
ARTICLE

TAMING TWOMBLY, EVEN AFTER *IQBAL*

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INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that an antitrust complaint alleging that major telecommunication providers engaged in parallel conduct unfavorable to competition could not survive a 12(b)(6) motion to dismiss, even though the complaint expressly alleged a conspiracy.¹ The Court insisted that a complaint contain “enough facts to state a claim to relief that is plausible on its face,”²

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¹ 550 U.S. 544 (2007).

² *Id.* at 570.

and concluded that a conspiracy, while “conceivable,” was not “plausible.”³ In addition, the Court retired the famous language from *Conley v. Gibson* 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.”⁴

Scholarly reaction to *Twombly* has been largely critical, with most complaining that the Court imposed a heightened specificity standard of pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery. Scholars have criticized the Court for abandoning decades of precedent and rejecting ideas central to the Federal Rules of Civil Procedure.

Some have suggested that *Twombly*'s requirement of plausibility should be understood as an aspect of substantive antitrust law, thereby limiting the impact of the decision largely to antitrust cases. Others have suggested that *Twombly* should be limited to large, complex, sprawling cases, given the Court's evident concern with the cost of discovery in such cases. These hopes of limiting *Twombly* were dashed by the Supreme Court's decision in *Ashcroft v. Iqbal*, which held that the *Twombly* framework applies to all civil actions.⁵

Naturally, critics of *Twombly* voice the same criticisms of *Iqbal* but are no longer tempered by the hope that its range might be limited.⁶ Faced with the failure of the attempt to limit *Twombly*, some have called for a legislative restoration of *Conley v. Gibson*.⁷

This Article takes a different tack. Rather than decrying *Twombly* as a radical departure and seeking to overturn it, this Article instead emphasizes *Twombly*'s connection to prior law and suggests ways in which it can be tamed. First, the plausibility standard of *Twombly* can be understood as equivalent to the traditional insistence that a factual inference be reasonable. Second, the *Twombly* framework can be treated as an invitation to present information and argument de-

³ *Id.*

⁴ *Id.* at 561 (noting that the passage “has earned its retirement”); see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

⁵ 129 S. Ct. 1937, 1953-54 (2009).

⁶ See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010) (manuscript at 2), available at <http://ssrn.com/abstract=14488796> (“By inventing a new and foggy test for the threshold stage of every lawsuit, [*Twombly* and *Iqbal*] have destabilized the entire system of civil litigation.”).

⁷ See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (providing that a federal court “shall not dismiss a complaint under rule 12(b)(6) . . . except under the standards set forth . . . in *Conley v. Gibson*” (citation omitted)).

signed to dislodge a judge's baseline assumptions about what is natural. Third, despite a widespread assumption to the contrary, discovery can proceed during the pendency of a *Twombly* motion. This Article also suggests that the traditional practice of pleading "on information and belief" be retired, and connects a tamed *Twombly* to broader trends toward managerial and discretionary judging.

I. THE *TWOMBLY* DECISION AND ITS CRITICS

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held by a vote of seven to two that an antitrust complaint alleging that major telecommunications providers engaged in parallel conduct unfavorable to competition could not survive a 12(b)(6) motion to dismiss.⁸

Stated this way, the outcome of the case is hardly surprising. Antitrust law has long insisted that parallel conduct is not itself a violation of section 1 of the Sherman Act, and if that were all that the complaint alleged, the decision would not warrant its headlining role here. However, there are three aspects of *Twombly* that are having a far broader impact on civil litigation in federal courts.

First, the Court emphasized that while a complaint "does not need detailed factual allegations" to survive a 12(b)(6) motion,⁹ Rule 8(a) does require that a complaint "show[] that the pleader is entitled to relief."¹⁰ Thus a "formulaic recitation of the elements of a cause of action will not do."¹¹ Instead, in order to "show" entitlement to relief, some factual allegations are required, not merely to give fair notice but also to provide the "grounds" on which the complaint rests.¹²

Second, the Court concluded that the famous language from *Conley v. Gibson*—"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"¹³—has "earned its retirement."¹⁴ The Court concluded that this language "has been questioned, criticized, and explained away long enough."¹⁵ Indeed, it stated that this phrase is "best forgotten."¹⁶

⁸ 550 U.S. at 570.

⁹ *Id.* at 555 (quoting *Conley*, 355 U.S. at 47).

¹⁰ *Id.*; see also FED. R. CIV. P. 8(a).

¹¹ *Twombly*, 550 U.S. at 555.

¹² *Id.* at 555 & n.3.

¹³ 355 U.S. at 45-46.

¹⁴ *Twombly*, 550 U.S. at 563.

¹⁵ *Id.* at 562.

¹⁶ *Id.* at 563.

Third, the Court insisted that the complaint allege “enough facts to state a claim to relief that is plausible on its face,”¹⁷ and ruled that because the plaintiffs did not “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed.”¹⁸

Scholars have been largely critical of this decision.¹⁹ The major criticism is that the Court imposed a heightened specificity standard

¹⁷ *Id.* at 570.

¹⁸ *Id.*

¹⁹ See, e.g., Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 (2009) (“Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics have attacked it as a sharp departure from the ‘liberal ethos’ of the Federal Rules”); Edward D. Cavanagh, Twombly: *The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17 (2008) (“The Twombly holding marks a significant retreat from the concept of notice pleading and certainly the end of notice pleading as envisioned by the drafters of the Federal Rules.”); Scott Dodson, *Pleading Standards after Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 135 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (stating that the Court “gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432 (2008) (describing Twombly as “quite at odds with the Court’s position heretofore” and a “break from the Court’s previous embrace of notice pleading”); Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 278 (2008) (describing Twombly as working “a substantial change to the pleading standards that had traditionally applied in federal court”); *The Supreme Court, 2006 Term — Leading Cases*, 121 HARV. L. REV. 185, 309 (2007) (“The majority’s view runs counter to the text of the Rules, Supreme Court precedent, and the historical purpose of notice pleading.”). But see Charles E. Clark, *Special Pleading in the “Big Case”*, 21 F.R.D. 45, 49-50 (1957) [hereinafter Clark, *Special Pleading*] (“But ‘notice’ is not a concept of the Rules, as the Advisory Committee’s Note reprinted in the Appendix here so carefully points out.”); *id.* at 53-54 (reproducing a note prepared by the Advisory Committee which explains its decision not to amend Rule 8(a)(2) by observing that the existing rule already “envisages the statement of circumstances, occurrences, and events in support of the claim,” requires that the complaint “must disclose information with sufficient definiteness,” and that the decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), “was not based on any holding that a pleader is not required to supply information disclosing a ground for relief”); Charles E. Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 12 (1941) [hereinafter Clark, *Texas Rules*] (stating that the federal rules are “certainly not” a system of notice pleading); Peter Julian, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality”*, 103 NW. U. L. REV. (forthcoming 2010) (manuscript at 3), available at <http://ssrn.com/abstract=1392546> (arguing that “Twombly moved back towards Clark’s vision by rejecting notice pleading’s rigid generality”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) (“Twombly thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings.”). The Advisory Committee note was never “officially approved, inasmuch as none of the proposals made by the Advisory Committee that year were acted upon by the Supreme Court.” 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1201, at 86-87 (3d ed. 2004).

of pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery.²⁰

Some scholars have focused less on criticism and more on limiting the range of the decision. One approach has been to argue that the requirement of plausibility is best understood as an aspect of substantive antitrust law.²¹ Because parallel conduct is quite compatible with competitive behavior, at the trial stage, courts should not permit juries to infer conspiracies when such inferences are implausible;²² at

Reflecting on the necessity of striking a balance between competing interests, Judge Clark stated that

one of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favor one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves. In view of this dilemma, pleading at best must be and should be a compromise. It is a compromise, however, which should be continually re-examined in order that the proper balance may not be lost.

CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* vii-viii (2d ed. 1947) (internal quotation marks and citation omitted).

²⁰ See Bone, *supra* note 19, at 908 (noting that “[c]ritics of *Twombly* . . . argue . . . that dismissal of a lawsuit is unfair when the plaintiff cannot obtain the information necessary to meet the applicable pleading standard”); 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, 1261 (2008) (criticizing *Twombly* for ignoring “information asymmetries”); Spencer, *supra* note 19, at 471 (“[R]equiring plaintiffs to offer factual allegations that plausibly suggest liability is a particular burden when key facts are likely obtainable only through discovery.”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 28 (2009) (noting that if “properly stating a claim requires the addition of facts that the plaintiff cannot know *ex ante*, the pleading standard present an insurmountable barrier to access in certain cases”).

²¹ See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 628 (stating that *Twombly* reflects “not a peculiarity of pleading; it is a peculiarity of the governing substantive law”); *id.* at 631 (stating that the Court’s explanation for its conclusion that the complaint did not meet the plausibility standard “is not premised on the law of pleading, but on the law of antitrust”); *id.* at 635 (arguing that the better reading of *Twombly* “is that it did not change the law of pleading, but that it simply applied long-accepted pleading standards to a unique body of law”); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 932 n.185 (2009) (suggesting that *Twombly* “may be more of a heightened antitrust pleading standard than a major change to general standards for dismissal motions”).

²² See *Monsanto Co. v. Spray-Rite Servs. Corp.*, 465 U.S. 752, 764 (1984) (“There must be evidence that tends to exclude the possibility that [the alleged conspirators] were acting independently.”).

the summary judgment stage, a “plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence that tends to exclude the possibility” that the defendants acted independently;²³ and now, at the pleading stage, a plaintiff must plead “some factual context suggesting agreement, as distinct from identical, independent action.”²⁴

When the Court mentions a requirement of “plausibility” in the *Twombly* opinion, it is usually narrowly focused on the need to separate permissible parallel conduct from unlawful agreement.²⁵ Indeed, the Court notes that “[p]laintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in [prior antitrust cases].”²⁶ Thus it was possible that the Supreme Court in the *Iqbal* case could have taken a page from an amicus brief by Professors Ides and Shapiro and given *Twombly* a “substantive law” interpretation.²⁷

A related approach has been to suggest that *Twombly* be limited to complex cases involving the likelihood of extremely expensive discovery.²⁸

²³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks omitted).

²⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

²⁵ *See, e.g., id.* at 556.

²⁶ *Id.* at 560.

²⁷ Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents at 7-11, *Aschcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015); *see* Transcript of Oral Argument at 23, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015) (Kennedy, J.) (“If we were to say that *Twombly* is to be confined to the antitrust and commercial context, would—would that destroy your case?”); Bone, *supra* note 19, at 881 (“Lower court judges and commentators at first questioned whether *Twombly*’s holding might be confined to antitrust cases”); *see also* William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 S.M.U. L. REV. (forthcoming 2009) (manuscript at 29) [hereinafter Page, *Gary Dinners*], available at <http://ssrn.com/abstract=1349173> (“[T]he law has never clarified the definition of a Sherman Act agreement sufficiently to distinguish concerted action from lawful conscious parallelism.”); William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. (forthcoming 2009) (manuscript at 2-3) [hereinafter *Emerging Definition*], available at <http://ssrn.com/abstract=1286872> (arguing that the “Supreme Court’s traditional definitions of agreement . . . are too vague to help litigants and courts distinguish between consciously parallel conduct and concerted action,” but that lower courts applying *Twombly* “have adopted a more meaningful definition”).

²⁸ *See* Bone, *supra* note 19, at 887 n.70 (observing that some have suggested “that the Court meant its plausibility standard to apply only to complex cases with a high risk of costly meritless suits,” but noting that “such an interpretation fits the language of *Twombly* rather poorly”); Smith, *supra* note 19, at 1083 (noting that “some commentators and courts have proposed” that *Twombly* only applies “to complex cases”).

It is true that the *Twombly* Court was plainly concerned with the cost of discovery.²⁹

But this attempt to limit the scope of *Twombly* has failed. Indeed, it did not attract a single vote on the Supreme Court in the *Iqbal* case. This is hardly surprising. Passages in the *Twombly* opinion speak broadly about a requirement that a complaint be plausible without the discussion being tightly tethered to antitrust law.³⁰ If the *Twombly* majority had been inclined to limit its decision to antitrust cases, it could have readily said so in response to Justice Stevens's dissent, which observed, "Whether the Court's actions will benefit only defendants in antitrust treble-damage cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."³¹

Indeed, when *Matsushita* was decided in 1986, it might have been read as simply an antitrust case that applied the plausibility requirement—already applicable at the trial stage—to the summary judgment stage.³² But it soon became part of the summary judgment trilogy (with *Liberty Lobby*³³ and *Celotex*³⁴) that constitutes a significant landmark in federal summary judgment practice.

