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Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry

Stephen R. Brown

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**RECONSTRUCTING PLEADING: *TWOMBLY*, *IQBAL*, AND
THE LIMITED ROLE OF THE PLAUSIBILITY INQUIRY**

*Stephen R. Brown**

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I. INTRODUCTION

Federal Rule of Civil Procedure 8(a)(2) requires every complaint to “contain . . . a short and plain statement of the claim *showing* that the pleader is *entitled* to relief.”¹ In a 2007 antitrust case, *Bell Atlantic Corp. v. Twombly*,² the Supreme Court held that Rule 8(a)(2) requires a plaintiff to plead “enough facts to state a claim to relief that is plausible on its face.”³ This Article will refer to this determination as the plausibility inquiry. In 2009, the Supreme Court’s *Ashcroft v. Iqbal* opinion confirmed that *Twombly* articulated a general standard of pleading that applied outside of the antitrust context.⁴

What followed these cases was a deluge of criticism: “[The *Twombly* holding] marks a fundamental—and unjustified—change in the character of pretrial practice”;⁵ “[T]he court’s majority messed up the federal rules”;⁶ “Notice pleading is dead. Say hello to plausibility pleading”;⁷ “[*Twombly* represents] an untenable interpretation of Rule 8(a) that is wholly inconsistent with Supreme Court precedent . . .”;⁸ “[T]oday, federal pleading standards are in crisis, thanks to [*Twombly* and *Ashcroft v. Iqbal*]”;⁹ “*Twombly* and *Iqbal* have introduced a wild card . . . at the threshold stage of civil process through which all litigation must pass”;¹⁰ “[*Twombly* and *Iqbal*] have destabilized the entire system of civil litigation”;¹¹ “The majority view among academics has been that robust efforts to regulate at the pleading stage are wrongheaded and inconsistent with the traditional pleading standard the Court has followed since *Conley*.”¹²

1. FED. R. CIV. P. 8(a)(2) (emphasis added).

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

3. *Id.* at 570.

4. 129 S. Ct. 1937, 1950-51 (2009).

5. *Twombly*, 550 U.S. at 597 (Stevens, J., dissenting).

6. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, Jul. 21, 2009, at A10, available at http://www.nytimes.com/2009/07/21/us/21bar.html?_r=1 (quoting statement by Justice Ginsburg).

7. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008)

8. *Id.* at 460.

9. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295.

10. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 859.

11. *Id.* at 823.

12. 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).

In this Article, I argue that much of this criticism is unjustified¹³ because it overlooks the analytical steps that occur before the plausibility inquiry. Under a proper reading of *Twombly* and *Iqbal*, the plausibility inquiry is not always necessary, and even when necessary, should be an inquiry of last resort.¹⁴ Additionally, commentators have generally failed to appreciate the significant case management authority district judges possess under the Federal Rules to help along a factually deficient claim.¹⁵

I develop this reading of *Twombly* and *Iqbal* more fully below by providing a three-step framework for courts to apply when confronted with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).¹⁶ Properly applied, this three-step process will ameliorate many, but not all, of the criticisms of *Twombly* and *Iqbal*.

13. Professor Robert Bone has reached a similar conclusion about the *Twombly* case. Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) (“[T]he Supreme Court’s decision in *Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.”). Although I agree with Professor Bone’s characterization of the case, I arrive at this conclusion for different reasons. Professor Bone reached this conclusion before the Supreme Court decided the *Iqbal* case. It should be noted, however, that Professor Bone has written critically about *Iqbal*. Robert G. Bone, *Plausibility Pleading Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849.

The actual impact of *Twombly* appears to have been more muted than some had expected. 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) (conducting a study of *Twombly*’s impact and concluding that the case “appears to have had *almost* no substantive impact,” except in civil rights cases where the impact “*does* show a significant departure”) (emphasis added); but see Spencer, *Plausibility Pleading*, *supra* note 7, at 460 (noting that “plausibility pleading is likely to stymie many valid claims . . .”); Steinman, *supra* note 9, at 1296 (noting that “*Twombly*’s approach to pleading has been widely criticized as . . . having destructive policy consequences in terms of litigants’ access to federal courts”).

14. Professor Adam Steinman makes a similar conclusion in his article on *Twombly* and *Iqbal* on which this Article will heavily comment. See Steinman, *supra* note 9. Professor Steinman correctly notes that “when a complaint contains nonconclusory allegations on every element of a claim for relief, the plausibility issue vanishes completely.” *Id.* at 1316. This leads to his conclusion that *Twombly* and *Iqbal* “cannot faithfully be read to make a lack of ‘plausibility’ grounds for disregarding a complaint’s allegations.” *Id.* at 1319. I will argue, however, that in some cases a plaintiff cannot plead a non-conclusory allegation on every element of a claim for relief. For this reason, in some cases—e.g., cases where a defendant’s state of mind is an element of the claim for relief—*Twombly* and *Iqbal* require a court to engage in the plausibility analysis. *Twombly* and *Iqbal* do make a lack of “plausibility” grounds for dismissing a claim when (1) an element of that claim cannot be alleged with a non-conclusory allegation or (2) a plaintiff has not alleged an element of a claim with a non-conclusory allegation.

15. In making this argument, I will draw heavily on Professor Hartnett’s piece on the two decisions and make some small additions. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010). This argument goes against the grain of most academic commentary on *Twombly* and *Iqbal*.

16. FED. R. CIV. P. 12(b)(6). Even if the critics of the *Twombly* and *Iqbal* cases do not agree with my premise that the plausibility inquiry is a limited one, those critics should still support the

Although critics have generally failed to appreciate the limited role of the plausibility inquiry, it is still necessary in some cases. I will therefore, in the discussion of plausibility within the three-step framework, provide a general defense of *Twombly* and *Iqbal* by recasting the decisions in light of a plaintiff's burden to certify to a court that the factual contentions in a complaint "will likely have evidentiary support"¹⁷ under Rule 11. Under this view of the plausibility inquiry, a court acts as a neutral third-party that simply evaluates a plaintiff's ability to predict her own likelihood of success. Instead, a court engaging in the plausibility inquiry gauges whether the plaintiff has accurately predicted that his or her claim "will likely have evidentiary support."¹⁸

To give a proper context to these arguments, I will begin in Part I by providing a very short introduction to pleading practice before the Supreme Court's decisions in *Twombly* and *Iqbal*. In Part II, I will then describe the *Twombly* and *Iqbal* cases in detail. After providing this introductory discussion, I will proceed in Part III to develop the arguments outlined above before briefly concluding in Part IV with a short summary.

II. PLEADING PRACTICE BEFORE *TWOMBLY* AND *IQBAL*

This section will begin with the seminal Supreme Court pronouncement on pleading, *Conley v. Gibson*,¹⁹ and then will then move to discuss three more recent cases of *Conley*'s progeny.²⁰

A. *Conley v. Gibson, No Set of Facts, and the Importance of Notice*

In *Conley*, a group of recently fired African-American railroad workers brought suit against a union that was responsible for

proposed framework because it helps to ensure that the plausibility inquiry is made in a transparent manner.

17. FED. R. CIV. P. 11.

18. FED. R. CIV. P. 11(b).

19. 355 U.S. 41 (1957). *Conley* is a prevalent enough authority on pleading that Justice Stevens referred to the retirement of its language as "rewrit[ing] the Nation's civil procedure textbooks." *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting); see also Scott Dodson, Essay, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 135 (2007) (noting that in *Twombly*, the Supreme Court "guttled the venerable language from *Conley* that every civil procedure professor and student can recite almost by heart").

20. For a much more informative and thorough discussion of the history and development of pleading practice in federal courts before *Twombly* and *Iqbal*, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

representing them.²¹ As interpreted at the time, the Railway Labor Act²² made it unlawful for a union representing members of a craft to make distinctions among members of the union based on “irrelevant and invidious” grounds.²³ When the plaintiffs’ employer purported to “abolish” their positions, each had lost their job.²⁴ Plaintiffs alleged that the employer then filled the abolished positions with all white workers, excepting “a few instances where Negroes were rehired to fill their old jobs but with loss of seniority.”²⁵

Plaintiffs alleged that the defendant union “did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees.”²⁶ Plaintiffs filed their suit seeking to compel the defendant union to “represent them fairly.”²⁷ The defendant sought to dismiss the plaintiffs’ claims under Rule 12(b)(6), arguing that the complaint failed to “set forth specific facts to support its general allegations.”²⁸

In reviewing the sufficiency of the complaint, the Supreme Court began by stating the “accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁹ In finding the complaint sufficient, the Supreme Court expressly rejected the argument that “specific facts”

21. *Conley*, 355 U.S. at 42.

22. 44 Stat. 577 (1926).

23. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944)

[I]t is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious.

Id.

24. *Conley*, 355 U.S. at 43.

25. *Id.*

26. *Id.* Professor Sherwin has explained that, at the time, “unions negotiating employment contracts with the railroad could not bargain for discriminatory terms, although there was no law directly prohibiting railroads from discriminating against black employees.” Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L. J. 73, 88 (2008).

27. *Conley*, 355 U.S. at 42.

28. *Id.* at 47.

29. *Id.* at 45-46; see Spencer, *Plausibility Pleading*, *supra* note 7, at 435-36 (noting that “[t]he immediate effect of *Conley* was to put an end to the murmurs of opposition to the new pleading standard of the Federal Rules and to clarify that yes, the new liberal rules mean what they say.”).

