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"<sup>188</sup> Here, courts have picked up on the language of doubt—"improbable" and "remote and unlikely"—to acknowledge that "plausibility" pleading, for all its terminological changes, is still just that—an inquiry into

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<sup>184</sup> *Id.* (citation omitted).

<sup>185</sup> Steinman, *supra* note 6, at 1323.

<sup>186</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added).

<sup>187</sup> *See, e.g., Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 29 (1st Cir. 2010); *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010); *Arar v. Ashcroft*, 585 F.3d 559, 618 (2d Cir. 2009) (en banc); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009).

<sup>188</sup> *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). For judicial application of this phrase, see, e.g., *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 13 (1st Cir. 2011).

pleadings, where discovery-like facts are not required.

Finally, *Iqbal's* statement that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>189</sup> Rather than serve as a tool for arbitrary judicial enforcement of “plausibility” as has been argued,<sup>190</sup> this sentence has worked to preserve relative consistency in determining sufficiency. Where the lack of clarity within *Twombly* and *Iqbal* could lead to inconsistent results, judicial experience is consistently invoked to remind lower courts to read allegations under the full spectrum of Rule 8 precedent—that is, to reign in judicial inquiries that interpret “plausibility” in an aggressive manner.

### C. How Should We Respond?

The upshot of these results should guide the conversation in a less reactionary direction by allowing the common law process to continue carving a path for “plausibility” pleading.<sup>191</sup> The primary fear that a quick response was needed to neutralize *Twombly* and *Iqbal* before it affected countless litigants is quickly being extinguished. The proposed changes rest on the assumption that pleading standards became harmfully strict; yet the assumption does not stand muster when compared to the trends that the FJC Report indicates. Accordingly, the argument for change develops cracks in its foundation.

A common approach to addressing “plausibility” is that change should come internally through the Court’s overruling of *Iqbal*.<sup>192</sup> One commentator has suggested that “[t]he best, and easiest, fix to this [‘plausibility’] problem is for the *Iqbal* case to be overruled and for *Twombly* to be read according to the ‘transactional’ method . . . .” instead of a “conclusory” method ushered in by *Iqbal*.<sup>193</sup> But it is not

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<sup>189</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

<sup>190</sup> See generally McNamara, *supra* note 168.

<sup>191</sup> The Advisory Committee has suggested that it shares this sentiment. See Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee, May 2, 2011, at 53, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf>.

<sup>192</sup> See, e.g., Luke Meier, *Why Twombly Is Good Law (But Poorly Drafted) And Iqbal Will Be Overturned*, 87 IND. L.J. 709 (2012).

<sup>193</sup> *Id.* at 759. The “transaction method” is, in short, a reading of *Twombly* where a complaint is factually sufficient so long as it explains the underlying transaction or events that point to the defendant’s liability; and this method. *Id.* at 741. The “conclusory” interpretation of *Twombly*—the one that some believe *Iqbal* has inappropriately adopted—finds a complaint factually insufficient, and thereby

clear that overruling the decisions would be justifiable under the principles of *stare decisis*. Specifically, proponents of this approach would have to explain its unworkability. While initial concerns about “plausibility” may have given rise to colorable arguments for the standard’s unworkability, the case studies and reports suggest that is not the case in practice. In fact, the lack of significant change between pre- and post-*Iqbal* empirical data suggests that these issues have not been exacerbated in any meaningful way by “plausibility” itself. Of course, that is not to say that the pleading as a whole could not use revision; the doctrine is far from perfect. But what the numbers do tell us is that *Twombly* and *Iqbal* are not the impetus for those problems. Without that critical link, any reasoning that pleading standards need revision specifically because of these cases does not hold water.

If anything, the sweeping change that critics believe will re-stabilize the pleading process has the potential to do just the opposite. This holds especially true in regard to proposed rule amendments. With any amendment, particularly to a rule that maintains the entryway to the court, uncertainty in application will initially cause confusion and threatens to affect almost all civil cases brought after that time.

Conversely, based on case development and data, the position that *Twombly* and *Iqbal* did not break the federal pleading system should encourage the Advisory Committee to maintain its current course. The devil, now, is in the details of the *Twombly* and *Iqbal*, and incremental advancements of district and circuit courts’ understanding of “plausibility” will ensure that the system can improve itself without risking a major, potentially unsettling jolt.

## VI. CONCLUSION

Determining the necessity of change requires the availability of diverse sources. The FJC and Advisory Committee have advanced the conversation immensely with their research. Their findings largely confirm the predictions of commentators like Professor Steinman, who anticipated a tempered application of “plausibility” pleading. And where the FJC Report’s empirical data lacks judicial analysis, Kuperman’s Advisory Committee memo fills in the gaps. It is now the legal community’s obligation to acknowledge these results and to use

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subject to a “plausibility” analysis, because it contains conclusory allegations. *Id.* Because the “transactional method” is more true to Rule 8, the Court can ostensibly snuff out the “conclusory” approach by expressly overruling *Iqbal*.

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them to redirect any misguided positions. The solutions need to be reframed to account for the tempered application of that precedent. Only then, with full attention given to the practicalities of “plausibility,” can a legitimate reevaluation be made of *Twombly*, *Iqbal*, and the entire pleading system. Nonetheless, while the reevaluation is being crafted, the main point still stands: litigants can safely plead on.