Moreover, lower courts around the country overwhelmingly refused to read the plausibility requirement of *Twombly* as limited to antitrust cases. Instead, they used the *Twombly* plausibility standard to test an enormous range of civil complaints.³⁵ In addition, reading

²⁹ See *Twombly*, 550 U.S. at 558-59 (noting that "proceeding to antitrust discovery can be expensive" and that the potential expense is obvious where "plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years").

³⁰ See, e.g., *id.* at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *id.* at 569 n.14 ("[O]ur concern is not that the allegations in the complaint were insufficiently 'particular[ized],' rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." (alteration in original) (citation omitted)).

³¹ *Id.* at 596 (Stevens, J., dissenting).

³² See *supra* notes 22-23 and accompanying text.

³³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

³⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

³⁵ See, e.g., *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 223 (4th Cir. 2009) (dismissing a breach of warranty claim under Maryland law as implausible); *Fitzgerald v. Harris*, 549 F.3d 46, 52 (1st Cir. 2008) (dismissing as implausible a claim that a state statute is preempted by a federal statute); *In re S. Scrap Material Co.*, 541 F.3d 584, 587

Twombly as a civil procedure decision limited to complex litigation would put the decision in serious tension with the transsubstantive approach of the Federal Rules of Civil Procedure.³⁶

As Justice Kennedy put it in one brusque paragraph in *Iqbal* rejecting the contention that *Twombly* be limited to antitrust cases,

This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard “in all civil actions and proceedings in the United States district courts.” Our decision in *Twombly* expounded the pleading standard for “all civil actions,” and it applies to antitrust and discrimination suits alike.³⁷

The *Iqbal* case involved a Pakistani Muslim, Javaid Iqbal, who was arrested on criminal charges and detained after 9/11. After pleading guilty, serving his sentence, and being removed to Pakistan, Iqbal filed a *Bivens* action complaining of his treatment while in custody.³⁸ In addition to various claims against correctional officers and wardens, he also sued Attorney General John Ashcroft and FBI Director Robert Mueller, alleging that these two men adopted an unconstitutional policy that subjected him to harsh conditions of confinement because of his race, religion, or national origin.³⁹

Addressing solely the claims against Ashcroft and Mueller, the Supreme Court held that they could be found liable only if they themselves had engaged in purposeful discrimination against Iqbal on the basis of race, religion, or national origin.⁴⁰ Applying *Twombly*, the Court concluded that the factual allegations against Ashcroft and Mueller did not plausibly establish such an unlawful purpose.⁴¹ Accordingly, it held that the claims against Ashcroft and Mueller were insufficient to survive a 12(b)(6) motion, even though the complaint

(5th Cir. 2008) (analyzing a motion to dismiss a Wreck Act claim in admiralty under the *Twombly* plausibility standard); *Phillips v. Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (declining “to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context” in a case involving a § 1983 claim alleging state-created danger).

³⁶ See *Spencer*, *supra* note 19 at 457-60 (arguing that *Twombly*’s pleading standard is not limited to antitrust cases or other cases “presenting the efficiency and judicial administration concerns pointed to by the Court in *Twombly*”).

³⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citations omitted).

³⁸ The claims of another plaintiff, Ehab Elmaghraby, an Egyptian Muslim, were settled.

³⁹ 129 S. Ct. at 1942-44. He did not challenge the legality of his arrest or confinement in the general prison population. *Id.* at 1943.

⁴⁰ *Id.* at 1949.

⁴¹ *Id.* at 1951-52.

expressly alleged that they had “willfully and maliciously agreed to subject” Iqbal to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin.”⁴²

In light of *Iqbal*, and short of an amendment to the Federal Rules of Civil Procedure or legislative action, *Twombly* is here to stay across the broad range of federal civil actions.

II. PLAUSIBILITY, SPECIFICITY, AND REASONABLENESS

One of the biggest challenges in understanding *Twombly* is coming to grips with its handling of the express allegation of conspiracy in the complaint. For the complaint in *Twombly* did not simply detail parallel conduct, it also alleged the following:

Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective . . . markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.⁴³

That is, the complaint expressly alleged a conspiracy. The Court, however, refused to accept this allegation as true, finding it implausible.⁴⁴ How do we understand the plausibility requirement and make sense of this refusal?

One way would be to treat *Twombly*'s plausibility requirement as broadly empowering judges to refuse to believe factual allegations that they find implausible. But this would be a remarkably radical step, authorizing judges—in cases where the Constitution protects a right to jury trial—to make factual findings based on nothing but the complaint. This reading should be rejected, not only because of its radical inconsistency with the entire structure of the Federal Rules of Civil Procedure and the Seventh Amendment, but also because the *Twombly* opinion rather frankly and properly disowns any such approach. It specifically notes that a factual allegation cannot be disregarded simp-

⁴² *Id.* at 1951 (quoting First Amended Complaint and Jury Demand ¶ 96, at 17-18, *Elmaghraby v. Ashcroft*, No. 04-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) [hereinafter *Iqbal* Complaint] (alteration in original)).

⁴³ Consolidated Amended Class Action Complaint ¶ 51, at 19, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02-10220); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 551 n.2 (2007) (describing paragraph sixty-four of the complaint as repeating the allegations of paragraph fifty-one “in substantially similar language”).

⁴⁴ *Twombly*, 550 U.S. at 570.

ly because a savvy district judge believes it unlikely to be proven,⁴⁵ and reiterates that “Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations.”⁴⁶

Moreover, even in the context of *in forma pauperis* (IFP) complaints, where completely farfetched and fanciful factual allegations abound, it is only due to a specific statutory provision that a judge may dismiss an action where the factual allegations are frivolous.⁴⁷ The IFP statute “gives courts the authority to ‘pierce the veil of the complaint’s factual allegations,’ [meaning] that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff’s allegations.”⁴⁸ In the IFP context, a district court may treat as frivolous factual allegations that are “irrational or wholly incredible,” but may not treat an allegation as frivolous “simply because the court finds the plaintiff’s allegations unlikely.”⁴⁹ It would seem doubtful that the *Twombly* Court meant to authorize judges to treat all complaints the way that Congress has empowered them to deal with factually frivolous IFP cases.

Accordingly, the majority in *Iqbal* denied that it was relying on a claimed power to reject allegations that judges view as “unrealistic,” “nonsensical,” “chimerical,” or “extravagantly fanciful” in either *Iqbal* or *Twombly*.⁵⁰ While the *Iqbal* majority claimed no such power, Justice Souter, the author of the *Twombly* majority, did so in his *Iqbal* dissent.⁵¹ Significantly, however, Justice Souter did not treat this power to disregard fanciful factual allegations as an aspect of *Twombly*’s plausibility test.⁵²

⁴⁵ See *id.* at 556 (“And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” (internal citation omitted)).

⁴⁶ *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

⁴⁷ See 28 U.S.C. § 1915(e)(2) (2006) (empowering a district court to “dismiss the case at any time if the court determines that . . . the action . . . is frivolous”).

⁴⁸ *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (quoting *Neitzke*, 490 U.S. at 327).
⁴⁹ 504 U.S. at 33.

⁵⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

⁵¹ See *id.* at 1959 (Souter, J., dissenting) (stating that a court need not assume the truth of factual allegations that “defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel”); see also Transcript of Oral Argument, *supra* note 27, at 15 (statement of Souter, J.) (“I think you are right that if somebody makes just a totally bizarre allegation that nobody in the world could take seriously, that—that the issue can be raised.”).

⁵² See 129 S. Ct. at 1959 (Souter, J., dissenting) (discussing his *Twombly* plausibility test in a separate paragraph from that discussing judicial power to disregard clearly fanciful allegations).

Thus no Justice interprets *Twombly* to empower a judge to disregard factual allegations simply because the judge finds them implausible.⁵³

Nor can the plausibility requirement be viewed as testing the plausibility of a legal theory. A judge's job on a motion to dismiss is to determine whether the legal theory or theories supporting a complaint are correct, not whether they are merely plausible. A motion to dismiss would serve remarkably little purpose if the legal basis for the complaint only had to be plausible rather than correct. Even when the legal question is close and difficult, if the court concludes that the defendant's view of the law is correct and the plaintiff's view is incorrect, dismissal is proper.⁵⁴ Furthermore, such an interpretation of *Twombly* would be inconsistent with the decision to dismiss in that case, for not only is it a plausible legal theory—it is a plainly correct legal theory—that defendants who “have entered into a contract, combination, or conspiracy to prevent competitive entry in their respective . . . markets and have agreed not to compete with one another and have otherwise allocated customers and markets to one another”⁵⁵ have violated the Sherman Act.⁵⁶

There is another way (or perhaps two closely related other ways) to understand *Twombly*'s plausibility requirement and make sense of its refusal to treat the allegation of conspiracy as true: The Court treated that allegation not as a factual allegation but instead as either a legal conclusion or as an inference from the factual allegations of the complaint. It determined that the allegations in paragraphs fifty-one and sixty-four were, “on fair reading . . . merely legal conclusions resting on the prior allegations,”⁵⁷ and reiterated that courts “are not bound to accept as true a legal conclusion couched as a factual allega-

⁵³ See *id.* (Souter, J., dissenting) (“I do not understand the majority to disagree with this understanding of ‘plausibility’ under *Twombly*.”); cf. Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents, *supra* note 27, at 14 (“[I]mplausibility might be established if the plaintiff were to allege a state of affairs that was so beyond the common understanding as to be virtually, if not literally, incredible.”).

⁵⁴ See *Neitzke v. Williams*, 490 U.S. 319, 326 - 27 (1989) (noting that Rule 12(b)(6) “authorizes a court to dismiss a claim on the basis of a dispositive issue of law . . . without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one”).

⁵⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 551 (2007) (quoting Consolidated Amended Class Action Complaint, *supra* note 43, at 19).

⁵⁶ Cf. Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents, *supra* note 27, at 19 (“[O]ne might say that the plausibility of one’s entitlement to relief is dependent on whether one’s plausible allegations, coupled with any plausible inferences drawn therefrom, state a legally recognized claim.”).

⁵⁷ *Twombly*, 550 U.S. at 564.

tion.”⁵⁸ It described the agreement as something to be “inferred” from the other allegations of the complaint,⁵⁹ discussed how its earlier antitrust decisions had “hedged against false inferences,”⁶⁰ and stated that it was insisting on “plausible grounds to infer an agreement.”⁶¹

Courts have long held that legal conclusions need not be accepted as true on 12(b)(6) motions, have long insisted that pleaders are not entitled to unreasonable factual inferences, and have long treated “legal conclusions,” “unwarranted deductions,” “unwarranted inferences,” “unsupported conclusions,” and “sweeping legal conclusions cast in the form of factual allegations” as “more or less synonymous” terms.⁶² So understood, *Twombly*’s insistence that the inference of

⁵⁸ *Id.* at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also id.* at 551 (referring to paragraph fifty-one of the ninety-six-paragraph complaint as the complaint’s “ultimate allegation,” thus making clear that it was not using the term “ultimate” to refer to the last paragraph of the complaint but rather to the legal conclusion that the complaint sought the court to reach); *id.* at 556-57 (referring to a “bare assertion of conspiracy,” a “conclusory allegation of agreement,” and a “naked assertion of conspiracy”); *id.* at 573 (Stevens, J., dissenting) (referring to the “ultimate factual allegation”).

⁵⁹ *See id.* at 551 (majority opinion) (“[A]greements by the ILECs to refrain from competing against one another . . . are to be inferred from the ILECs’ common failure [to pursue business opportunities in contested markets].”).

⁶⁰ *Id.* at 554.