Some have suggested that this language was “rarely” taken literally. See Steinman, *supra* note 9, at 1321 (quoting Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procure*, 86 COLUM. L. REV. 433, 434 (1986) (“How can a court ever be *certain* that a plaintiff will prove no set of facts entitling him to relief?”)).

must support “general allegations” in a complaint.³⁰ According to the Court, “all the Rules require is ‘a short and 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.”³¹ The Supreme Court also emphasized that the pleadings should not be read in a hyper technical manner, and that decisions should be made on the merits: “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”³²

As Justice Stevens observed in his *Twombly* dissent, since *Conley*, the Supreme Court had cited the no-set-of-facts language “in a dozen opinions . . . and four separate writings.”³³ And “[i]n not one of those 16 opinions was the language ‘questioned,’ ‘criticized,’ or ‘explained away.’”³⁴ Before *Twombly*, then, the no-set-of-facts language appeared to have been fairly solid precedent.³⁵

30. *Conley*, 355 U.S. at 47.

31. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

32. *Id.* at 48 (citing *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938)). This notion of pleading has been called the “liberal ethos.” See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986); see also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 228 (2004) (arguing that “the system of pleading should not unduly interfere with decisions on the merits”). Professor Spencer has suggested that *Twombly* may be “a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers.” Spencer, *Plausibility Pleading*, *supra* note 7, at 433. Spencer terms the new pleading practice as the “‘restrictive’ or ‘efficiency-oriented’ ethos.” *Id.*

33. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (citing *SEC v. Zandford*, 535 U.S. 813, 818 (2002)); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989); *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam); *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969) (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 554 (1985) (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin*, 466 U.S. 558, 587 (1984) (Stevens, J., dissenting); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561, n.1 (1977) (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 55, n.6 (1976) (Brennan, J., concurring in judgment).

34. *Twombly*, 550 U.S. at 577-78.

35. *But see* Bone, *Twombly*, *Pleading Rules*, *supra* note 13 at 897 (“Long before the *Twombly* decision, lower federal courts in the 1980s responded to this sense of crisis by tightening up on pleading requirements. And they continued in this vein despite Supreme Court decisions to the contrary in *Leatherman* and *Swierkiewicz*.”) (citations removed); *id.* at 890 (noting that lower courts, “enthusias[ti]c for heightened pleading . . . found ways to get around *Leatherman* and *Swierkiewicz*”).

B. After Conley: Prohibiting Heightened Pleading Per Se

Since *Conley*, the Supreme Court has decided three additional important cases on pleading under Rule 8(a): *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,³⁶ *Swierkiewicz v. Sorema*,³⁷ and *Dura Pharmaceuticals, Inc. v. Broudo*.³⁸ I will briefly explain each below.

In *Leatherman*, the Supreme Court reviewed a Fifth Circuit decision that had expressly imposed a “heightened pleading standard” for cases alleging a § 1983 violation against a municipality.³⁹ The Supreme Court rejected the heightened pleading standard as “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules.”⁴⁰ In reaching this conclusion, the Court echoed *Conley*’s focus on “fair notice.”⁴¹ The Court additionally observed that the Federal Rules had explicitly singled out those cases where heightened pleading was necessary in Rule 9(b) (cases alleging “fraud or mistake”),⁴² and a § 1983 claim against a municipality was not among the claims listed in Rule 9(b).⁴³ The Court also emphasized that the Fifth Circuit’s heightened pleading standard was problematic because it would have effected an amendment to the Federal Rules by judicial interpretation.⁴⁴

In *Swierkiewicz*, the Supreme Court continued to abjure the use of heightened pleading outside of those cases listed in Rule 9.⁴⁵ There, the

36. 507 U.S. 163 (1993).

37. 534 U.S. 506 (2002).

38. 544 U.S. 336 (2005).

39. *Leatherman*, 507 U.S. at 164.

40. *Id.* at 168.

41. *Id.* at 168 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

42. FED. R. CIV. P. 9(b).

43. *Leatherman*, 507 U.S. at 168 (noting Rule 9(b) and stating the familiar Latin axiom: “[e]xpressio unius est exclusio alterius”).

44. *Leatherman*, 507 U.S. at 168-69.

Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Id. Critics of the *Twombly* case have noted the importance of this language. See, e.g., Spencer, *Plausibility Pleading*, *supra* note 7, at 453-54 (“[T]he rule amendment process is preferable because it is a much more democratic, transparent, and accountable method of making changes to the Federal Rules.”).

45. *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002) (quoting *Leatherman*’s language rejecting heightened pleading standards by judicial interpretation). Professor Spencer suggests that the *Swierkiewicz* case was necessary because “lower courts continued to impose heightened

lower court had required the plaintiff in an employment discrimination case to plead a prima facie case of discrimination to survive a motion to dismiss.⁴⁶ In reversing, the Supreme Court noted that, in the context of a case for employment discrimination, “[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement.”⁴⁷ The burden-shifting evidentiary standard of the prima facie case in employment discrimination claims was inapplicable in the pleading context:

Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.⁴⁸

The Supreme Court characterized the lower court’s requirement of pleading the prima facie case as a “heightened pleading standard,” and, like in *Leatherman*, the Court rejected its use.⁴⁹ The Court again reemphasized that “[t]h[e] simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”⁵⁰

In the third important case, *Dura Pharmaceuticals*, the Supreme Court began a slight break from the liberal attitude to pleading evinced in *Conley*, *Leatherman*, and *Sweikewicz*.⁵¹ There, the plaintiffs had brought a class action for securities fraud against Dura Pharmaceuticals, alleging that the company had “falsely claimed that it expected the FDA would soon grant its approval” of one of its products, a new asthmatic spray device.⁵² The plaintiffs, in claiming that they were damaged by the false statement, stated: “In reliance on the integrity of the market, [the plaintiffs] paid artificially inflated prices for Dura securities and the plaintiffs suffered damage[s] thereby.”⁵³

pleading in many cases.” Spencer, *Plausibility Pleading*, *supra* note 7, at 437-38 (citing Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-59 (2003) (describing cases)).

46. *Sweirkiewicz*, 534 U.S. at 509.

47. *Id.* at 510.

48. *Id.* at 512.

49. *Id.* at 511.

50. *Id.* at 512 (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993). Professor Bone suggests that the *Twombly* Court’s skepticism of district judge case management as panacea for discovery burdens “may be the most important part of the *Twombly* opinion—perhaps even more important than the discussion of *Conley*.” Bone, *Twombly*, *Pleading Rules*, *supra* note 13, at 898.

51. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

52. *Id.* at 339.

53. *Id.* at 340 (emphasis removed) (internal quotations removed).

In moving to dismiss the plaintiffs' complaint, the defendant argued that the plaintiffs failed to adequately plead an economic loss or "a causal connection between the material misrepresentation and the loss."⁵⁴ The Court agreed and held that the plaintiffs' allegation that they "suffered damage[s]" was insufficient.⁵⁵

According to the Court, an artificially inflated purchase price did not necessarily show a loss or cause a loss even when the securities were resold later at a lower price.⁵⁶ The artificially high price did not show a loss because "the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value."⁵⁷

The Court read the plaintiffs' complaint as attempting to support the "suffered damage[s]" allegation by pleading that the share price was artificially inflated at the time of the sale.⁵⁸ The blanket allegation of damages supported by an allegation of an inflated purchase price was, however, insufficient.⁵⁹ This was true even though the inflated price may "touch upon" a later economic loss,⁶⁰ and "will *sometimes* play a role in bringing about a future loss."⁶⁰ The inflated purchase price, without more, was insufficient to state a claim for economic loss.⁶¹ The Court suggested, however, that the plaintiffs could have saved their complaint by "claim[ing] that [defendant]'s share price fell significantly after the truth became known."⁶²

To summarize: After *Conley*, the function of the complaint was to "merely 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"⁶³ The Court reemphasized the

54. *Id.* at 342.

55. *Id.* at 348.

56. *Id.* at 347.

57. *Id.* at 342 (emphasis in original).

58. *Id.* at 347 ("The complaint's failure to claim that Dura's share price fell significantly after the truth became known suggests that the plaintiffs considered the allegation of purchase price inflation alone sufficient. The complaint contains nothing that suggests otherwise.").

59. *Id.* at 346.

60. *Id.* at 343 (emphasis in original).

61. *Id.*

62. *Id.* at 347.

63. Steinman, *supra* note 9, at 1321 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also Spencer, *Plausibility Pleading*, *supra* note 7, at 434 ("Since the enactment of the Federal Rules of Civil Procedure in 1938, notice pleading has been the watchword for the system of pleading in federal civil courts."); see also *id.* at 438 (noting that before *Twombly* and *Iqbal*, "whether the possibility of recovery is likely or remote was rendered irrelevant; what mattered was whether the statement of the claim gave the defendant 'fair notice' of the claim and its basis."); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (noting that dismissal is not appropriate even it appears "that a recovery is very remote and unlikely").

importance of notice pleading in *Leatherman* and *Sweikerwicz*. In *Dura Pharmaceuticals*, a bridge between *Conley* and *Twombly*, the Court began scaling back on *Conley*'s liberal language on pleading.

III. TWOMBLY AND IQBAL

Twombly and *Iqbal* discuss pleading and the motion to dismiss in different terms than in previous cases. Briefly, *Twombly* and *Iqbal* describe two new "lines" that a plaintiff must "cross[]" to sufficiently plead a claim for relief: (1) "the line between the conclusory and the factual"; and (2) "the line between "the factually neutral and the factually suggestive."⁶⁴ Below, I will describe these two lines and the *Twombly* and *Iqbal* opinions in detail. I will then make the argument that this new terminology does not change pleading practice as much as commentators have assumed.