⁶¹ *Id.* at 556; *see also id.* at 567 n.12 (referring to the “inference” of conspiracy); *id.* at 566 (arguing that avoiding competition may be a natural market response and thus is itself not “enough to imply an antitrust conspiracy”); *id.* at 565 n.11 (criticizing the dissent for “leav[ing] the impression that plaintiffs directly allege illegal agreement”). Other interpretations of *Twombly* agree that “plausibility” refers to the strength of inferences from allegation to conclusion. *See Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (stating that “*Twombly* was concerned with the plausibility of an inference of conspiracy”); Bone, *supra* note 19, at 881 (stating that the “term ‘plausible’ obviously refers to the strength of the inference from allegation to necessary factual conclusion”).

⁶² *See* 5B WRIGHT & MILLER, *supra* note 19, § 1357, at 521-44 (surveying unacceptable 12(b)(6) allegations); *id.* at 548-53 (“[T]he district judge will accept the pleader’s description of what happened to him or her along with any conclusions that can reasonably be drawn therefrom. However, the court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader’s description of what happened”); *see also, e.g., Aktieselskabet*, 525 F.3d at 16 n.4 (“[I]t has never been literally true, as *Twombly* noted, that a complaint is adequate unless ‘no set of facts’ consistent with the complaint could support a claim. We have never accepted legal conclusions cast in the form of factual allegations” (internal quotation marks and citations omitted)); *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 818 (7th Cir. 2006) (“Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. This rule simply specifies the conditions of the formal adequacy of a pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit. When presented with a

conspiracy be “plausible” is equivalent to the traditional insistence that an inference be “reasonable.”⁶³ The *Twombly* Court concluded

motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action. Although the district court is required to consider whether a plaintiff could prevail under any legal theory or set of facts, it will not invent legal arguments for litigants, and is not obliged to accept as true legal conclusions or unsupported conclusions of fact.” (internal quotation marks and citations omitted)); *Farm Credit Servs. of Am. v. Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (“All facts alleged in the complaint are taken as true and construed in the light most favorable to the plaintiff. However, like the district court, we are free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” (internal quotation marks and citations omitted)); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (conceding that the Supreme Court in *Conley* held that Rule 8 requires only that a defendant be given fair notice of a plaintiff’s claim and its grounds, but adding that “we accept neither inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint, nor legal conclusions cast in the form of factual allegations” (internal quotation marks and citations omitted)); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (“Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”); 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 12.34[1][6], at 12-79 to -81 (3d ed. 2009) (“Additionally, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions.” (internal quotation marks and citations omitted)); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal* 19 (Boston Univ. Sch. of Law, Working Paper No. 09-41, 2009), available at <http://ssrn.com/abstract=1467799> (acknowledging that “it is settled law that a judge deciding a 12(b)(6) motion need not accept legal conclusions or conclusory allegations as true”); cf. *Clermont & Yeazell*, *supra* note 6 (manuscript at 17) (“[I]nsisting on nonconclusory statements and then testing for reasonable inferences constitute a method not unknown at law, but doing so based on a bare pleading was previously unknown.”).

⁶³ See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (“[A]n inference of scienter must be more than merely plausible or reasonable . . .”); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 539 (stating that the Court in *Tellabs* “equated *plausible* with *reasonable*”); cf. Spencer, *supra* note 19, at 446 & n.90 (implicitly equating “all inferences” with “all reasonable inferences”). Professor Thomas objects to courts testing the reasonableness or plausibility of inferences on a pretrial motion, claiming that the Seventh Amendment requires a federal court to accept all “inferences pled by the plaintiff,” no matter how implausible or unreasonable, when addressing a motion to dismiss or a summary judgment motion. See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1878 (2008). This strikes me as completely untenable. Suppose, for example, that a plaintiff were to assert in a pleading that one should infer from the fact that the CEOs of the two defendant corporations both have green eyes that they conspired to restrain competition. Why should a court have to accept that asserted inference? Professor Thomas might respond that only inferences “corresponding” to factual allegations need be accepted, *see id.*, but this response—if intended as a limit on permissible inferences—gives away all, because the only way to test what inferences correspond to factual allegations is to determine what inferences are supported by reason, that is, are reasonable.

that it would be implausible or unreasonable to infer a conspiracy from the factual allegations of the complaint, even assuming that all of those factual allegations were true.

Significantly, this is how the *Iqbal* Court understood the plausibility requirement. It explained that a “claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁶⁴ Moreover, it reiterated that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”⁶⁵ The reason it refused to assume the truth of the allegation that Ashcroft and Mueller subjected Iqbal to harsh conditions of confinement, “solely on account of [his] religion, race, and/or national origin,”⁶⁶ was because it viewed this allegation as “conclusory,” and “nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”⁶⁷

Some may worry that this reading of *Twombly* means the resurrection of concepts that the drafters of the Federal Rules of Civil Procedure had thought they had left behind with code pleading: distinctions between evidentiary facts, ultimate facts, and legal conclusions.⁶⁸ It is true that these distinctions were crucial to code pleading. Under the code-pleading regime, “[t]he codes require[d] that only the ultimate material operative facts constituting the plaintiff’s cause of action be alleged. Conclusions of law on the one hand and evidential facts on the other [were] not [to] be pleaded.”⁶⁹

⁶⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); see also *id.* at 1950 (explaining that plausibility turns on whether the factual allegations “permit the court to infer more than the mere possibility of misconduct”); *id.* at 1951-52 (holding that the “purposeful, invidious discrimination respondent asks [the Court] to infer . . . is not a plausible conclusion”).

⁶⁵ *Id.* at 1949.

⁶⁶ *Id.* at 1951 (quoting *Iqbal* Complaint, *supra* note 42, at 17-18).

⁶⁷ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁶⁸ *Twombly*, 550 U.S. at 589-90 (Stevens, J., dissenting) (“The Court’s dichotomy between factual allegations and ‘legal conclusions’ is the stuff of a bygone era. That distinction was a defining feature of code pleading . . . but was conspicuously abolished when the Federal Rules were enacted in 1938.” (citations omitted)); Ides, *supra* note 21, at 633 (raising the concern that *Twombly*’s “brief foray into general pleading standards” could be read as “return[ing] pleading to a pre-FRCP regime in which courts were required to distinguish among facts and conclusions of law, and in which conclusory allegations were suspect and often inadequate as a matter of law”).

⁶⁹ CLARK, *supra* note 19, at 225; see also, e.g., Bone, *supra* note 19, at 891 (noting that the code system drew “hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (stating

The Federal Rules, by rejecting the “arbitrary formula” of the codes, avoid the “confusing emphasis upon pleading facts alone.”⁷⁰ But the Federal Rules’ rejection of the code’s insistence that conclusions of law not be pled does not entail a wholesale rejection of the distinction between allegations of fact and legal conclusions, and certainly does not entail requiring a court to assume the truth of a pleader’s legal conclusions. While the Federal Rules neither require nor prohibit the pleading of legal conclusions, a pleader’s decision to include such allegations does not require that a court assume their truth. Neither a pleading that includes such allegations nor one that leaves them out is, for that reason, “bad” under Rule 8. Nor are such allegations simply ignored; as *Iqbal* noted, “legal conclusions can provide the framework of a complaint.”⁷¹ Nevertheless, a court deciding whether a pleading states a claim upon which relief can be granted under Rule 12 is not bound to assume the truth of such an allegation.

Perhaps Judge Clark had hoped to completely bury the distinction between law and fact, finding it “illusory” and, “viewed as anything other than a convenient distinction of degree, . . . philosophically and logically unsound.”⁷² If so, perhaps just as every age has to learn that there are limits to what pleadings can be expected to do, so too every age has to learn that there are limits to what changing terminology can do.⁷³ Just as changing the terminology from “cause of action” to “claim” did not make the ambiguities attached to the former term go away,⁷⁴ but rather led to their return with the new term,⁷⁵ so too abandonment of the code terminology did not eliminate the need to dis-

that code pleading “invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper”).

⁷⁰ CLARK, *supra* note 19, at 225.

⁷¹ 129 S. Ct. at 1950.

⁷² CLARK, *supra* note 19, at 231. For a recent restatement of this realist critique, see Bone, *supra* note 62, at 16 - 17.

⁷³ See Clark, *Special Pleading*, *supra* note 19, at 46 (“I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial . . .”).

⁷⁴ Indeed, it did not even succeed in making the old terminology go away, as *Twombly* itself reveals.

⁷⁵ See Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *FORDHAM L. REV.* 1099, 1136 n.213 (1995) (“[I]t appears that the different senses in which earlier generations used ‘cause of action’ . . . have been reproduced in the current usage of ‘claim.’”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. PA. L. REV.* 909, 976 (1987) (discussing the avoidance of the terms “facts” and “cause of action” in the Federal Rules of Civil Procedure and noting that “the drafters could avoid the words but not the concepts”).

tinguish between different kinds of allegations, at least in a legal system that allocates the determination of different kinds of allegations to different decisionmakers and different processes.⁷⁶

So long as some questions are left to judges and others to jurors,⁷⁷ some questions to trial judges and others to appellate judges,⁷⁸ and some questions to state courts and others to federal courts,⁷⁹ there will be a need to distinguish in some way between fact and law—and to police the boundaries between them in the face of the adversaries who will inevitably test those boundaries.⁸⁰ So long as there is a motion

⁷⁶ See generally WILLIAM TWINING, *RETHINKING EVIDENCE* 318 (2d ed., Cambridge Univ. Press 2006) (1990) (“The conceptual difficulties associated with distinctions between ‘law,’ ‘fact’ and ‘value’ are much debated in jurisprudence. . . . However, the distinction between ‘questions of fact’ and ‘questions of law’ has very significant consequences for the discourse of advocates. How an issue is classified affects who addresses whom in what arena according to what procedural conventions and practices.”). Article III itself distinguishes between law and fact, albeit in the context of providing for Supreme Court appellate jurisdiction over both. U.S. CONST. art. III, § 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

⁷⁷ See, e.g., U.S. CONST. amend. VII (“[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

⁷⁸ See, e.g., FED. R. CIV. P. 52(a)(1) (“In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.”); *id.* at 52(a)(2) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . .”).

⁷⁹ See, e.g., 28 U.S.C. § 2254(e) (2006) (codifying the deference a federal habeas court must give to a state court’s factual determinations).

⁸⁰ See generally George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 14 (1992) (noting that “courts have traditionally distinguished among questions of fact, questions of law, and mixed questions of law and fact” and that “[h]ow to characterize a particular question has continually exercised the intellectual faculties of the justices”); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232-33 (1985) (acknowledging that some find the distinction between law and fact “fundamentally incoherent,” but arguing that the “incoherence argument seem greatly overdrawn”). There is, of course, the classic debate between Thayer and Holmes regarding the proper classification of negligence. Compare JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 250-51 (Boston, Little, Brown, and Co. 1898) (arguing that the reasonableness standard is a legal rule that, when specified, reduces the determination of negligence to a “mere question of fact”), with O.W. HOLMES, JR., *THE COMMON LAW* 110-12 (Boston, Little, Brown, and Co. 1881) (emphasizing courts’ role in creating rules which clarify the “featureless generality” of the reasonableness standard by further delineating the bounds of negligent behavior). For a recent discussion, see Adrian Diethelm, *Law and Fact in Common Law Procedure* (May 17, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1385622> (tracing the historical development of the fact/law distinction, the debate between Holmes and Thayer, and subsequent reforms enacted in some common law countries). Professor Bone, who accepts the realist critique of the

that accepts the truth of a pleader's factual allegations and tests for their legal sufficiency, courts must distinguish between factual and legal allegations. And so long as there is a motion designed to test the legal sufficiency of a plaintiff's claim,⁸¹ courts cannot be bound to treat a plaintiff's legal conclusions as true.

Mixed questions of law and fact, or, as Professor Monaghan would put it, instances of "law application,"⁸² have long presented the greatest challenge.⁸³ However they are properly handled for other purposes (such as allocating power between state court and federal habeas court,⁸⁴ between judge and jury,⁸⁵ or between trial court and appellate court⁸⁶), in the context of a Rule 12(b)(6) motion all allegations con-

law/fact distinction for purposes of pleading, acknowledges that the "fact-law dichotomy operates in other legal contexts . . . [and] has a core of meaning that is useful in each of these contexts." Bone, *supra* note 62, at 11-18, 23 n.87. It is ironic that Professor Bone, while criticizing the usefulness of the fact/law distinction in the pleading context, relies instead on a distinction between "thick" and "thin" screening, *see id.* at 23-24. Those terms not only have no core of legal meaning, but it is not even obvious from the terms whether a thick screen filters out more than a thin screen, or vice versa.

⁸¹ FED. R. CIV. P. 12. Clark described Rule 12 as "the most unsatisfactory of all the federal rules," because it was "a compromise, made necessary by the exigencies of opposing views as to the proper functions of pleading, being a combination of modern English practice and older American code pleading." Charles E. Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307, 312 (1942).

⁸² Monaghan, *supra* note 80, at 234-36 (distinguishing between "law declaration, fact identification, and law application," and stating that law application "involves relating the legal standard of conduct to the facts").

⁸³ *See, e.g.*, Marcus, *supra* note 69, at 438 (stating that under code pleading, "there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion").

⁸⁴ *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) ("In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. . . . At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.").

⁸⁵ *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art. We said in *Miller v. Fenton* that when an issue 'falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.' So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms." (citation omitted)).

⁸⁶ *See Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. Rule 52(a) does not furnish particular guidance with respect to distin-

cerning such mixed questions cannot simply be assumed to be true, for that would make it impossible to test the legal sufficiency of a complaint.⁸⁷

Clark himself recognized “that the attempted distinction between facts, law, and evidence” was a “convenient distinction of degree.”⁸⁸

guishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion. . . . [W]e have little doubt about the factual nature of § 703(h)'s requirement that a seniority system be free of an intent to discriminate. Treating issues of intent as factual matters for the trier of fact is commonplace” (citation omitted); *id.* at 289 n.19 (“We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i.e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the Circuits on both sides of this question. There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court.” (citations omitted)).

⁸⁷ See, e.g., Dist. 28, United Mine Workers of Am., Inc., v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979) (“While it is true that this court, in reviewing the Rule 12(b)(6) dismissal, must accept the factual allegations of the complaint, we are not so bound with respect to its legal conclusions. Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint.”); see also *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (“Suppose the complaint had alleged that the defendants had violated Illinois or federal law by failing to obtain a license to manufacture cigarettes. The complaint would comply with Rule 8(a)(2), but, assuming no such license is required, it would be highly vulnerable to dismissal under Rule 12(b)(6).”).

I urge anyone who doubts this principle to consider, for example, the allegations in paragraph 232 of the *Iqbal* complaint. The plaintiff alleges that

Defendants Ashcroft, Mueller, Rolince, Maxwell, Sawyer, Rardin, Cooksey, Hasty, Zenk, Thomas, Sherman, Lopresti, Barrere, Torres, Cotton, DeFrancisco, Perez, and Shacks, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs’ sincere religious beliefs violated Plaintiffs’ rights under the First Amendment to the United States Constitution.

First Amended Complaint and Jury Demand ¶ 232, at 43, *Elmaghraby v. Ashcroft*, No. 04-CV-1809 (E.D.N.Y. Sept. 30, 2004). Is it possible that a court would have to accept as true that each of these defendants “violated . . . the First Amendment”? *Id.* For a host of similar allegations in the complaint, see *id.* ¶¶ 202, 205, 208, 211, 214, 217, 220.

Even in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court did not assume the truth of the allegation that the plaintiff was fired because of national origin and age. See *id.* at 508 n.1, 508-09 (noting the obligation to “accept as true all of the factual allegations contained in the complaint,” and providing a two-paragraph statement of facts based on those allegations, but not including the allegation that the firing was based on Swierkiewicz’s national origin and age). But see Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 36 n.196), available at <http://ssrn.com/abstract=1442786> (citing this same footnote for the proposition that the allegation of discriminatory intent was accepted as true).

He wrote that

[n]o rule of thumb is possible, but in general it may be said that the pleader should not content himself with alleging merely the final and ultimate conclusion which the court is to make in deciding the case for him. He should go at least one step further back and allege the circumstances from which this conclusion directly followed.⁸⁹

This approach suggests a way to understand what the *Iqbal* Court means by a “conclusory” allegation that is “not entitled to be assumed true.”⁹⁰ A conclusory allegation is one that asserts “the final and ultimate conclusion which the court is to make in deciding the case for him,”⁹¹ that is, one that alleges an element of a claim.⁹² Such an allegation is not itself assumed to be true, but must be supported by the pleader going a “step further back”⁹³ and alleging the basis from which this conclusion follows.⁹⁴ In *Iqbal* itself, the Court treated as conclusory those allegations—that Ashcroft was the “principal architect” and that Mueller was “instrumental” in adopting and executing a policy of subjecting *Iqbal* to harsh conditions of confinement “solely on account of [his] religion, race, and/or national origin”—that it saw

⁸⁸ CLARK, *supra* note 19, at 231.

⁸⁹ *Id.* at 234.

⁹⁰ *Iqbal*, 129 S. Ct. at 1951.

⁹¹ CLARK, *supra* note 19, at 234.

⁹² Professor Bone contends that it is incoherent to attempt, as *Iqbal* does, to separate the conclusory from the factual and that the term “legal conclusion” or “conclusory” is simply the label we put on allegations that “fail to meet the pleading standard.” Bone, *supra* note 62, at 19, 21. However, he describes *Twombly* as interpreting particular allegations as “intended to be conclusions and not to add any new facts to the complaint.” *Id.* at 22. If the drafter of a complaint can intend to distinguish between a conclusion and “new facts,” it would seem that the distinction is not incoherent and that the reader of a complaint can draw the same distinction.

Professor Steinman, on the other hand, contends that the term “conclusory” should be defined in “transactional terms,” so that “an allegation is conclusory only when it fails to identify the real-world acts or events . . . that took place.” Steinman, *supra* note 87 (manuscript at 46). But this definition of “conclusory” bears scant relation to how the word has been used in legal parlance for decades. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 191 (2d ed. 1995) (tracing the use of conclusory to mean “expressing a factual inference without expressing the fundamental facts on which the inference is based” to the 1920s).

⁹³ CLARK, *supra* note 19, at 234.

⁹⁴ *Cf.* BLACK’S LAW DICTIONARY 329 (9th ed. 2009) (defining conclusory as “[e]xpressing a factual inference without stating the underlying facts on which the inference is based”); BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 174 (2003) (describing conclusory as “expressing a factual inference without stating the facts or reasoning on which the inference is based”).

as amounting to “nothing more than a ‘formulaic recitation of the elements’ of a . . . claim.”⁹⁵

By contrast, it treated allegations that the FBI, under Mueller’s direction, arrested and detained thousands of Arab-Muslim men as part of its investigation of the events of September 11th as entitled to the presumption of truth. The Court also did not treat as conclusory allegations that the policy of holding post-September 11 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 the attacks.⁹⁶

Some, including the dissenting Justices, see no basis for treating the first set of allegations, but not the second set of allegations, as “conclusory.”⁹⁷ In the abstract, divorced from any particular right of action, this may be so.⁹⁸ But the conclusory nature of an allegation is not judged in the abstract; it is judged in the context of a particular right of action. When viewed in the context of the particular right of action involved in *Iqbal*—a *Bivens* action claiming unconstitutional discrimination—there is a difference: the first set effectively alleges elements of the claim, but the second set does not. Put somewhat differently, what is “conclusory” depends on the right of action on which

⁹⁵ *Iqbal*, 129 S. Ct. at 1951 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original)); see also *id.* at 1954 (“Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”).

⁹⁶ See *id.* at 1951 (giving a presumption of truth to these allegations). Professor Steinman contends that the complaint in *Iqbal* may have survived if it included at this point the clause “and they adopted this policy because of its adverse effect on this particular group.” Steinman, *supra* note 87 (manuscript at 51 n.259). I find this contention, well, implausible. On my analysis, the proposed clause would itself be conclusory, because it simply asserts an element of a claim for unconstitutional discrimination. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose,’ . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).

⁹⁷ *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting) (stating that the “majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory”).

⁹⁸ Professor Steinman is drawn to his idiosyncratic view of “conclusory” in part because he fears a “literally endless cascade of inquiry” in that every allegation in a complaint could be described as conclusory because one can always ask for the basis for an allegation, just as a toddler can always ask “why?” in response to a parent’s answer to a previous “why?” question. Steinman, *supra* note 87 (manuscript at 33). But what is *conclusory* in a given legal context depends on what *conclusions* the law requires be reached in that context. There is no need to fear infinite regression; it is only necessary to go “one step back” from the necessary conclusions.

the claimant seeks relief and the conclusions that are necessary to relief under that right of action.

Given the attention focused on the form complaint for negligence in the Federal Rules,⁹⁹ it is noteworthy that Clark made the same point about a claim for negligence, explaining that “it is not sufficient for the plaintiff to allege that due to the defendant’s negligence, he was injured in a certain fashion. That is the conclusion he is asking the court to draw and he must go at least one step farther back in his allegation.”¹⁰⁰ In situations where a “court can easily see” the defendant’s duty to the plaintiff,

such as where the defendant drives his automobile upon the plaintiff, it is not necessary to specify in detail. But where such duty is not clear, as, for example, where a workman is upon a railroad track and is struck by a train, the facts must be set forth. Further, it is necessary to give sufficient details so that the court may itself be convinced that the duty arose, and not be compelled to rely on the mere statement that there was a legal duty.¹⁰¹

While Clark is discussing code pleading in these passages, it is important to recognize that the form complaint for negligence contained in the Federal Rules was not an innovation of the Federal Rules, but instead was taken from a form already in use in Massachusetts state courts, which in turn derived from common law pleading.¹⁰²

⁹⁹ See, e.g., *Twombly*, 550 U.S. at 575-76 (2007) (Stevens, J., dissenting) (“The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence.”); *id.* at 590 (“‘Defendants entered into a contract’ is no more a legal conclusion than ‘defendant negligently drove.’” (citation omitted)); Bone, *supra* note 19, at 886 (noting that “some courts and commentators claim to be confused by the Court’s apparent approval of the very skeletal Form 9 complaint”); Ides, *supra* note 21, at 633 (finding it “difficult if not impossible to distinguish between the supposedly sufficient ‘negligently drove’ allegation in Form 9, where no specific facts of negligence are alleged, and the supposedly inadequate, ‘fact-deficient’ allegation of an antitrust conspiracy (or any other type of conspiracy) other than on grounds of the relative complexity of the respective claims”); Spencer, *supra* note 19, at 442 (“Form 9 . . . relies on the conclusory term ‘negligently’ to assert liability.”).

¹⁰⁰ CLARK, *supra* note 19, at 298.

¹⁰¹ *Id.* at 298-99 (footnote omitted).

¹⁰² See *id.* at 300 n.61 (explaining the evolution of the form complaint for negligence); see also Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 309 (1938) (noting that “while special pleading could be had in the old days, yet in such usual cases as claims for debt or negligence a simple form of general allegation was permissible, a practice so admirable that it was carried over to the more successful of the code systems, and thence directly into the new federal rules”); *id.* at 315 (stating that Forms 4 through 8 are “based on these common law models, which, although criticized from time to time by theorists, were found practically too convenient to be rejected in code pleading”); *id.* at 317 (stating that Form 9 “is taken directly from the

Thus, while Clark criticized some negligence decisions under the codes, he connected proper code pleading of a negligence claim backward to the common law and forward to the Federal Rules:

While it has always been insufficient to allege merely that the plaintiff's injury was due to the defendant's negligence, the common-law precedents sustain a form of pleading only a little less general than that. Under the common-law precedents it was customary to state in fairly general form what the defendant's act was and characterize it as negligent. Thus, in a complaint for injury on the highway the form of statement would be that the defendant so carelessly drove his horse that through his carelessness the plaintiff was struck and injured. The trend of modern authority, supplemented by the direct precedent of the Federal Rules, is to the same effect.¹⁰³

What emerges from *Twombly* and *Iqbal*, then, is a two-step process for adjudicating a 12(b)(6) motion. First, identify allegations that are not subject to the presumption of truth, typically because they simply allege the conclusion that the pleader wishes the court to make regarding an element of the claim. Second, determine whether the allegations that are assumed to be true plausibly suggest an entitlement to relief—typically by determining whether, as a matter of plausible inference, they support the conclusion that the pleader wishes the court to make regarding an element of the claim.¹⁰⁴

Massachusetts statute” and “[i]n turn it comes from Chitty and the common-law action of trespass on the case”).