A. *Twombly: The Line between the Factually Neutral and the Factually Suggestive*

As the Supreme Court did in deciding *Twombly*, before proceeding to the legal analysis, it is necessary to provide some background on the *Twombly* case.⁶⁵ The history of this litigation can be traced all the way back to the 1984 divestiture of AT&T's local telephone business. The divestiture had generated a great deal of litigation and the Supreme Court had itself confronted issues stemming from the divestiture several times.⁶⁶

In 1984, AT&T's local telephone business was divided up into to regional service monopolies called Incumbent Local Exchange Carriers (ILECs).⁶⁷ Congress, however, became displeased with the operation of the regional monopolies, and eventually enacted the Telecommunications Act of 1996,⁶⁸ which imposed on the ILECs "a host of duties intended to facilitate market entry"⁶⁹ for competitors.⁷⁰ As the Court had explained, "[c]entral to the [new] scheme [was each

64. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007).

65. This background will be lifted from Justice Souter's majority opinion in *Twombly*. See *Twombly*, 550 U.S. at 548-52.

66. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004); *Twombly*, 550 U.S. 544; see also *Covad Comm. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

67. *Twombly*, 550 U.S. at 549. The ILECs have also been called "Baby Bells." *Id.*

68. 110 Stat. 56 (1996).

69. *AT&T Corp.*, 525 U.S. at 371.

70. *Twombly*, 550 U.S. at 549.

ILEC's] obligation . . . to share its network with competitors.”⁷¹ The competitors were known as “competitive local exchange carriers” (CLECs).⁷² In enacting this legislation, Congress had apparently “expected some ILECs to become CLECs in the legacy territories of other ILECs,” but this never occurred.⁷³

Despite that 1996 Act, then, the CLECs failed to achieve meaningful competition with the ILECs, and the ILECs failed to meaningfully compete with each other.⁷⁴ The plaintiffs in *Twombly* brought a class action complaint alleging that ILECs engaged in a “contract, combination . . . , or conspiracy, in restraint of trade or commerce” in violation of § 1 of the Sherman Act.⁷⁵ The complaint alleged conduct directed at demonstrating two separate conspiracies: (1) a conspiracy among the ILECs to inhibit the growth and market entry of the CLECs in the same ways (the “no-market-entry-for-CLECs conspiracy”); and (2) a conspiracy among the ILECs to refrain from competing with each other (the “no-competition-among-ILECs conspiracy”).⁷⁶

According to Justice Souter, writing for the majority, the plaintiffs did not “directly allege illegal agreement; in fact, they proceed[ed] exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized.”⁷⁷ The Court made this conclusion despite the plaintiffs’ allegation that “[d]efendants . . . engaged in a contract, combination or conspiracy to prevent competitive entry . . . [and] agree[d] not to compete with one another and to stifle attempts by others to compete with them.”⁷⁸ The Court read this allegation as a

71. *Id.* (quoting *Trinko*, 540 U.S. at 402) (alterations in original). The ILECs “vigorously litigated the scope of the [new] sharing obligation.” *Id.* at 549. As a result of this litigation, the FCC “three times revised its regulations to narrow the range of network elements to be shared with the CLECs.” *Id.* at 549-50 (citing *Covad Communications*, 450 F.3d at 533-34).

72. *Id.* at 549.

73. *Id.* at 569 (“The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make a conspiracy plausible.”).

74. *Id.* at 551.

75. 15 U.S.C. § 1 (2006) (making unlawful “[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”); *Twombly*, 550 U.S. at 551.

76. *Twombly*, 550 U.S. at 550-51.

77. *Id.* at 565 n.11, 564 (“[T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs.”). This explains the somewhat tortured language I use below to describe the plaintiffs’ allegations.

78. *Twombly*, 550 U.S. at 551 n.2 (quoting First Amended Complaint and Jury Demand at 64), *Twombly v. Bell Atlantic Corp.*, 313 F.Supp.2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220) [hereinafter *Twombly* Complaint]).

“legal conclusion[] resting on the prior allegations.”⁷⁹ Finding that no agreement had been directly alleged, the Court focused on the allegations that the plaintiffs pleaded that tended to suggest an agreement.⁸⁰

As to the no-market-entry-for-CLECs conspiracy, the plaintiffs alleged that this conspiracy could be seen by the ILECs “parallel conduct” that “included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers.”⁸¹ According to the plaintiffs, the ILECs’ “compelling common motivation[n]” to thwart the CLECs’ competitive efforts naturally led them to form a conspiracy.⁸²

As to the no-competition-among-ILECs conspiracy, the plaintiffs alleged that the ILECs failed to meaningfully pursue attractive business opportunities in adjacent markets where they would have had substantial competitive advantages.⁸³ Additionally, the plaintiffs noted that Richard Notebaert, an ILEC CEO, stated in an interview that competing in the residual territory of an ILEC “might be a good way to turn a quick dollar but that doesn’t make it right.”⁸⁴ The majority held that, despite these allegations, the complaint did not contain “enough facts to state a claim to relief that [wa]s plausible on its face.”⁸⁵

In reaching this conclusion, the majority began by first examining the requirements necessary to prove a § 1 claim.⁸⁶ Previously, the Court had held that, at the summary judgment stage, “a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.”⁸⁷ At the summary judgment stage, then, a plaintiff must show more than parallel business conduct and more than “even ‘conscious parallelism’”⁸⁸ because this activity does not tend to exclude the possibility that the defendants were acting independently. Noting that the sufficiency of allegations at the pleading

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

80. *Id.* at 565.

81. *Id.* at 550-51.

82. *Id.* at 551 (quoting *Twombly* Complaint, *supra* note 78, ¶ 50 (alteration in original)).

83. *Id.* (citing *Twombly* Complaint, *supra* note 78, ¶¶ 40-41).

84. *Id.* at 551 (quoting *Twombly* Complaint, *supra* note 78, ¶ 42).

85. *Id.* at 570.

86. *Id.* at 553.

87. *Id.* at 554.

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

stage is an “antecedent question” to the sufficiency of proof at trial and at summary judgment, the Court held that to state a claim under § 1, “a complaint [must allege] with enough factual matter (taken as true) to suggest that an agreement was made.”⁸⁹ The Court noted that the “‘crucial question’ [wa]s whether the challenged anticompetitive conduct stem[med] from independent decision or from an agreement, tacit or express.”⁹⁰

According to the Court, though, the factual matter pleaded by the plaintiffs did not suggest an agreement.⁹¹ As to conduct pleaded to infer the no-market-entry-for-CLECs agreement, the Court noted that, “nothing in the complaint intimate[d] that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.”⁹² As to the conduct pleaded to infer no-competition-among-ILECs agreement, the court noted that “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.”⁹³

The Court rejected the inference of an agreement that the plaintiffs drew from their allegations.⁹⁴ According to the Court, the allegations in the complaint failed to cross the line between the factually neutral and the factually suggestive and were therefore not plausible.⁹⁵ In a footnote, the Court noted that, in addition to the line between factually neutral and factually suggestive covered in *Twombly*, to plausibly state a claim for relief, the allegations in the complaint must also cross “the line between the conclusory and the factual.”⁹⁶

89. *Id.* at 556.

90. *Id.* at 553 (quoting *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1953)).

91. *Id.* at 566.

92. *Id.*

93. *Id.* at 568. Justice Stevens, in dissent, criticized the majority in this sense for “engag[ing] in arm-chair economics.” *Twombly*, 550 U.S. at 587 (Stevens, J., dissenting).

94. *Id.* at 569.

95. *Id.* But see Spencer, *Plausibility Pleading*, *supra* note 7, at 446-47.

Under the traditional rule, factual allegations that were consistent with liability passed muster because courts were required to draw any permissible inferences in the plaintiff’s favor, permissible here meaning those inferences simply consistent with the stated allegations. Thus, in the *Twombly* case, the courts should have been able—at the pleading stage—to infer from parallel conduct and the lack of competition among the ILECs, coupled with the statement of one of the ILEC presidents regarding the impropriety of such competition, that there was some agreement among the ILECs to restrain trade in violation of the Sherman Act.

Id.

96. *Twombly*, 550 U.S. at 557 n.5.

After *Twombly*, there was still some “hope” among those criticizing the case that it “might be narrowly confined to complex antitrust cases.”⁹⁷ Justice Stevens, writing in dissent in *Twombly*, wondered “[w]hether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint w[ould] inure to the benefit of all civil defendants.”⁹⁸ This question was answered in *Iqbal*, where the Supreme Court definitively stated: “Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’”⁹⁹

B. *Iqbal: The Line between the Conclusory and the Factual*

The *Iqbal* case addressed the line noted, but left unaddressed in *Twombly*: the line between the conclusory and the factual. As in the discussion of *Twombly*, a brief background discussion will help to frame the legal issues. The *Iqbal* case involved the September 11 attacks and the FBI investigation that followed: “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.”¹⁰⁰

After the September 11, 2001 attacks, “the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general.”¹⁰¹ Following this questioning, “some 762” of the individuals were held on immigration charges, and 184 of those held on immigration charges “w[ere] deemed to be of high interest to the investigation.”¹⁰² Once an individual was determined to be of high interest, the individual was “held under restrictive conditions designed to prevent . . . communicati[on] with the general prison population or the outside world.”¹⁰³

In *Iqbal*, the plaintiff was one of the individuals that was arrested on immigration charges and was also one of the individuals designated as “of high interest.”¹⁰⁴ Because he was deemed to be “of high interest,” he was placed in a high security housing unit, the Administrative

97. Steinman, *supra* note 9, at 1296.

98. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

99. Ashcroft v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1).

100. *Id.* at 1951.

101. *Id.* at 1943.

102. *Id.* at 1943.