Form 9 underwent some revisions as part of the Restyling Project and emerged as Form 11. As restyled, it does not provide the particular date and place contained in Form 9 but instead has blanks for the date and place and no longer states what the plaintiff was doing when hit. To the extent that the allegations in Form 9 concerning the place of the collision (a public highway and not, for example, a racetrack) and the plaintiff's actions are significant, Restyled Form 11 may provide another illustration of the unintended consequences of the Restyling Project. See generally Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 158-64 (2006) (providing examples of how restyling may inadvertently change the meaning of a rule).

¹⁰³ CLARK, *supra* note 19, at 300-01 (footnotes omitted). He also pointed out that the leading advocate of notice pleading would not require an allegation that the defendant was careless, and that the Federal Rules were a compromise between those who thought that there was value in “attack on the face of a pleading by demurrer or its modern substitute” and those who did not. *Id.* at 540; see also Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 513 (1918) (advocating for the adoption of notice pleading, such as the English system, which is “a compromise which retains essential-fact pleading in part, adopts notice pleading in part, and for the rest makes all pleading unnecessary”).

¹⁰⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual

Treating *Twombly*'s plausibility requirement as equivalent to the traditional requirement that inferences be reasonable also helps to make sense of the Court's insistence that it was not imposing a requirement of heightened specificity.¹⁰⁵ Plausibility of inference is not the same as specificity of factual allegation; indeed, more specific factual allegations can make an inference *less* plausible. Suppose a plaintiff were to start with the form complaint for negligence but add the following specific factual allegations:

The defendant's car was stopped at a red light when the collision occurred.

The plaintiff was listening to his iPod, sending a text message, and eating a slice of pizza when the collision occurred.

Surely such a complaint is more factually specific than the form complaint. But just as surely, the inference of negligence on the part of the defendant (or legal conclusion of negligence, or mixed question of negligence) is far less plausible with these factual specifics than without them. Indeed, might not a judge refuse to assume the truth of the allegation of negligence in such a complaint?¹⁰⁶

allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *see, e.g.*, *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) ("We follow the Court's suggested sequence."); *cf.* *Burbank*, *supra* note 63, at 551 n.78 (suggesting that "[p]erhaps 'legal conclusions' are those the plausibility (reasonableness) of which cannot be confirmed on the basis of the rest of the complaint assessed in light of both background knowledge about human behavior and the substantive law").

There are cases in which a pleader has personal knowledge of an element of a claim that he alleges. In such cases, it is simplest to view such an allegation as not conclusory—because it is not expressing an inference at all. Alternatively, one could view it as conclusory and ask whether it is plausible to infer that the conclusion is true, given that a person with personal knowledge says that it is true, but (without making a forbidden credibility determination) the answer to that inquiry will always be yes. *Cf.* *Bone*, *supra* note 62, at 28 (comparing a breach of contract case to *Twombly*, and noting that because the plaintiff in the former was a party to the agreement, the judge "has reason to be more confident . . . than in *Twombly* that the plaintiff will be able to prove the existence of an agreement"); Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry* 26 (Sept. 16, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1469638> (suggesting that an allegation is conclusory "when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible"). Of course, if the claimant's legal theory is wrong, so that he loses even if his inferential conclusions are plausible, dismissal is appropriate.

¹⁰⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) ("[W]e do not apply any 'heightened' pleading standard . . ."); *id.* at 570 ("[W]e do not require heightened fact pleading of specifics . . .").

¹⁰⁶ *Cf.* *Bone*, *supra* note 62, at 14 ("Since the Forms are supposed to be sufficient, the *Iqbal* majority cannot classify this allegation as a legal conclusion.").

It is not simply that specific allegations can make an inference less plausible, but that specificity has no necessary connection to plausibility of inference. When assessing the plausibility of an inference, we are asking, “What reason is there to draw that conclusion?” Giving more specifics about the conclusion may be completely unresponsive, while a responsive answer may be no more specific.¹⁰⁷

A requirement of plausibility will, however, apply differently in different substantive areas of the law and in different factual situations—it will depend on what facts the substantive law makes material and on the appropriate inferential connections between facts.¹⁰⁸ Plausibility is easier to find in claims of negligence based on a factual sketch of a car accident on a public street,¹⁰⁹ or in claims of deliberate indifference

¹⁰⁷ Consider a claim for battery in which the plaintiff alleges that the defendant hit the plaintiff while the plaintiff was sleeping. A statement with no more specificity at all could be a completely adequate response (e.g., the plaintiff’s roommate saw the defendant hit the plaintiff). On the other hand, providing more specifics (e.g., the defendant used a thirty-two ounce Louisville Slugger baseball bat and hit the plaintiff twice in the back of legs) does little to support the conclusion that the defendant hit the plaintiff. Cf. D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”*: *Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 435 n.84 (1998) (reciting the parable of the brick: “My grandfather was a wonderful man, and he had a wonderful cow. That cow could jump like no other cow. One night she jumped over the moon, which upset the man in the moon so much that he knocked her flying, and she fell back to earth and fell on my grandfather’s house and broke his chimney to pieces, and I can prove that every word I say is true, because *here’s a brick from that very chimney.*”).

¹⁰⁸ See *Iqbal*, 129 S. Ct. at 1956 (Souter, J., dissenting) (“[W]ithout knowing the elements of a . . . claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim.”); Brown, *supra* note 104, at 21-24 (describing the identification of the elements of a claim as step one in adjudicating a 12(b)(6) motion). This suggests an important, but rarely mentioned, conceptual point about the forms: compliance with the forms, despite Rule 84, does not guarantee that the complaint will survive a 12(b)(6) motion because deciding such a motion depends on the substantive law. See FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules . . .”). Imagine that a state were to abolish the tort of negligence regarding automobile accidents (including with pedestrians) and substitute a compensation scheme. Under this substantive law, a complaint that tracked Form 11 would nevertheless be properly dismissed.

¹⁰⁹ See FED. R. CIV. P. Form 11 (form complaint for negligence involving injuries from car); Bone, *supra* note 19, at 886 (“[D]rivers do not usually strike pedestrians when driving with reasonable care, so the probability of negligence conditional on a pedestrian being struck should be quite high The baseline . . . is the behavior of automobile drivers in general, which supports the inference of a breach of duty from a pedestrian being struck.”); Burbank, *supra* note 63, at 551 n.78 (“Thus, it is not implausible that the driver of a car that strikes a pedestrian has been negligent in some respect.”); Randal C. Picker, Twombly, Leegin and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161, 176 (“In the world of Form 9, the accident itself allegedly has taken place and perhaps that alone is enough, if we assume that most accidents arise from some

based on a factual sketch of a prisoner's untreated serious medical needs,¹¹⁰ than in antitrust.

Similarly, it is easier to infer that a supervisor knew about a subordinate's constitutional violation but did nothing about it (perhaps because he thought other matters of higher priority and the costs of discipline to exceed the benefit) than to infer that a supervisor shared the subordinate's unconstitutional purpose.¹¹¹ If the substantive law requires the latter rather than the former, it will be harder to state a plausible claim. For this reason, the *Iqbal* Court's insistence that "supervisory liability" is a "misnomer" in the context of a *Bivens* action and that "purpose rather than knowledge is required to impose *Bivens* liability" is a crucial step in concluding that the *Iqbal* complaint was insufficient.¹¹² Nowhere does the majority in *Iqbal* state that it would be implausible to infer that Attorney General Ashcroft knew about, but did nothing to stop, the actions of his subordinates.¹¹³

None of this is because the relevant Federal Rules of Civil Procedure are different in different areas of the law, but because the substantive law ultimately determines what is necessary to prevail,¹¹⁴ and some things are more readily inferred than others.¹¹⁵

sort of wrong."); Spencer, *supra* note 20, at 15 ("Because one does not ordinarily hit a person with a motor vehicle, the facts described suggest wrongdoing and thus enjoy the presumption of impropriety.").

¹¹⁰ See *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (explaining that a prisoner's allegation that hospital staff was "endangering [his] life" by removing him from a hepatitis C treatment program, and his claim that he was still in need of treatment, which prison officials refused to give, was sufficient to satisfy the pleading standard (alteration in original)).

¹¹¹ *Cf. Iqbal*, 129 S. Ct. at 1958 (Souter, J., dissenting) (noting various standards for supervisory liability adopted by the courts of appeals).

¹¹² *Id.* at 1949 (majority opinion). *But see id.* at 1958 (Souter, J., dissenting) (stating that the majority's "foray into supervisory liability . . . has no bearing on its resolution of the case").

¹¹³ *Cf. id.* at 1952 (majority opinion) (noting that the allegations of beatings, "if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part," but that this is not sufficient because the law requires a "discriminatory state of mind").

¹¹⁴ The underlying problem—well beyond the scope of this Article—may well be the extent to which the substantive law has made liability turn on the defendant's state of mind. See Marcus, *supra* note 69, at 450 (explaining that "particularly difficult problems . . . often involve outwardly innocent or admitted behavior that can, depending on the defendant's state of mind, result in very substantial liability").

¹¹⁵ *Cf. Spencer*, *supra* note 19, at 459-60 (arguing that the plausibility standard will probably "be more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage" and contending that this "violates the principle of transubstantivity").

Significantly, determinations of plausibility depend on baseline assumptions about the way the world usually works. What strikes a judge as plausible depends on the judge's sense of what is (to use the *Twombly* Court's term) "natural." In *Twombly*, the Court saw "no reason to infer that the companies had agreed among themselves to do what was only natural anyway."¹¹⁶ The *Iqbal* Court was even more explicit, observing that determining plausibility is a "context-specific task that requires the . . . court to draw on its judicial experience and common sense."¹¹⁷

The need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication.¹¹⁸ Professor Twining has summarized some of the common assumptions underlying our rationalist model of adjudication as follows:

The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.

Judgments about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision maker[.]

The characteristic mode of reasoning appropriate to reason about probabilities is induction.

Judgments about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialized scientific or expert knowledge when it is available.¹¹⁹

It is interesting to note in this regard that Clark did not believe that Rule 9, which governs pleading special matters such as capacity, fraud, and mistake, was "absolutely essential" because it "probably states only what courts would do anyhow." Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 282 (1942); cf. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (noting that "Rule 9(b) does impose a particularity requirement" with regard to allegations of fraud or mistake, and relying on the *expressio unius* canon to conclude that a particularity requirement does not apply other than to those mentioned in Rule 9(b)).

¹¹⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 541, 566 (2007); see also *id.* at 568 (referring to "a natural explanation for the noncompetition alleged").

¹¹⁷ 129 S. Ct. at 1950.

¹¹⁸ See TWINING, *supra* note 76, at 108 (noting that there "seems to be a general consensus among theorists of evidence that the mode of argumentation appropriate to proof in legal contexts is induction, as it is found in everyday practical reasoning").

¹¹⁹ *Id.* at 76 tbl.1; see also WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 325 (1st ed. 1990) ("Both holists and atomists generally seem to accept that one tests the credibility or plausibility of a theory or a story by reference to more general beliefs about the world, variously referred to as 'the common course of events,' 'commonsense generalizations,' 'the stock of knowledge' in a given society or 'our web of

Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, or a matter of common sense. This may be an area where President Obama's preference for judges with a range of life experiences might matter. As he put it when announcing his nomination of Judge Sonia Sotomayor,

Supreme Court Justice Oliver Wendell Holmes once said: "The life of the law has not been logic; it has been experience." Experience being tested by obstacles and barriers, by hardship and misfortune, experience insisting, persisting, and ultimately, overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of Justice we need on the Supreme Court.¹²⁰

beliefs.""). Of course, Twining is addressing the determination of facts, but our legal system has long treated the scope of permissible factual inferences—as opposed to the choice of the best inference among permissible inferences—as a question of law. *See, e.g.,* Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872) ("Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.").

For an account of the long history of probabilistic thinking before its mathematization, see JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* (2001).

¹²⁰ President Barack Obama, Remarks on the Nomination of Judge Sonia Sotomayor to Be a Supreme Court Associate Justice, (May 26, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900402.pdf>. He had made similar statements in the past:

[P]art of the role of the court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout. And part of what I want to find in a Supreme Court justice . . . sometimes we're only looking at academics or people who've been in the court. If we can find people who have life experience and they understand what it means to be on the outside, what it means to have the system not work for them, that's the kind of person I want on the Supreme Court.