103. *Id.*

104. *Id.*

Maximum Special Housing Unit (“ADMAX SHU”).¹⁰⁵ While housed in ADMAX SHU, the plaintiff was: (1) “kicked . . . in the stomach, punched . . . in the face, and dragged . . . across his cell without justification”;¹⁰⁶ (2) “subjected . . . to serial strip and body-cavity searches when he posed no safety risk to himself or others”;¹⁰⁷ and (3) refused the opportunity, along with other Muslims to pray and was told that there would be “[n]o prayers for terrorists.”¹⁰⁸ The plaintiff brought a complaint against numerous federal officers, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the FBI.¹⁰⁹

Only defendants Ashcroft and Mueller, however, were before the Supreme Court in *Iqbal* and the Court accordingly focused specifically on the allegations in the complaint connecting either Ashcroft or Mueller to Iqbal’s alleged harsh treatment.¹¹⁰ The plaintiff pleaded:

In the months after September 11, 2001, the Federal Bureau of Investigation (FBI), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men, designated herein as post-September 11th detainees, as part of its investigation of the events of September 11.

. . .

The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

. . .

Defendants ASHCROFT [and] MUELLER . . . 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.¹¹¹

105. *Iqbal*, 129 S. Ct. at 1943.

106. *Id.* at 1944. (internal quotations omitted).

107. *Id.*

108. *Id.* (internal citations and quotations omitted).

109. *Id.* at 1942.

110. *Id.* at 1944 (“The allegations against [Ashcroft and Mueller] are the only ones relevant here.”). Although ultimately dismissing the claims against Ashcroft and Mueller, the Court noted that “[Iqbal’s] account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here.” *Id.* at 1942.

111. Complaint at ¶¶ 47, 69, 96, *Ashcroft v. Elmaghraby*, No. 04 CV 01809 (E.D.N.Y. Sept. 27, 2005) [hereinafter *Iqbal* Complaint].

In identifying Ashcroft as a Defendant, the plaintiff described him as having “ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws. He [wa]s a principal architect of the policies and practices challenged [in the complaint].”¹¹² The plaintiff described Mueller as being “instrumental in the adoption, promulgation, and implementation of the policies and practices challenged [in the complaint].”¹¹³

In analyzing the complaint, the Court began by observing that the *Twombly* Court “found it necessary first to discuss the antitrust principles implicated by the complaint.”¹¹⁴ Following course, the Court stated it would “begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.”¹¹⁵ The Court then described *Iqbal*’s complaint for “invidious discrimination in contravention of the First and Fifth Amendments,” as a claim under *Bivens v. Six Unknown Federal Narcotics Agents*.¹¹⁶ A *Bivens* action is an implied cause of action against federal officials for a violation of a constitutional right.¹¹⁷ The cause of action is “disfavored,”¹¹⁸ and the Court has therefore “been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’”¹¹⁹ Where *Bivens* does apply, it “is the ‘federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983.’”¹²⁰

The Court explained that, for a *Bivens* claim, “the plaintiff must plead and prove that the defendant acted with discriminatory purpose.”¹²¹ To prove a discriminatory purpose, though, a plaintiff must show more than “‘intent as volition or intent as awareness of consequences.’”¹²² A plaintiff must show that a defendant adopted a course of action “‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.”¹²³ Accordingly, the Court stated, the plaintiff “must plead sufficient factual matter to show that

112. *Id.* ¶ 10.

113. *Id.* ¶ 11.

114. *Iqbal*, 129 S. Ct. at 1947.

115. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007)).

116. *Id.* at 1948.

117. *Id.* at 1947.

118. *Id.* at 1948.

119. *Id.* (quoting *Correctional Service Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

120. *Id.* (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006)).

121. *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540-41 (1993)); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

122. *Id.* (quoting *Personnel Administrator of Mass v. Freeney*, 442 U.S. 256, 279 (1979)).

123. *Id.* (quoting *Freeney*, 442 U.S. at 279) (alteration in original).

[Ashcroft and Mueller] 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.”¹²⁴

Before proceeding to determine if the plaintiff’s complaint crossed the line between factually neutral and factually suggestive,¹²⁵ the Court discussed the line between the conclusory and the factual mentioned in a footnote in *Twombly*: “In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”¹²⁶ The Court noted that it had followed this practice in *Twombly*: the *Twombly* Court “first noted that the plaintiffs’ assertion of an unlawful agreement was a ‘legal conclusion’ and, as such, was not entitled to the assumption of truth.”¹²⁷

The Court excised the following allegations from the complaint:

“[Ashcroft] is a principal architect of the policies and practices challenged here.”¹²⁸

“[Ashcroft] . . . 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.”¹²⁹

Most important was the Court’s rejecting the allegations that Ashcroft and Mueller “willfully . . . agreed to subject [Plaintiffs] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin.”¹³⁰ Recall that to recover on a *Bivens* action, a violation of a constitutional right does not equal intent; the plaintiff must prove that the motivation behind the violation was discriminatory.¹³¹

The Court then noted the allegations that it found well-pleaded:

124. *Id.* at 1948-49. An interesting note about the phrasing in *Iqbal* is the focus on opening the doors to discovery, rather than opening the doors to the district courts. *Iqbal*, 129 S. Ct. at 1950 (“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.”); *cf.* Phillips v. Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) (“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”).

125. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007).

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

127. *Id.* at 1950 (quoting *Twombly*, 550 U.S. at 555).

128. *Id.* at 1944; *id.* at 1951; *Iqbal* Complaint, *supra* note 111 ¶ 10.

129. *Iqbal*, 129 S. Ct. at 1951; *Iqbal* Complaint, *supra* note 111, ¶ 96.

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

131. *Id.* at 1948.

“In the months after September 11, 2001, the [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.”¹³²

“The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by [Ashcroft and Mueller] in discussions in the weeks after September 11, 2001.”¹³³

Having distilled the complaint down to its well-pleaded allegations, the Court moved to the plausibility analysis. In a statement that has generated much controversy following *Iqbal*, the Court noted that, “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*.”¹³⁴ The majority searched the complaint for “any factual allegation sufficient to plausibly suggest [Ashcroft’s and Mueller’s] discriminatory state of mind.”¹³⁵

Of the remaining, non-conclusory allegations, only two spoke to the discriminatory state of mind: the 1000s-of-arrests allegation and the hold-until-cleared-discussions allegation. On the 1000s-of-arrests allegation, the Court found that the “disparate, incidental impact on Arab Muslims” was not enough to state a plausible claim that Ashcroft and Mueller subjected the plaintiff to the harsh conditions because he was a Muslim.¹³⁶ As to the hold-until-cleared-discussions allegation, the Court found that “[a]ll it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”¹³⁷

On this point of plausibility—i.e., whether the majority’s cherry-picked allegations plausibly suggested discriminatory intent—the Court was unanimous.¹³⁸ Writing for the remaining four Justices in dissent, Justice Souter stated: “I agree that the two allegations selected

132. *Id.* at 1951; *Iqbal* Complaint, *supra* note 111, ¶ 47.

133. *Iqbal*, 129 S. Ct. at 1951; *Iqbal* Complaint, *supra* note 111, ¶ 69.

134. *Iqbal*, 129 S. Ct. at 1950 (emphasis added).

135. *Id.* at 1952.

136. *Id.* at 1951 (“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.”).

137. *Id.* at 1952.

138. *Id.* at 1960 (Souter, J., dissenting) (joined by Justices Stevens, Ginsburg, and Breyer).

by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.”¹³⁹

For the purposes of this Article then,¹⁴⁰ the disagreement in *Iqbal* was solely over the majority’s disregarding of certain allegations as conclusory. Justice Souter read the complaint as suggesting that Ashcroft and Mueller “helped to create the discriminatory policy [the plaintiff] has described.”¹⁴¹ The disagreement, then, is whether plaintiff’s statement that Ashcroft was the “principal architect”¹⁴² of a policy that subjected plaintiff to the harsh conditions of confinement “solely on account of [his] religion, race, and/or national origin”¹⁴³ was conclusory or factual. This disagreement will be explained more fully below.

To summarize: After *Twombly* and *Iqbal*, in adjudicating a motion to dismiss, the two crucial questions are (1) whether the allegations have crossed the line between the conclusory and the factual, and (2) whether the allegations have crossed the line between the factually neutral and the factually suggestive.

To guide courts in answering these questions, I will below describe a three-step process gleaned from *Twombly* and *Iqbal* that will provide methodological consistency. This approach will also relegate the plausibility inquiry to its proper role as an inquiry of last resort, and will ensure that, if necessary, the plausibility inquiry will be done transparently. This reading demonstrates that many of the criticisms of *Twombly* and *Iqbal* are overstated. Additionally, in discussing the plausibility inquiry, the final of the three steps, I will provide new interpretation of *Twombly* and *Iqbal* in light of Federal Rule of Civil Procedure 11 and suggest again that much of the criticism of the two cases is overstated.

IV. THE THREE-STEP PROCESS

Briefly, in adjudicating a motion to dismiss, a court should: (1) identify the elements of a claim that a plaintiff will ultimately need to prove on the legal theory that a defendant seeks to have dismissed; (2) excise from the complaint conclusory allegations; and (3) determine whether the remaining non-conclusory allegations directly allege each

139. *Id.*

140. Justice Souter in dissent also strongly disagreed with the majority’s legal analysis of the requirements for a *Bivens* claim. See *Iqbal*, 129 S. Ct. at 1954-55 (Souter, J., dissenting).

141. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

142. *Iqbal* Complaint, *supra* note 111, ¶ 10.

143. *Id.* ¶ 96 (emphasis added).

element of the claim, and if not, determine whether the non-conclusory allegations that indirectly allege an element of a claim suggest more than a possibility that the plaintiff will be able to prove his or her claim.

A. *The Elements of the Cause of Action*

Exactly how a court should define the elements of a cause of action at the pleading stage has received relatively little scholarly attention.¹⁴⁴ Professor Charles Campbell, however, has suggested that a plaintiff must plead “factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law.”¹⁴⁵ I agree with Professor Campbell: Under *Twombly* and *Iqbal* a plaintiff must plead factual matter that speaks to each element of a claim for relief. This statement seems obvious, but is confused by the *Sweirkeiwicz* case, where the Supreme Court held that a plaintiff need not plead a prima facie case to survive a motion to dismiss.¹⁴⁶ A close reading of *Sweirkeiwicz*, however, reveals that the holding is not inconsistent with requiring a plaintiff to plead to each element of a claim for relief.

Before the *Sweirkeiwicz* case, in *McDonnell Douglas Corp. v. Green*, the Supreme Court outlined the plaintiff’s evidentiary burden at the summary judgment stage and referred to this as a prima facie case.¹⁴⁷ The Court required a plaintiff to show “(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination.”¹⁴⁸

In rejecting the Fifth Circuit’s requirement that a plaintiff to plead each of these four elements, the Court noted that the prima facie case requirements were an “evidentiary standard”¹⁴⁹ that “set forth the basic

144. Professor Spencer has previously touched on this. Spencer, *Plausibility Pleading*, *supra* note 7, at 487 (“To the extent that *Twombly* endorses parity between the level of scrutiny applied to claims at the Rule 12(b)(6) and Rule 56 stages—with the only distinction being that between alleged facts and evidenced facts—such a development is unwelcome.”).

145. Charles B. Campbell, *A ‘Plausible’ Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L. J. 1, 22 (2008). Professor Emily Sherwin, however, has argued that “no one maintains that plaintiffs must specify the elements of a legal cause of action in their complaints.” Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L. J. 73, 75 (2008).

146. *Sweirkeiwicz v. Sorema*, 534 U.S. 506, 511 (2002) (“This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.”).

147. 411 U.S. 792, 802 (1973).

148. *Sweirkeiwicz*, 534 U.S. at 510 (citing *McDonnell Douglas*, 411 U.S. at 802).

149. *Id.* (“In *McDonnell Douglas*, this Court made clear that ‘[t]he critical issue before us concern[ed] the order and allocation of proof in a private, non-class action challenging employment

allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.”¹⁵⁰ Once a plaintiff presented enough evidence to establish a prima facie case, this created a “presumption that the employer unlawfully discriminated against the employee.”¹⁵¹

But, to prove employment discrimination, a plaintiff does not always need to present circumstances that support an inference of discrimination. Instead, as the *Sweirkeiwicz* Court noted, “if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.”¹⁵²

In *Sweirkeiwicz*, the Court referred to the requirement of pleading a prima facie case as a “heightened pleading standard” that “conflict[ed] with Federal Rule of Civil Procedure 8(a)(2).”¹⁵³ As Campbell notes, “*Swierkiewicz* rejected using an evidentiary standard as a pleading standard; it did not reject measuring the sufficiency of a complaint by whether it alleged all of the elements necessary to recover.”¹⁵⁴ Indeed, the Court rejected the prima-facie-case pleading standard because it required pleading *more* than all of the elements necessary to recover.¹⁵⁵

Additionally, the material-elements pleading requirement is consistent with the Supreme Court’s unanimous opinion in *Dura Pharmaceuticals*. There, in determining the sufficiency of a plaintiff’s complaint, the Court first examined what a plaintiff would ultimately “need to *prove*.”¹⁵⁶ The Court identified all the elements necessary to succeed on a securities fraud action, and found that the plaintiff failed to plead two of them: “what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation.”¹⁵⁷ Because the plaintiff had failed to “giv[e] any

discrimination.”) (quoting *McDonnell Douglas*, 411 U.S. at 800) (alteration and emphasis in *Sweirkeiwicz*).

150. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).

151. *Id.* at 254.

152. *Swierkiewicz*, 534 U.S. at 511.

153. *Id.* at 512.

154. Campbell, *supra* note 149 at 23. Moore’s Federal Practice suggests that “[t]he Supreme Court had rejected the idea that courts should measure a pleading’s adequacy by the elements of a claim.” 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 8.04[1a] (3d ed. 2010). John P. Lenich, however, says that “[t]he authors [of Moore’s Federal Practice] are wrong.” John P. Lenich, *Notice Pleading Comes to Nebraska: Part I—Pleading Claims for Relief*, NEB. LAW., Sept. 2002, at 2, 7 n.12.

155. *Sweirkeiwicz*, 534 U.S. at 515.

156. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 346 (2005).

157. *Id.* at 347.

indication of the economic loss and proximate cause,”¹⁵⁸ the Court held that the complaint was insufficient.¹⁵⁹

When adjudicating a motion to dismiss, as the Court did in *Dura Pharmaceuticals*, *Twombly*, and *Iqbal*, a court should begin the analysis by identifying the minimum elements a plaintiff must prove to recover on the cause of action for which the defendant seeks dismissal. A court only needs to complete this process on those particular legal theories on which the defendant seeks to foreclose the plaintiff’s recovery. This first step in the three-step process existed before *Twombly* and *Iqbal* and should therefore be unobjectionable to those critical of the plausibility inquiry. Additionally, determining the elements of a claim is a legal question, which is proper at the pleading stage.¹⁶⁰

B. Defining Conclusory

After defining the elements of the cause of action on which the defendant seeks dismissal, a court should closely examine the complaint and excise those allegations that are conclusory.¹⁶¹ Defining conclusory is a difficult task, partly because the Federal Rules attempted to move away from the language of “facts,” “ultimate facts,” and “conclusions” with Rule 8(a)’s short-plain-statement language.¹⁶² Indeed, the drafters of Rule 8 “intentionally avoided any reference to ‘facts’ or ‘evidence’ or ‘conclusions.’”¹⁶³

Because this line between the conclusory and the factual appears to have been drawn (or at least received significant attention) for the first time in *Iqbal*, its definition must be found there. As noted above in the

158. *Id.*

159. *Id.* at 438.

160. One potential problem, however, with this approach is that it may increase the workload of courts because it requires courts to identify the legal elements of the claim. I contend, however, that based on *Dura Pharmaceuticals*, this was already the practice in federal courts—if a plaintiff does not plead any allegation that speaks to a claim for relief, the court should dismiss the claim. The proposed approach here simply asks courts to make the identification of the elements of a cause of action more systematically.

161. See *Iqbal*, 129 S. Ct. at 1950 (instructing courts to “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”).

162. Bone, *Twombly*, *Pleading Rules*, *supra* note 13, at 891 (“[N]ineteenth-century judges applied the code rules in a hyper-technical fashion, insisting on ‘strict and logical accuracy’ and drawing hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts.”) (citations omitted).

163. *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004) (“The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’”).

description of *Iqbal*, the Supreme Court held that the plaintiff had failed to adequately allege that Ashcroft and Mueller intentionally formulated the plan of restrictive confinement to subject the plaintiff to his mistreatment in confinement because of some discriminatory animus.¹⁶⁴ Importantly, the Court noted that it did not disregard the allegations because they were “unrealistic or nonsensical.”¹⁶⁵

In this process, the Court excised from the complaint the allegation that “ASHCROFT [and] MUELLER . . . willfully . . . agreed to subject [Iqbal] to the[] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,”¹⁶⁶ and the allegation that Ashcroft was the “principal architect”¹⁶⁷ of the policy and Mueller was “instrumental”¹⁶⁸ in carrying it out. The Court characterized these as “bald allegations” and found them not well-pleaded.¹⁶⁹

In contrast, the Court found as non-conclusory the allegations that (1) “[i]n the months after September 11, 2001, the Federal Bureau of Investigation (FBI), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men, designated herein as post-September 11th detainees, as part of its investigation of the events of September 11,”¹⁷⁰ and (2) “[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.”¹⁷¹

Justice Souter, writing in dissent in *Iqbal*, faulted the majority’s analysis on this point saying, “[b]y my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.”¹⁷²

So the question becomes: what is the difference between the allegations that the Court held conclusory and those allegations that the Court found well-pleaded?

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

165. *Id.* at 1951.

166. *Iqbal* Complaint, *supra* note 111 ¶ 96; *Iqbal*, 129 S. Ct. at 1951.

167. *Iqbal* Complaint, *supra* note 111, ¶ 10; *Iqbal*, 129 S. Ct. at 1951.

168. *Iqbal* Complaint, *supra* note 111, ¶ 11; *Iqbal*, 129 S. Ct. at 1951.

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

170. *Iqbal* Complaint, *supra* note 111, ¶ 47; *Iqbal*, 129 S. Ct. at 1951.

171. *Iqbal* Complaint, *supra* note 111, ¶ 69; *Iqbal*, 129 S. Ct. at 1951.

172. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

1. Elements of a Claim that are only Indirectly Perceptible

Professor Steinman has provided a definition of the line between the conclusory and the factual: “an allegation is conclusory only when it fails to identify adequately the acts or events (or, one might say, the transactions or occurrences) that entitle the plaintiff to relief from the defendant.”¹⁷³

I suggest a similar, although not identical, definition. An allegation in a complaint is conclusory when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible. By sensory perceptible, I mean capable of being perceived by any of the five senses. To illustrate, I provide several examples, none of which is entirely conclusory:

1. Defendant fired Plaintiff because she was a woman.
2. During a performance review, Defendant stated that clients have complained about doing business with a woman.
3. Plaintiff heard Defendant make a joke and laugh when she exited the room.
4. Defendant failed to use gender-neutral language in his intra-office memoranda.
5. Defendant fired Plaintiff because of his hostility to women which he demonstrated by his constant telling of sexist jokes in the office.