Senator Barack Obama, The Democratic Presidential Debate in Las Vegas, Nev. (Nov. 15, 2007), *available at* http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html?_r=1&pagewanted=all.

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

In considering *Iqbal*, it is interesting to note that four of the five Justices in the majority had served significant roles in the federal executive branch.¹²¹ Of the dissenting Justices, only one, Justice Breyer, had a significant background in the federal executive branch—and his federal executive experience included service as a special Watergate prosecutor.¹²² Might these experiences have shaped these Justices’ “common sense” understanding of what is “natural” for a high-level federal executive?

Others have made the point that plausibility depends on baseline assumptions about the way the world usually works.¹²³ They seem to assume, however, that everyone shares those same baseline assumptions.¹²⁴ If we recognize that different judges with different life experiences may have different baseline assumptions about the way the world usually works, then *Twombly* can be understood as inviting lawyers to present information and argument designed to convince a judge that what the judge thinks is “natural” is not.

Carrie Dann, *Obama on Judges, Supreme Court*, MSNBC FIRST READ, July 17, 2007, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx> (quoting Senator Barack Obama, Address at the Planned Parenthood Conference in Washington, D.C. (July 17, 2007)).

¹²¹ Justice Scalia was an assistant attorney general in the Office of Legal Counsel from 1974–1977. Justice Thomas was the Chairman of the Equal Employment Opportunity Commission from 1982–1990. Chief Justice Roberts was a special assistant to the Attorney General from 1981–1982, an associate counsel to the President in the White House Counsel’s Office from 1982–1986, and the principal deputy solicitor general from 1989–1993. Justice Alito was an assistant to the U.S. Solicitor General from 1981–1985, a deputy assistant U.S. attorney general from 1985–1987, and the U.S. Attorney for the District of New Jersey from 1987–1990. The biographical information contained in this footnote and the next is taken from the Biographical Directory of Federal Judges on the website of the Federal Judicial Center, <http://www.fjc.gov>.

¹²² Justice Breyer was a special assistant to the Assistant U.S. Attorney General for Antitrust from 1965–1967 and an assistant special prosecutor for the Watergate Special Prosecution Force in 1973. Justice Stevens does have military experience, having served as a Lieutenant Commander in the U.S. Naval Reserves from 1942–1945. See *supra* note 122.

¹²³ See Bone, *supra* note 19, 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. . . . Understood in these terms, what the *Twombly* Court requires are allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.”); Spencer, *supra* note 20, at 15 (contrasting the presumption of impropriety that an automobile collision enjoys with the absence of such presumption for a termination of employment because while “one does not ordinarily hit a person with a motor vehicle . . . firings in our society are not ordinarily or presumptively for inappropriate reasons”).

¹²⁴ Professor Bone does note that defining the appropriate baseline “involves a normative judgment.” Bone, *supra* note 19, at 887.

Notice that in *Twombly* itself, the Court did not rest its evaluation of plausibility solely on its own intuitive sense of the way the world naturally works, or its sense of “common economic experience.”¹²⁵ It also relied on the particular history of the telecommunications industry:

But [the defendants’ “competitive reticence”] was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The [defendants] were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.¹²⁶

In other words, additional information—in *Twombly*, historical context¹²⁷—can influence a judge’s perception of what things are considered natural or ordinary; it can shift the baseline. Judges might know such information based on their own experience. But in cases where lawyers think that a judge’s baseline assumptions about what is natural might be wrong, they should be prepared to provide information that can correct it.

Indeed, in this regard, the shift from reasonable to plausible might be an improvement. A test for reasonableness suggests that a judge does not need any more information to evaluate the inference beyond her own reason and common sense; every judge thinks herself reasonable. But a test for plausibility is suggestive of different perspectives and more probabilistic thinking. Perhaps this is simply reflecting my own idiosyncratic perspective, but I would rather try to convince another that additional information might make something that she thought was implausible actually seem plausible, than to try to

¹²⁵ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 (2007).

¹²⁶ *Id.* at 567-68 (citation omitted). *But cf. id.* at 587 (Stevens, J., dissenting) (arguing that courts should “resist the urge to engage in armchair economics at the pleading stage” of an antitrust case).

¹²⁷ See also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (referring to the September 11th attacks as “perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group . . . headed by another Arab Muslim . . . and composed in large part of his Arab Muslim disciples,” and finding it unsurprising 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”).

convince her that additional information might make something that she thought unreasonable actually seem reasonable.

The possibility of additional information shifting a court's baseline assumptions might have particular significance in the area of unlawful discrimination. To the extent that *Twombly* is having a disproportionate effect on such claims,¹²⁸ perhaps the reason is that many judges operate from a baseline assumption that unlawful discrimination is rare and that when employees are fired (or otherwise subjected to adverse employment actions) the natural explanation is that their employers had a perfectly legal reason to do so, ranging from the

¹²⁸ See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 ILL. L. REV. 1011, 1036 (reporting that “*Twombly* is being extended beyond the antitrust context to employment discrimination cases” and having an “impact in the outcome of Title VII claims”); 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) (finding that “[t]he rate of dismissal in civil rights cases has spiked in the four months since *Twombly*”); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. (forthcoming) (manuscript at 2) (reporting that motions to dismiss in constitutional civil rights cases were granted at a higher rate than in all cases combined, and that the rate of granting 12(b)(6) motions in constitutional civil rights cases increased after *Twombly* and again after *Iqbal*).

A significant question here is how to reconcile *Twombly* and *Iqbal* with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), and whether such reconciliation is even possible. Cf. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“We have to conclude . . . that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”). While there is undeniably serious tension, particularly given the *Swierkiewicz* court’s rejection of the argument that “allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits,” 534 U.S. at 514-15, reconciliation is possible. First, the question presented in *Swierkiewicz* was phrased in terms of whether an employment discrimination plaintiff must “plead specific facts showing that at trial he can make out a *prima facie* case of discrimination under *McDonnell Douglas*.” Brief for the Petitioner, at i, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853). The Court rejected any such requirement, in part, “because the *McDonnell Douglas* framework does not apply in every employment discrimination case.” 534 U.S. at 511; see also Charles B. Campbell, A “Plausible” Showing After *Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 24 (2008) (“What the Court rejected in *Swierkiewicz* was requiring a complaint to allege all the elements of the *McDonnell Douglas* evidentiary standard . . .”). In addition, as noted above, the *Swierkiewicz* Court did not treat the allegation of age and national-origin discrimination as itself subject to the assumption of truth. Moreover, it noted that the “complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.” 534 U.S. at 514. See, e.g., Bone, *supra* note 19, at 887 n.68 (stating that while “the *Twombly* Court’s basis for distinguishing *Swierkiewicz* is problematic, the result is clearly consistent with my baseline interpretation of plausibility” because the plaintiff detailed the events leading to his termination and alleged that “he was more qualified than the younger person of French origin who replaced him” (citation omitted)).

need to cut costs to unhappiness with the employee's attitude and personality. If so, perhaps *Twombly* suggests that litigants seek directly to undermine this baseline assumption with social science research.¹²⁹

III. DISCOVERY PRIOR TO DECISION ON 12(B)(6) MOTION

Some might contend that all of this misses the point—and misses the problem with the decisions in *Twombly* and *Iqbal*. They might say that the allegation of conspiracy in *Twombly*—like the allegation of unlawful discrimination in *Iqbal*—was not a legal conclusion or an inference from other facts or a mixed question of law and fact, but instead was a straightforward factual allegation and should have been treated as such and presumed to be true for purposes of deciding a 12(b)(6) motion.¹³⁰

Notice, however, that the allegation of conspiracy in *Twombly* was made “upon information and belief,”¹³¹ which is the traditional method used by plaintiffs who lack evidentiary support for factual allegations without discovery. The individual allegations of unlawful discrimination in *Iqbal* do not state that they are made “upon information and belief”; instead, *every* allegation in the plaintiff's *entire complaint*—except “as to themselves” (whatever that means)—was made “upon information and belief.”¹³²

While pleading “on information and belief” is traditional,¹³³ it is a tradition rooted in the requirement of verification under code plead-

¹²⁹ See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory* 38 HARV. C.R.-C.L. L. REV. 91, 97 (2003) (summarizing “[s]ocial science research into the operation of unconscious motivational and cognitive bias”).

¹³⁰ See *Twombly*, 550 U.S. at 571 (Stevens, J., dissenting) (stating that “[p]laintiffs have alleged such an agreement”); *id.* at 588-89 (Stevens, J., dissenting) (finding it “mind-boggling” that the majority treats the complaint as if “so far as the Federal Rules are concerned, no agreement has been alleged at all”); see also Marcus, *supra* note 69, at 468 (“State of mind is undoubtedly a fact, even now sometimes labeled an ‘ultimate fact.’” (quoting *Herbert v. Lando*, 441 U.S. 153, 170 (1979))).

¹³¹ *Twombly*, 550 U.S. at 551 (quoting Consolidated Amended Class Action Complaint, *supra* note 43, ¶ 51, at 19).

¹³² The opening sentence of the complaint states as follows:

Plaintiffs Ehab Elmaghraby and Javaid Iqbal, by their attorneys, the Urban Justice Center and Koob & Magoolaghan . . . allege upon knowledge as to themselves and upon information and belief as to all other matters as follows . . .

Iqbal Complaint, *supra* note 42, at 2.

¹³³ I confess, however, that I do not believe I have ever previously seen a pleading that is based in its entirety—except “as to [the plaintiffs] themselves”—on “information and belief.”

ing and is not mentioned in the Federal Rules of Civil Procedure. “David Dudley Field considered the swearing to all pleadings an essential to secure the good faith in pleading and honest issues.”¹³⁴ Accordingly, some codes required verification of all pleadings, while others enabled a pleader to verify his pleadings and thereby require that subsequent pleadings also be verified.¹³⁵ To deal with the problem that verification posed for some pleaders, codes permitted “[a]ffirmative allegations of fact in the complaint [to] be made upon information and belief instead of positively, so that the pleader may be enabled to verify even where he lacks definite knowledge.”¹³⁶ As Dean Clark explained,

[I]t is contemplated by the codes that the allegations of the complaint may be made not only directly, as upon the plaintiff's own knowledge, but also upon information and belief. The codes also provide expressly for denials upon information and belief. Such form of allegation was not permitted at common law.¹³⁷

Under the Federal Rules, “[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.”¹³⁸ As a result, there is rarely a need for a verified pleading under the Federal Rules, and the Rules make no provision for pleading an allegation on information and belief.¹³⁹ Courts nevertheless accepted this method of pleading under the Federal Rules, treating it as consistent with the “spirit” of those rules.¹⁴⁰ Some pointed to

¹³⁴ CLARK, *supra* note 19, at 216 (citing DAVID DUDLEY FIELD, *What Shall Be Done with the Practice of the Courts?*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226, 231, 239-40 (A.P. Sprague ed., 1884)); *see also* Subrin, *supra* note 75, at 936 (“The Field Code contained a strong verification requirement to encourage truthful pleading . . .”).

¹³⁵ CLARK, *supra* note 19, at 215.

¹³⁶ *Id.* at 216.

¹³⁷ *Id.* at 220 (footnotes omitted).

¹³⁸ FED. R. CIV. P. 11(a). Rule 23.1 requires that a complaint in a derivative action be verified, and Rule 65 requires that an application for a temporary restraining order be supported by either “an affidavit or a verified complaint.” FED. R. CIV. P. 23.1, 65. Oddly, the authors of *Federal Practice and Procedure* nevertheless worry that without the ability to plead on information and belief, a pleader would have to worry about the “appearance of perjury.” WRIGHT & MILLER, *supra* note 19, § 1224, at 300.

¹³⁹ *See, e.g.*, WRIGHT & MILLER, *supra* note 19, § 1224, at 299 (noting that “[t]here is no express authorization in the federal rules for pleading on information and belief”); *cf.* FED. R. CIV. P. 8(b)(5) (“A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”).

¹⁴⁰ *See, e.g.*, *Carroll v. Morrison Hotel Corp.*, 149 F.2d 404, 406 (7th Cir. 1945) (“[T]o refuse to give credence to [facts alleged on information and belief] on defendants’ motion to dismiss would be opposed to the spirit of the Rules.”).