In allegation one, the Defendant’s firing of the Plaintiff is sensory perceptible. An employer cannot fire an individual without some sensory perceptible action—a phone call that the individual can hear, or a letter that an individual can see and read. In allegations two, the Defendant’s statement is sensory-perceptible by hearing; likewise in allegation three. In allegation four, the use of the pronouns could have been seen while Defendant was at his desk typing, or could have been seen by reading the memoranda. Allegation five is sensory-perceptible because the jokes could be heard.

But parts of allegations one and five are not *directly* sensory perceptible—these are the allegations that state the Defendant’s motive for the firing. A motivation cannot be directly perceived; it can only be perceived indirectly. One can only know an individual’s state of mind

173. See Steinman, *supra* note 9, at 1298. Professor Spencer, although not addressing the issue in the same way, has suggested that a non-conclusory allegation is one “of observed or experienced *objective facts* about what transpired.” (emphasis added). A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 14 (2009).

through those sensory-perceptible actions that tend to evince motivation. Allegations two through four are all examples of sensory-perceptible allegations that can evince the Defendant's intent.

It is important to note, though, that in the hypothetical complaint, combining a sensory-perceptible allegation with an imperceptible allegation does not transform the latter into a non-conclusory allegation. This is true even if the plaintiff says that the sensory-perceptible allegation demonstrates the imperceptible element. For example, in allegation five, the allegation about the sexist jokes is sensory-perceptible and therefore well-pleaded. But the "because-of" part of the allegation—that "Defendant fired Plaintiff because of his hostility to women"—is not directly perceptible. The Plaintiff's linking of these two allegations in a single paragraph, and suggesting that the jokes prove the intent, does not transform the allegation on the Defendant's state of mind into a non-conclusory allegation. This rule can be lifted from *Dura Pharmaceuticals*. There, the plaintiffs alleged damages and the court read the complaint as linking the allegation of an artificially inflated price (which is a directly sensory-perceptible fact) with the damages.¹⁷⁴ The Court nonetheless held that the allegation was insufficient.¹⁷⁵ As further support, in *Papasan v. Allain*,¹⁷⁶ the Court noted that "[a]lthough for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."¹⁷⁷

This definition of conclusory described above can be seen in *Iqbal*. There, a meeting between Ashcroft and Mueller where they "discussed"¹⁷⁸ the policy of the restrictive conditions of confinement could have been seen and heard. Ashcroft's intention in implementing the policy, that he did it "solely on account of their religion, race, and/or national origin,"¹⁷⁹ however, is only indirectly perceptible. One can try to understand Ashcroft's intent by what one hears him saying, or what one sees him doing, but one cannot perceive what his motivation is.

It is important to note that a plaintiff cannot always avoid the plausibility inquiry by simply pleading sensory-perceptible allegations

174. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 347 (2005).

175. *Id.*

176. 478 U.S. 265 (1986).

177. *Id.* at 286.

178. *Iqbal* Complaint, *supra* note 111, ¶ 69.

179. *Id.* ¶ 96.

on each of the elements of a cause of action.¹⁸⁰ Some elements cannot be pleaded directly with sensory-perceptible allegations. When a statute or common law rule makes intent an element of a claim, a plaintiff cannot directly plead that element with a non-conclusory allegation.

Again, this can be seen in *Iqbal*. There, the plaintiff pleaded a non-conclusory allegation—the arrest and detention of thousands of Arab Muslim men after September 11: “[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.”¹⁸¹ This is a sensory-perceptible allegation that tends to show Mueller’s and Ashcroft’s state of mind. Although the plaintiff did not explicitly allege the connection between the two, the plaintiff’s failure to explicitly make the connection did not cause the allegation to fail.¹⁸² Conversely, a plaintiff’s explicitly connecting the two should not make the allegation sufficient. Similarly, in the *Dura Pharmaceuticals*, the Court read the complaint as the plaintiff making this connection, but this was still not enough. Again, whether a claim is well-pleaded should not turn on the plaintiff’s artfully connecting a non-conclusory allegation with an element of a claim that cannot be directly pleaded—this type of hypertechnical rule is a result that the Federal Rules sought to avoid.¹⁸³

The only way to plead intent is to provide the court with sensory-perceptible allegations that indirectly speak to the element. When a cause of action requires as an element some level of intent—or some other element that is not itself directly sensory-perceptible—the plaintiff must plead around this requirement with other sensory-perceptible allegations.

2 Directly Perceptible Elements that are Pleded Indirectly

Twombly, however, necessitates a second part of the definition of conclusory. An allegation in a complaint is also conclusory when the plaintiff pleads an element that is directly sensory perceptible, but pleads the element as though it has not been directly perceived. An agreement or a conspiracy is a directly-perceptible element: a handshake, an oral assent, or even a wink and a nod that is the assent to the agreement. But,

180. See Steinman, *supra* note 9, at 1316 (“But a complaint that *does* provide non-conclusory allegations on every element of a claim, by definition, exceeds the threshold of *plausibly* suggesting an entitlement to relief for purposes of *Iqbal* step two.”) (emphasis added).

181. *Iqbal* Complaint, *supra* note 111, ¶ 47.

182. Cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009).

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

according to the Court in *Twombly*, the plaintiffs did not state a claim even though they alleged that:

Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section I of the Sherman Act.¹⁸⁴

The Court found that the plaintiffs were not proceeding on an allegation of direct agreement: “[T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs.”¹⁸⁵ The allegations of the “agreement” in *Twombly* were not describing some directly perceptible fact—instead they were reciting the element of the cause of action, and were pleaded as only indirectly perceptible.

To make this distinction clear, I suggest that the plaintiffs would have stated a claim had they alleged that:

1. [T]he CEOs of each of the [ILECs] reserved a private room at a high-priced restaurant in Bermuda in January 1996, and then alleged a second-by-second transcript of exactly what was said by whom at the meeting as they hatched their conspiratorial regime.¹⁸⁶

With this hypothetical allegation, the plaintiffs would have pleaded the agreement as a directly perceptible allegation. The Court, despite being skeptical that any of the plaintiffs were in that room, and without the plaintiffs producing any documents (such as minutes from the meeting), would have had to accept this allegation as true—the allegation is non-conclusory.

What is important is whether the plaintiffs were alleging the agreement as a recitation of the elements of the cause of action or were directly alleging the agreement. In other words, just because an element of a claim (e.g., an agreement) can be directly sensory perceptible does not mean that any time the allegation is used in the complaint it will be used as sensory perceptible. A complaint can allege a conspiracy but

184. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551 n.2 (2007).

185. *Id.* at 564.

186. Steinman, *supra* note 9, at 1318 n.149 (using the hypothetical pleading to argue that *Twombly* and *Iqbal* cannot be read to require evidentiary support for non-conclusory allegations at the pleading stage).

really plead it as an indirectly perceptible element and make allegations of parallel conduct to show it.

3. Changes to Pleading under this Step

As I did after step one, I pause here to note why this step should still be unobjectionable to critics of the plausibility inquiry. First, for a cause of action where all the elements are directly perceptible and the plaintiff directly pleads each element with sensory perceptible allegations, a court need not and *cannot* engage in the plausibility inquiry. As Professor Steinman has pointed out, in this situation the plausibility inquiry “vanishes completely.”¹⁸⁷

Second, a court cannot require a plaintiff to produce evidence to back up non-conclusory allegations in the complaint. It is important to note that the definition of conclusory does not require sensory-*perceived* allegations, but instead sensory-*perceptible* allegations. Confronted with *Iqbal*’s allegations, I personally would find it “unrealistic”¹⁸⁸ that he had himself perceived those discussions in the weeks after September 11—i.e., he had heard Ashcroft and Mueller discussing the policy, or had heard Ashcroft’s and Mueller’s phone calls, or read their emails. I would also be surprised to find out that the plaintiff had heard this information from someone else that had actually perceived these allegations. But none of this matters. As the Supreme Court stated: “To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”¹⁸⁹

Third, I suggest also that the above definition of conclusory, although not compelled by, is nonetheless consistent with Supreme Court precedent before *Twombly* and *Iqbal*. In *Dura Pharmaceuticals*, the plaintiffs alleged that they “suffered damage[s].”¹⁹⁰ Suffering economic damages is a directly perceptible allegation—this can be seen through a lower resale price. But the plaintiffs pleaded that allegation as though it was only indirectly perceptible. This allegation is conclusory

187. See Steinman, *supra* note 9, at 1316. But, where a plaintiff cannot allege an element of a cause of action directly—either because the element is only indirectly perceptible, or because the plaintiff pleads the allegations as a conclusion and pleads the element indirectly with other sensory-perceptible allegations—the court must then proceed to the plausibility analysis on those specific elements.

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

189. *Id.*

190. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 340 (2005).

in the same way that the use of the term “agreement” was conclusory in *Twombly*.¹⁹¹ What remains, then, is the discussion of plausibility.

C. *Plausibility*

As noted above, up until this point, *Twombly* and *Iqbal* have not significantly changed pleading practice and have not yet introduced the feared subjectivity into pleading practice. Again, under the first two steps outlined above, when confronted with a motion to dismiss, a court should first identify the elements of a claim for relief. A court should then see if the elements of the claim are directly perceptible, and if so, whether the plaintiff has directly pleaded those elements with sensory-perceptible allegations. In these types of claims a court *cannot* engage in the plausibility inquiry and must deny the motion to dismiss.

But sometimes a claim will contain elements that cannot be directly perceived, or a plaintiff will plead a directly perceptible element only indirectly. In these situations, a court must examine whether the sensory-perceptible allegations that indirectly speak to the missing element plausibly suggest that the plaintiff will be able to prove the missing element.