Rule 11 as “indirect support” for such pleadings, in that Rule 11 originally provided that an attorney’s signature was a certificate that “to the best of his knowledge, information, and belief” there appeared to be “good ground to support” the pleading.¹⁴¹

But for more than fifteen years now, the Federal Rules have provided specific instructions for plaintiffs who cannot rely on their own definite knowledge to support a factual allegation. Such plaintiffs are instructed by Rule 11(b)(3) to specifically identify allegations that are “likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery.”¹⁴²

I suggest that the phrase “upon information and belief,” like the *Conley* language, should be retired. Indeed, its retirement is long overdue; it somehow survived the ax that befell the term “demurrer” in 1938,¹⁴³ and when a replacement was hired in 1993, the Advisory Committee kept it on board by referring to it in a Note.¹⁴⁴ Rather than using “information and belief” as a backhanded way of referring to Rule 11(b)(3), pleaders should use the language of Rule 11(b)(3), thereby focusing on the key issue of discovery to substantiate such allegations.

Some may think this suggestion a semantic quibble. Who cares whether a complaint uses the language of Rule 11(b)(3) to focus attention on the issue of discovery if the complaint is dismissed under *Twombly* anyway?

This focus is important for three reasons. First, it identifies what is really the core issue at stake: should the plaintiff be able to obtain discovery in an effort to uncover evidence without which he cannot prevail? Second, precision here can lead to clarity for both drafter and reader as to whether a pleader intends an allegation to be an ordinary factual one as to which he seeks discovery or a conclusion he seeks the

¹⁴¹ *E.g., id.*; see also WRIGHT & MILLER, *supra* note 19, § 1224, at 299-301 (explaining the history of Rule 11).

¹⁴² FED. R. CIV. P. 11(b)(3).

¹⁴³ See FED. R. CIV. P. 7(c). This provision was deleted by the Restylers.

¹⁴⁴ “Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.” FED. R. CIV. P. 11 advisory committee’s note (1993). Pleading on information and belief has also been kept alive by the Private Securities Litigation Reform Act. See 15 U.S.C. § 78u-4(b)(1) (2006) (“[I]f an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).

court to draw as to an element of the claim. Indeed, such clarity by lawyers might lead to clarifying an ambiguity in *Twombly* itself.

The ambiguity stems from passages in *Twombly* suggesting that plausibility is connected to the likelihood of discovery producing evidentiary support. For example, the Court stated that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”¹⁴⁵ Similarly, it observed that “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.”¹⁴⁶

But the plausibility of the conclusion that the pleader seeks the court to adopt is not the same thing as the plausibility that discovery would lead to evidentiary support for that conclusion. There is a difference between

- 1) the plausibility of inferring x , given a , b , c , and d ; and
- 2) the plausibility of finding evidence to support x , given a , b , c , and d .

This point is perhaps clearest in the criminal context: evidence that would be insufficient to support a conclusion of guilt can easily be sufficient to support a search or a lesser intrusion.¹⁴⁷ Making this sort of

¹⁴⁵ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

¹⁴⁶ *Id.* at 559 (internal quotation marks and citations omitted); see also *In re S. Scrap Material Co.*, 541 F.3d 584, 587 (5th Cir. 2008) (stating that *Twombly*'s plausibility standard “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements” (internal quotations marks omitted)); cf. Spencer, *supra* note 19, at 485 (contending that this statement “steps directly on the toes of Rule 11”).

¹⁴⁷ Compare *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”) with *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that “probable cause” is needed for search), and *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that “reasonable” suspicion is sufficient for stop). See *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (explaining that reasonable suspicion “is considerably less than proof of wrongdoing by a preponderance of the evidence,” that probable cause means “a fair probability that contraband or evidence of a crime will be found,” and that “the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause”); see also *Clermont & Yeazell*, *supra* note 6 (manuscript at 47) (suggesting the possibility of requiring a claimant “demonstrate something like probable cause to believe that discovery would yield significant pertinent evidence”).

determination is part of the everyday work of a magistrate judge called upon to evaluate requests for search warrants.¹⁴⁸ And these same magistrate judges are commonly given the responsibility to supervise discovery.

By including the relevant language of Rule 11(b)(3), a pleader could make clear that an individual allegation is an ordinary factual one as to which she seeks discovery and that a different allegation is the conclusion she seeks the court to draw as to an element of the claim. She could then acknowledge that the court need not assume the truth of the latter allegation, and even acknowledge that, based on the factual allegations for which she already has evidentiary support, it is not (yet) plausible to infer that the latter allegation is true, but that it is plausible to think that discovery will yield evidentiary support for the former allegation.

Third, this focus is important because discovery can proceed prior to the filing of a 12(b)(6) motion and during its pendency. While the opinions in *Twombly*, as well as most commentators, seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery,¹⁴⁹ this is simply not the case. The mere filing of a motion to dismiss does not trigger a stay of discovery. As the Court of Appeals for the Seventh Circuit once put it, “Discovery need not cease during the pendency of a motion to dismiss.”¹⁵⁰

And while a district court has discretion under Rule 26(c) to stay discovery pending a motion to dismiss “for good cause,” issuance of

¹⁴⁸ See FED. R. CRIM. P. 41.

¹⁴⁹ See *Twombly*, 550 U.S. at 564 n.8 (referring to an “understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct”); *id.* at 546 (cautioning against forgetting that “proceeding to antitrust discovery can be expensive”); *id.* at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings”); see also *id.* at 577 (“*Conley*’s ‘no set of facts’ formulation permits outright dismissal only when proceeding to discovery or beyond would be futile.” (Stevens, J., dissenting)); Hoffman, *supra* note 20, at 1268 (“[A] pleading sufficiency challenge is designed to be made before the case advances to the discovery stage.”); Page, *Emerging Definition*, *supra* note 27 (manuscript at 9) (noting that “both opinions [in *Twombly*] betray the Court’s ignorance of the complex reality of modern discovery, where discovery frequently occurs while a motion to dismiss for failure to state a claim is pending”); Spencer, *supra* note 19, at 471 (“[P]laintiffs are required to offer such facts at the pleading phase before discovery may occur.”); Steinman, *supra* note 87 (manuscript at 60) (arguing that a standard requiring evidence at the pleadings phase prevents plaintiffs from reaching the discovery process and keeps “meritorious claims from ever seeing the light of day”).

¹⁵⁰ *SK Hand Tool Corp. v. Dresser Indus.*, 852 F.2d 936, 945 n.11 (7th Cir. 1988).

such a stay is not routine.¹⁵¹ Indeed, to routinely stay discovery simply because of the filing of a motion to dismiss would be to treat a unique provision of the Private Securities Litigation Reform Act of 1995 as if it applied to all cases.¹⁵²

¹⁵¹ See, e.g., *In re Winn Dixie Stores, Inc. ERISA Litig.*, No. 3:04-194-J-33MCR, 2007 WL 1877887, at *2 (M.D. Fla. June 28, 2007) (noting that circuit precedent “[a]t most . . . support[s] a discovery stay—in the district court’s discretion—when an especially dubious claim would unduly expand the scope of discovery” (citation omitted)); *In re Chase Manhattan Corp. Sec. Litig.*, No. 90-6092, 1991 WL 79432, at *1 (S.D.N.Y. May 7, 1991) (“[Orders staying discovery] should not be granted routinely simply on the basis that a motion to dismiss has been filed.”); *Spencer Trask Software & Info. Servs., LLC v. RPost Int’l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (same); *WRT Energy Sec. Litig.*, No. 96-3610, 1996 WL 580930, at *1 (S.D.N.Y. Oct. 9, 1996) (same); *Moran v. Flaherty*, No. 92-3200, 1992 WL 276913, at *1 (S.D.N.Y. Sept. 25, 1992) (same); see also *In re Lotus Dev. Corp. Sec. Litig.*, 875 F. Supp. 48, 51 (D. Mass. 1995) (“[T]he burden of proof imposed on the party seeking a stay is a stiff one. To create a full-blown procedure, or to make a stay more readily obtainable simply because there is a colorable motion to dismiss, would undermine the spirit of the new [mandatory disclosure] rule, and vindicate the critics who cried that the reform was bound to balloon motion practice by introducing new ambiguities that would be seized upon by lawyers trained to operate in an adversarial system.”); Page, *Emerging Definition*, *supra* note 27 (manuscript at 15) (“[A]s many of the post-Twombly cases show, the district court may permit . . . access to narrowly focused discovery in order to frame a sufficient complaint.”).

Professor Bone asserts, without citation, that judges rarely allow targeted discovery prior to a deciding a 12(b)(6) motion, Bone, *supra* note 19, at 933 n.249, but this phrasing puts the matter backwards: discovery is available unless it is stayed, for good cause, under Rule 26. He also contends that “pleading-stage discovery fits the current Rules awkwardly at best,” in part because “formal discovery is not supposed to begin until after the parties meet and confer pursuant to Rule 26(f).” *Id.* at 935 & n.257. But Rule 26(f) requires that the discovery planning conference occur “as soon as practicable,” and does not contain any provision delaying the conference based on the filing of a 12(b)(6) motion, nor any provision suggesting that the filing of such a motion somehow makes the conference “impracticable.” FED R. CIV. P. 26(f). Rule 26(f) also requires that the conference must take place “in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” *Id.* Rule 16(b), in turn, requires the issuance of a scheduling order “as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.” FED R. CIV. P. 16(b). There is certainly no guarantee that a 12(b)(6) motion will even be filed, much less decided, before the rules require the discovery planning conference, particularly in light of ease with which extensions of time to answer or move are granted. See FED. R. CIV. P. 6(b) (noting that the time limits under the rules may be extended “for good cause”). It is not all that unusual for six months to a year to elapse between the filing of a motion to dismiss and the court’s decision on that motion.

¹⁵² See 15 U.S.C. § 77z-1(b)(1) (2006); LARRY L. TEPLY, RALPH U. WHITTEN & DENIS F. McLAUGHLIN, CIVIL PROCEDURE: CASES, TEXT, NOTES, AND PROBLEMS 539-40 (2d ed. 2008) (comparing the approach of the PSLRA with the general approach under the Federal Rules and noting that the Advisory Committee in 2000 “considered postponing initial disclosure pending disposition of such preliminary motions [such as a 12(b)(6) motion], but ultimately rejected any provision for an automatic stay of discovery”); Page, *Emerging Definition*, *supra* note 27 (manuscript at 25) (“The fact that

Notice how this can play out. One way, which critics of *Twombly* would certainly fear, is that a defendant files a motion to dismiss along with a motion to stay discovery pending the motion to dismiss, and the district court grants the stay and then grants the motion to dismiss. Similarly, a defendant might simply stonewall discovery, forcing the plaintiff to file a motion to compel, and the district court might do nothing to compel meaningful discovery before granting the motion to dismiss. Or a district court might simply hear and decide the motion to dismiss so quickly that little discovery would have been taken.

But that is not the only way it can play out. Instead, the district court could deny the motion to stay discovery (or grant a motion to compel) and delay decision (either purposefully or simply due to competing priorities) on the motion to dismiss. As a result, by the time briefing and argument on the motion to dismiss is complete (or at least before the motion is decided), the plaintiff will have had an opportunity to obtain discovery to support those allegations as to which discovery was needed. If discovery reveals such evidence, the allegations made on information and belief can be replaced, via an amended complaint, with allegations based on the discovery.

If a district court actively manages the case, other possibilities arise. For example, the court could hold a Rule 16 conference to set a schedule for motion practice and discovery. At this conference, a defendant might state that it plans to file (or has filed) a 12(b)(6) motion and argue that discovery should be stayed until that motion is decided, and the plaintiff might explain the particular discovery it wants to support an allegation identified in accordance with Rule 11(b)(3).¹⁵³ The court could allow limited discovery, targeted at the identified allegation, and establish a briefing schedule for any motion

Congress chose to require a stay of discovery in securities fraud cases implies that no such requirement applies in other cases.”).

Under the original federal rules, a plaintiff could not, without leave of court, take a deposition before the defendant answered, but a 1946 amendment removed this restriction. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 737 (1998) (explaining that under the 1946 amendment, “plaintiffs would no longer have to wait for the defendant to answer before they could depose as a matter of right; one only needed court permission if a deposition was sought prior to twenty days after commencement of the action”). Prior to 1946, the filing of a motion to dismiss could effectively block the plaintiff from taking depositions, but this has not been the rule for more than sixty years.