This third step—a court’s analysis of whether the non-conclusory allegations that indirectly speak to an element of a cause of action—is the plausibility inquiry. Before addressing this inquiry, however, I will first pause to point out several of the practicalities that are involved in Rule 12(b)(6) motion practice that tend to forestall the necessity of the plausibility inquiry. This discussion is intended to answer the fears that *Twombly* has introduced “a wild card . . . at the *threshold stage* of civil process through which all litigation must pass.”¹⁹²

1. Getting to Plausibility

In *Taming Twombly*, Professor Edward Harnett describes how district judges can forestall the plausibility inquiry. He points out that, although “most commentators[] seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery, this is simply not the case.”¹⁹³ He continues that, “the mere filing of a motion to dismiss does

191. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.11 (2007).

192. Clermont & Yeazell, *supra* note 10 (emphasis added).

193. Harnett, *supra* note 15, at 507.

not trigger a stay of discovery . . . ‘Discovery need not cease during the pendency of a motion to dismiss.’”¹⁹⁴

A district court that is generally sympathetic to a plaintiff’s complaint, but unsure whether the complaint could survive the plausibility analysis, simply “could . . . delay decision on the motion to dismiss.”¹⁹⁵ If a court sits on the motion to dismiss, “by the time briefing and argument on the motion to dismiss is complete, the plaintiff will have had an opportunity to obtain discovery to support those allegations as to which discovery was needed.”¹⁹⁶ If this discovery while the motion is pending turns up evidence that supports the plaintiff’s allegations, a court would likely find that “justice so requires” granting “leave” to amend the complaint to include the new allegations.¹⁹⁷ Hartnett also points out that Rule 12(i) “authorize[s] a district court to defer hearing and decision on a 12(b)(6) motion until trial.”¹⁹⁸

Even if a district court does entirely dismiss the plaintiff’s complaint, the district court can do so with leave to amend the complaint. This is, in fact, the “commonly followed” practice.¹⁹⁹ Indeed, in *Iqbal*, the Supreme Court specifically provided for this option: “The Court of Appeals should decide in the first instance whether to

194. *Id.* at 507 (quoting *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 852 F.2d 936, 945 n.11 (7th Cir. 1988)). Hartnett notes that under Rule 26(c), a court may “for good cause[] issue an order . . . forbidding . . . discovery.” *Id.* at 507-08. He points out, though, that the “issuance of such a stay is not routine.” *Id.* Hartnett additionally notes that, if courts would normally grant a stay of discovery while a motion to dismiss was pending, this “would be to treat a unique provision of the Private Securities Litigation Reform Act of 1995 as if it applied to all cases.” *Id.* (citing 15 U.S.C. § 77z-1(b)(1) (2006)).

195. Hartnett, *supra* note 15, at 509. Hartnett also notes, however, that in some cases a defendant may simultaneously file a motion to dismiss and a motion to stay discovery. *Id.* Alternatively, he points out that a defendant may simply “stonewall” discovery, a behavior which a plaintiff may not be able to redress with a motion to compel before the district court makes a decision on the motion to dismiss. *Id.*

196. *Id.*

197. *Id.* at n.166; FED. R. CIV. P. 15.

198. Hartnett, *supra* note 15, at 511; FED. R. CIV. P. 12(i) (“If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion— . . . must be heard and decided before trial unless the court orders a deferral until trial.”).

199. See 5B FED. PRAC. & PROC. CIV. § 1357 n.98 (3d ed.) and accompanying text.

A wise judicial practice (and one that is commonly followed) would be to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief.

Id. As a matter of course, plaintiff’s attorneys, when opposing a motion to dismiss, should ask for the court’s leave to amend if the court determines that the complaint cannot state a claim.

remand to the District Court so that respondent can seek leave to amend his deficient complaint.”²⁰⁰

Additionally, a motion to dismiss does not always dispose of the plaintiff’s entire action. On those claims that survive the partial dismissal, which generally will form part of the same set of transactions and occurrences, continued discovery may reveal evidence that would demonstrate that “justice so requires”²⁰¹ leave to amend the complaint to replead those previously dismissed claims. Hartnett also notes that a district court’s discretion to help along a deficient claim is “largely unreviewable.”²⁰²

Some cases will, however, require a court to engage in the plausibility inquiry.

2. Plausibility

Confronted with the necessity of the plausibility inquiry, a court should carefully examine the complaint and find those allegations that speak to the element indirectly. As in *Iqbal*, it should not be necessary for the plaintiff to specifically link within the complaint which allegations speak to which elements.²⁰³ A court should look at the allegations cumulatively. The court should then determine whether it can “draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁰⁴ A court faced with this decision will be required to apply some amount of “judicial experience and common sense.”²⁰⁵ This is where the inquiry becomes problematic.

How a court determines whether the inference is reasonable is a difficult question. Professor Bone suggests that, in making this determination, a court will compare the alleged conduct with a baseline of conduct and see if the alleged conduct “differ[s] in some significant

200. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

201. FED. R. CIV. P. 15(a).

202. Hartnett, *supra* note 15, at 513. “The major exception to this principle is when qualified immunity is in play.” *Id.* This explains the language in *Iqbal* that suggests that discovery should not proceed during a motion to dismiss. *See id.*

203. *See Iqbal*, 129 S. Ct. at 1951-52.

204. *Id.* at 1949.

205. *Id.* at 1950. Professor Scott Dodson notes an interesting aspect of *Twombly* that remains unsettled:

[W]ho will determine (and under what standards) what is “plausible” or not? . . . May a defendant moving to dismiss support his motion with expert opinions that the plaintiffs’ allegations are not plausible? Must a plaintiff oppose the motion with his own expert’s contrary opinions? Must the trial court then convert the motion into one for summary judgment?

Dodson, *supra* note 19, at 142.

way from what usually occurs in the baseline and differ[s] in a way that supports a higher probability of wrongdoing than is ordinarily associated with the baseline conduct.”²⁰⁶ Professor Bone, although generally concluding that the “plausibility standard marks only a modest departure from traditional notice pleading,” recognizes that “[d]efining the appropriate baseline will not always be easy, and in any event it involves a normative judgment.”²⁰⁷ This is about as accurate of a description of the analysis as possible. A judge, and the Supreme Court, “could never succeed in intelligibly” defining the line between speculative and plausible, but I think that most judges will “know it when [they] see it.”²⁰⁸ I pause here to point out that excepting the disagreement on the conclusory nature of several of the allegations, there was surprising uniformity in the Justices’ interpretation of the plausibility inquiry in *Twombly* (a 7–2 decision) and *Iqbal* (9–0).

I acknowledge here that the plausibility inquiry does involve some subjectivity in the use of judicial experience and common sense. In the next section, I will argue that this subjectivity is not as problematic as some have suggested.

3. Recasting *Twombly* and *Iqbal*: Defending Plausibility Pleading and Confronting Its Critics

Federal Rule of Civil Procedure 11 requires a plaintiff to have a “belief[] formed after an inquiry reasonable under the circumstances . . . [that] the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable

206. See Bone, *Twombly, Pleading Rules*, *supra* note 13 at 885-86.

By a ‘baseline,’ I mean the normal state of affairs for situations of the same general type as those described in the complaint. The probability of wrongdoing for baseline conduct is not necessarily zero, but it should be very small, for otherwise the conduct in question would not be part of a socially acceptable baseline.

Id. Bone explains that he read *Twombly* as a case determined by what baseline is applied to the conduct of the telecommunications companies. See *id.* at 885.

It is tempting to conclude that there must be something amiss when competing firms stay out of one another’s markets and use common techniques to deter entry into their own. But this is an example of a baseline problem. Parallel conduct of this sort might seem odd when compared to the baseline of competitive behavior in general. But this is the wrong baseline for the *Twombly* case. The correct baseline is competitive behavior under the particular conditions of the telecommunications market. And compared to that baseline, there is nothing necessarily odd about what the defendants are doing.

Id.

207. See Bone, *Twombly, Pleading Rules*, *supra* note 13, at 935, 887.

208. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Breyer provides a modern-day version of this quotation in *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (“I see no test-related substitute for the exercise of legal judgment.”).

opportunity for further investigation or discovery”²⁰⁹ When Rule 11 speaks of “factual contentions” it does not have the same definition as the definition of non-conclusory that I have provided above. Factual contentions under Rule 11 are those contentions that are not legal conclusions. Under Rule 11, a defendant’s state of mind or purpose, then, is a factual contention.

Under Rule 11, when a plaintiff alleges that a group of defendants formed a conspiracy, or alleges that a defendant had a discriminatory motive, a plaintiff is not required to have evidentiary support for these contentions. But a plaintiff is required to have a reasonable belief that these factual contentions will “likely have evidentiary support.”²¹⁰ This makes sense—one would not normally expect an individual who got fired to file a discrimination claim for no reason. The individual will have some basis for believing that the termination was discriminatory.

Twombly and *Iqbal* require a plaintiff to plead that basis.²¹¹ This must be done in non-conclusory (sensory-perceptible) allegations, but this should be no insuperable hurdle for a plaintiff; for those elements of a claim that a plaintiff does not, or cannot (like discriminatory purpose) directly allege in a sensory-perceptible allegation, the plaintiff must have some sensory-perceptible reason for believing that the element is satisfied. To make the point more clear, I draw again on the above provided hypothetical allegations of discrimination:

1. Defendant fired Plaintiff because she was a woman.
2. During a performance review, Defendant stated that clients have complained about doing business with a woman.
3. Plaintiff heard Defendant make a joke and laugh when she exited the room.
4. Defendant failed to use gender-neutral language in his inter-office memoranda.
5. Defendant fired Plaintiff because of his hostility to women which he demonstrated by his constant telling of sexist jokes in the office.

A plaintiff can make the allegation that Defendant fired her because she was a woman. But she cannot plead this in directly perceptible allegations. By filing the suit though, she believes that the allegation of discrimination in Allegation 1 will likely have evidentiary support. Why

209. FED. R. CIV. P. 11.

210. *Id.*

211. Professor Hoffman has previously suggested that plausibility “is probably close—if not (at least sometimes) equivalent—to the Rule 11(b)(3) proscription against asserting claims for which there is no evidentiary support and no likelihood of evidentiary support after a reasonable opportunity for further discovery.” Hoffman, *supra* note 12, at 1253-54.

does she believe this—because of the additional sensory-perceptible allegations two through five. A court must accept that all of these things physically happened (aside from the non-conclusory part of allegation 5). The court will then evaluate whether the plaintiff has accurately predicted whether she will likely find evidence of discrimination.

Under *Twombly* and *Iqbal*, then, a Court is simply evaluating whether the plaintiff has adequately appraised her claim. The Court is not making any factual determination or weighing any credibility. The Court is not requiring a plaintiff to produce evidence to back up her well-pleaded allegations. Instead, the Court is determining whether the plaintiff's reasons for believing that she was discriminated against suggest that she will be entitled to relief. A plaintiff does not have a new evidentiary burden under *Twombly* and *Iqbal*. Instead, a plaintiff must reveal to the court what she is already required to have under Rule 11.

The circumstances under which plausibility pleading will lead to a different result than the traditional system of notice pleading are limited. This will only occur when a court disagrees with a plaintiff on whether her reasons for bringing a claim suggest liability. *Twombly* and *Iqbal* should only be feared on policy grounds if one assumes that a plaintiff as a better ability than a disinterested judge to gauge whether her claim is more than speculative. To put it another way, is it fair to subject a defendant to legal costs and the costs of discovery when a plaintiff has only a hunch?²¹² In Rule 8(a)'s terms, a pleading without the plaintiff's reasons for believing that the allegation will likely have evidentiary support fails to "show[]" that the plaintiff is "entitled to relief."²¹³

Professor Steinman has questioned whether it is appropriate to use Rule 11's certification requirement as a pleading standard. Rule 11 already has its own enforcement mechanism, which is sanctions, and courts should not commandeer that standard into the 12(b)(6) adjudication.²¹⁴ While this may be a valid criticism, my argument is merely that *Twombly* and *Iqbal* do not, practically, require anything new

212. Cf. Bone, *Twombly*, *Pleading Rules*, *supra* note 13, at 900 ("When proceduralists discuss pleading standards, they tend to assume that fairness applies just to plaintiffs and that any pleading standard stricter than liberal notice pleading can be justified only on efficiency grounds."). Granted, though, a court will end up dismissing a case on a mere hunch. But there are still many protections of plaintiffs in place—need to take the non-conclusory allegations as true—that are in the plaintiff's favor, and, anyway, it seems better to have a neutral third-party—the judge—make this decision than the interested plaintiff.

213. See FED. R. CIV. P. 8(a)(2).

214. See Steinman, *supra* note 9, at 1331-32 ("Using Rule 11 as a basis for requiring supportive allegations at the pleadings phase would, therefore, conflate two separate procedural issues, contrary to the text and structure of the Federal Rules.").

of plaintiffs. Additionally, this requirement can be tenably derived from Rule 8(a)'s language quoted above.

Professor Spencer suggests that the rules of pleading were not intended to screen out claims at the pleading stage,²¹⁵ except when the complaint fails to give the defendant adequate notice. Spencer also argues that the plausibility pleading standard “is out of step with the larger matrix of rules governing procedure in federal civil cases.”²¹⁶ He suggests that “although Rule 11(b) allows for the possibility that the pleader will require discovery to obtain supportive facts, plausibility pleading does not make such an allowance.”²¹⁷ Rather, plaintiffs are required to offer such facts at the pleading phase before discovery may occur.²¹⁸ This characterization, however, misconceives the plausibility inquiry. Plaintiffs may still plead allegations on which they do not have supporting facts but on which they anticipate finding facts. Plausibility simply makes the plaintiffs tell the court why he or she thinks that the facts will be uncovered. The plaintiff does not, under plausibility pleading, need the ultimate facts to plead a valid claim—this was recognized in *Twombly* itself, where the Court provided examples of parallel conduct (sensory-perceptible allegations that speak indirectly to an agreement) that would state a valid claim despite a plaintiff's inability to allege an actual agreement.²¹⁹

Additionally, the Federal Rules certainly contemplate some case screening function at the pleading stage. Although the Supreme Court has traditionally focused on the notice function of the rules, if the drafters really believed that the pleadings should not be used to screen out unmeritorious cases, why allow a defendant to move to dismiss for “failure to state a claim”?²²⁰ The Rule does not allow dismissal for “failure to give notice.” Indeed, the rule expressly provides a procedural vehicle to remedy a pleading that is not sufficiently specific to give notice: “A party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response.”²²¹ If notice was the only goal of the complaint, Rule 12(e) would sufficiently address this—regardless of the merit of a

215. Spencer, *Plausibility Pleading*, *supra* note 7, at 480.

216. *Id.* at 469.

217. *Id.* at 471.

218. *Id.*

219. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.4 (2007) (providing the example of “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason”) (internal quotations and citations omitted).

220. FED. R. CIV. P. 12(b)(6).

221. FED. R. CIV. P. 12(e).

plaintiff's complaint, a defendant will have notice of exactly what events or transactions the plaintiff is attempting to sue upon.

In dissent in *Twombly*, Justice Stevens stated that the Court's approach was inconsistent with the Forms appended to the Federal Rules of Civil Procedure.²²² Under Federal Rule of Civil Procedure 84, "[t]he forms in the Appendix *suffice* under these rules and illustrate the simplicity and brevity that these rules contemplate."²²³ Form 11²²⁴ is a Complaint for Negligence and states:

1. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.
2. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$_____.

Therefore, the plaintiff demands judgment against the defendant for \$____, plus costs.²²⁵

The majority in *Twombly* suggested that its approach was indeed consistent with this Form.²²⁶ Professor Spencer suggests that the Form "reveals that pleading facts that establish the defendant's negligence—such as the defendant's use of a cell phone while driving, operation of the vehicle at excessive speed, or failure to wear required prescription spectacles—are not necessary to state a claim."²²⁷ Requiring a plaintiff to plead these facts, according to Spencer, would be a problem because "there would be no way for unwitting victims who are blindsided by wayward vehicles to state their claims."²²⁸ This, however, overstates a plaintiff's lack of knowledge. The plaintiff must have, under Rule 11, some reason to believe that the defendant drove negligently. This may simply be that she was hit. She will, however, know her own actions, i.e., whether she was lawfully crossing the street at the time of the accident.

222. *Twombly*, 550 U.S. at 575-76.

223. FED. R. CIV. P. 84 (emphasis added).

224. FED. R. CIV. P. Form 11. Some of the commentary on *Twombly* and *Iqbal* refers to this as Form 9. See, e.g., *Twombly*, 550 U.S. at 575-76. The different number is the result of recent style amendments in the Rules. Bone, *Twombly, Pleading Rules*, supra note 13, at 883 n.47 ("After the recent style amendments, Form 9—a model complaint for automobile negligence—appears as Form 11 and the specific date and location reference in the original have been replaced with placeholders.") (citing FED. R. CIV. P. Form 11).

225. FED. R. CIV. P. Form 11.

226. *Twombly*, 550 U.S. at 565 n.10.

227. Spencer, *Understanding Pleading*, supra note 173, at 26.

228. *Id.* at 27.

But it is true that the plaintiff may not be able to specifically allege what that negligent behavior was. A court, evaluating this complaint, would have to make a judgment as to whether plaintiff's being hit by a car raises the inference of negligence above the speculative level. Most would say "yes." Some may say "no"—which is the difficulty in *Twombly* and *Iqbal*. This is fairly criticized as a subjective judgment—a judgment based on judicial experience and common sense. But the danger that this presents (that a judge's subjective judgment will result in the dismissal of a potentially meritorious suit) is a remote danger. This danger, unlike a court's ability to help along a deficient claim, is also subject to judicial review and the above-described three-step framework will ensure that district judges make the plausibility inquiry transparently²²⁹ to facilitate this review. And this danger must be evaluated against the alternative system, where a plaintiff can subject a defendant to discovery costs by concealing her reasons for filing suit from the court.

Professor Spencer has summarized what he sees as the conclusion that can be drawn from a dismissal based on the plausibility inquiry: "After a *Twombly* dismissal, observers can only say, 'He might have had a claim but he failed to 'prove' it.' One cannot say, 'He did not have a claim' or 'His claim was groundless.'"²³⁰ This mischaracterizes the inquiry. Rather, after a *Twombly* dismissal, one can say "He may have a claim but he has no good reason to think so."

V. CONCLUSION

Above I have proposed a three-step process to aid courts in adjudication of a motion to dismiss after *Twombly* and *Iqbal*. This approach is designed (1) to ensure that the plausibility inquiry is relegated to its proper role as an inquiry of last resort and (2) to ensure that, when necessary, the plausibility inquiry will be done transparently to facilitate judicial review. This approach helps to ameliorate many of the criticisms of *Twombly*, as can a district judge's exercise of case management discretion to help insufficient claims along.

I also conclude, however, that the plausibility inquiry, in light of Rule 11, can provide a helpful case-screening function that is preferable to the alternative pleading system where a plaintiff's appraisal of her

229. Additionally, if the plausibility inquiry really does, as Professor Bone describes, involve a comparison of the alleged conduct with a baseline of normal conduct, there will likely be some pressure on judges to avoid dismissing claims that allege lawful but politically incorrect action. Bone, *Twombly*, *Pleading Rules*, *supra* note 13, at 882.

230. Spencer, *Plausibility Pleading*, *supra* note 7, at 483.

own claim opens the doors to federal court without any judicial involvement.