¹⁵³ Cf. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 966 (9th Cir. 2009) (“At a pre-trial conference, Defendants indicated that they would resist all discovery requests until they obtained a ruling on a yet to be filed qualified immunity motion. Rather than engage in a discovery battle, Plaintiffs elected to await Defendants’ motion.”).

to dismiss that follows the completion of that limited discovery. This scenario tames *Twombly* rather thoroughly; indeed, it resembles what Justice Stevens envisioned in his dissenting opinion in that case.¹⁵⁴ But nothing in *Twombly* prohibits a district court from taking this course.

Even in antitrust cases, *Twombly* “does not . . . erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff’s complaint survives a motion to dismiss.”¹⁵⁵ In *Twombly*, “[t]he Court did not hold, implicitly or otherwise, that discovery in antitrust actions is stayed or abated until after a complaint survives a Rule 12(b)(6) challenge. Such a reading of that opinion is overbroad and unpersuasive.”¹⁵⁶ “Recognition by the courts of the hefty costs associated with antitrust discovery is not . . . tantamount to an automatic prohibition on discovery in every antitrust case where defendants challenge the sufficiency of a complaint.”¹⁵⁷

Admittedly, language in *Iqbal* makes this argument more difficult; as in *Twombly*, the Court rejected the “careful-case-management ap-

¹⁵⁴ *Twombly*, 550 U.S. at 591-94 (Stevens, J., dissenting); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961-62 (2009) (Breyer, J., dissenting) (stating that “a trial court, responsible for managing a case . . . can structure discovery” and that “[n]either the briefs nor the Court’s opinion provides convincing grounds for finding these alternative case-management tools inadequate”); Bone, *supra* note 19, at 933 (“The idea is simple: give the plaintiff a chance to conduct limited discovery before deciding a motion to dismiss for failure to state a claim or a motion for a more definite statement.”); Spencer, *supra* note 20, at 30 & n.142 (suggesting that “a better approach might be to permit judges to identify those cases where additional facts are needed to support the needed inference and reserve judgment on the motion to dismiss until after limited, focused discovery on that issue can occur,” and that one “could argue that judges already have the authority to tailor discovery in this way via their authority under Rule 26”). Such an approach would ultimately be quite similar to that recommended by Professor Marcus in 1986. See Marcus, *supra* note 69, at 486-87 (suggesting that defendants move for summary judgment at the outset of the case, and district judges focus on the propriety of discovery sought by a plaintiff under Rule 56(f)). The resemblance is still closer after *Celotex*. See *id.* at 488 n.323 (stating that a defendant moving under Rule 56 must show the absence of disputed facts and noting the pendency of *Celotex* in the Supreme Court).

¹⁵⁵ *In re Graphics Processing Units Antitrust Litig.*, No. 06-07417, 2007 WL 2127577, at *4 (N.D. Cal. July 24, 2007); see also *In re Flash Memory Antitrust Litig.*, 2008-1 Trade Cas. (CCH) ¶ 76,053, at 110,439 (N.D. Cal. 2008) (agreeing explicitly with this aspect of the decision in *Graphics Processing Units*).

¹⁵⁶ *Flash Memory*, 2008-1 Trade Cas. (CCH) at 110,439.

¹⁵⁷ *DSM Desotech Inc. v. 3D Sys. Corp.*, 2008-2 Trade Cas. (CCH) ¶ 76,423, at 112,852, 112,853 (N.D. Ill. 2008) (finding, however, that “the principles underlying *Twombly* counsel in favor of granting defendants’ motion to stay”); cf. Page, *Emerging Definition*, *supra* note 27 (manuscript at 24) (citing antitrust cases where discovery was conducted prior to decision on a motion to dismiss).

proach.”¹⁵⁸ It also explicitly stated that “[b]ecause respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”¹⁵⁹

However, it is crucial that these statements were made in the context of a case involving the defense of qualified immunity. Decades ago, the Supreme Court instructed that in such cases discovery should not be allowed until the issue of qualified immunity is resolved.¹⁶⁰ It has never made a similar pronouncement regarding motions to dismiss generally, nor could it, consistent with the plain text of the Federal Rules.

The *Iqbal* Court itself acknowledged the importance of the qualified immunity context, stating that its “rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity,” and that limited discovery is “cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.”¹⁶¹ It was immediately after emphasizing the Court’s duty to give real content to qualified immunity that, in the next sentence, it stated that the plaintiff was “not entitled to discovery.”¹⁶²

Lest anyone think that such an approach cannot be right because it guts rather than merely tames *Twombly*, bear in mind that the Federal Rules explicitly authorize a district court to defer hearing and decision on a 12(b)(6) motion until trial. Rule 12(i) states that “[i]f 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.”¹⁶³

Clark acknowledged that the “form of statement of the rule perhaps suggests that this [deferral to trial] should be the exception, rather than the ordinary course,” but believed that the rule empowered a “strong-minded judge” to make deferral to trial the ordinary course and choose to address Rule 12 motions pretrial only “if in the opinion

¹⁵⁸ *Iqbal*, 129 S. Ct. at 1953.

¹⁵⁹ *Id.* at 1954.

¹⁶⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“Until this threshold immunity question is resolved, discovery should not be allowed.”).

¹⁶¹ *Iqbal*, 129 S. Ct. at 1953-54.

¹⁶² *Id.* at 1954; cf. Bone, *supra* note 62, at 11 (noting that the “Court might intend this principle to apply only to qualified immunity cases, but it uses language that suggests a broader application”). Moreover, the lack of entitlement to discovery does not foreclose discretionary allowance of discovery.

¹⁶³ FED. R. CIV. P. 12(i).

of the judge decision will substantially dispose of the whole action or a distinct part thereof.”¹⁶⁴

Although the Court in both *Twombly* and *Iqbal* was plainly skeptical of the ability of judicial supervision to check discovery abuse,¹⁶⁵ a decent respect for the Supreme Court counsels against reading its opinions to have deleted an explicit provision of the Federal Rules without so much as mentioning it.

A more difficult question is presented if a district court grants a 12(b)(6) motion with leave to amend. Can discovery proceed after the dismissal of the complaint but while the action is still pending? There is some reason to think that it may: after all, the case is still alive and the discovery rules still apply.¹⁶⁶ On the other hand, if there is no viable complaint currently framing the dispute, it might be thought that there is no way for a court to determine the scope of discovery, and therefore none is permissible.¹⁶⁷ If the latter view is correct, a district court that

¹⁶⁴ Clark, *supra* note 115, at 285. Observing that “federal judges are often availing themselves of this authority,” thereby showing its “desirability,” he urged that it “should be made the rule, rather than the seemingly optional exception.” *Id.* at 285-86; *see also* Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 568-69 (1939) (urging deferral until trial); Clark, *supra* note 81, at 312 (making a similar point). Once again, the decision of the Restylers to eliminate the word “shall” may have shifted the meaning of the rule. *See* Hartnett, *supra* note 102, at 159-61 (using Rule 65(c) to illustrate how removing “shall” can change the discretionary aspects of a rule). The explicit power to order deferral to trial, however, remains.

¹⁶⁵ *See Iqbal*, 129 S. Ct. at 1953 (quoting *Twombly* on the modest successes of judicial supervision); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting the “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side”); *see also* Bone, *supra* note 19, at 884 (stating the *Twombly* “rejects the conventional case-management solution”).

¹⁶⁶ *See, e.g., In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (granting motion to dismiss with leave to amend while ordering narrowly tailored document discovery in post-*Twombly* decision); *see also* Damon Amyx, Note, *The Toll of Bell Atlantic Corp. v. Twombly: An Argument for Taking the Edge Off the Advantage Given Defendants*, 33 VT. L. REV. 323, 351 (2008) (advocating that federal courts “seriously consider adopting” the *Netflix* approach). Certainly, if only part of the case is dismissed, discovery can continue regarding the claims that were not dismissed, and that discovery could lead to information regarding the dismissed case. *See* Brown, *supra* note 104, at 34 (“[C]ontinued discovery may reveal evidence that would demonstrate that ‘justice so requires’ leave to amend” (footnote omitted)); *see also* FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

¹⁶⁷ *See In re Flash Memory Antitrust Litig.*, 2008-1 Trade Cas. (CCH) ¶ 76,053, at 110,440 (N.D. Cal. 2008) (noting that “[d]iscovery in the absence of any operative pleading . . . does not fit easily within the framework established by the Federal Rules,” and that Rule 27 does permit depositions prior to filing for the limited purpose of perpetuating witness testimony).

thought limited discovery appropriate could either delay action on the 12(b)(6) motion or order a more definite statement (to be provided after the limited discovery) rather than order dismissal.¹⁶⁸

Thus, a district court retains considerable discretion, even after *Twombly* and *Iqbal*, to allow discovery prior to deciding a 12(b)(6) motion.¹⁶⁹ Significantly, the exercise of that discretion is largely unreviewable. Neither a grant of a stay of discovery nor the denial of motion for a stay is a final order appealable to the court of appeals. Nor is an order permitting limited and targeted discovery. Moreover, even when review is possible, the standard of review is abuse of discretion.¹⁷⁰

If a district court stays discovery, then grants the 12(b)(6) motion without leave to amend and dismisses the action, the plaintiff can appeal and secure plenary appellate review of the dismissal. While it might be possible to argue that the stay of discovery was inappropriate, it is hard to imagine a court of appeals that agrees with the district court that the key allegation or allegations are implausible under *Twombly* would do anything but affirm; the chances are vanishingly small that a court of appeals would find that the stay of discovery constituted reversible error.¹⁷¹

On the other hand, if a district court allows discovery prior to decision on a 12(b)(6) motion and then denies the 12(b)(6) motion, there is ordinarily no appealable order. The same is true if the district court converts the 12(b)(6) motion into a summary judgment motion and denies that motion. If the case proceeds to trial and the defendant wins, any errors in permitting discovery or denying a 12(b)(6) motion will be unreviewable. If the case proceeds to trial and the

¹⁶⁸ Cf. *In re Graphics Processing Units Antitrust Litig.*, No.06-07417, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (staying discovery pending a motion to dismiss and suggesting that if “the complaint proves to be solid save for perhaps a single soft element for which evidence would normally be outside the reach of plaintiffs’ counsel without discovery, then it may be that a narrowly-directed and less burdensome discovery plan should be allowed with leave to amend to follow,” but that if “the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied”).

¹⁶⁹ See *Coss v. Playtex Prods., LLC*, No. 08-50222, 2009 WL 1455358, at *1-4 (N.D. Ill. May 21, 2009) (Mahoney, M.J.) (noting the concerns in both *Twombly* and *Iqbal* regarding burdensome discovery, the “extremely broad discretion” trial judges have to oversee discovery, and the disfavor with which it views stays of discovery, then ordering certain of the targeted discovery that it asked plaintiff to suggest).

¹⁷⁰ See, e.g., *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (“A district court’s decision to allow or deny discovery is reviewable only for abuse of discretion.”).

¹⁷¹ If the court of appeals, but not the district court, accepted the argument made above concerning Rule 11(b)(3), it might vacate and remand for reconsideration under the proper standard.

plaintiff wins, it is difficult to imagine reversal on the ground that discovery should not have been allowed: either the discovery did not produce useful evidence, in which case any error was harmless, or it did produce useful evidence that contributed to the verdict, in which case a court is hardly likely to reverse an accurate verdict because the plaintiff should not have been permitted to gain access to the (non-privileged) evidence in the first place.

The point is that district courts have broad and largely unreviewable discretion to decide whether to allow discovery prior to a decision on a 12(b)(6) motion. The major exception to this principle is where qualified immunity is in play. There, not only has the Supreme Court instructed that discovery should ordinarily not be allowed until the defense of qualified immunity is resolved,¹⁷² but has also held that a denial of a motion to dismiss (or a motion for summary judgment) based on that defense is itself an appealable order.¹⁷³ In that area, a district court's discretion is more limited, and as *Iqbal* itself reveals, the prospects of meaningful appellate review much greater.

Not only do district courts have broad and largely unreviewable discretion regarding the scope of discovery prior to a decision on a 12(b)(6) motion, but that discretion is frequently exercised in chambers, with scant (if any) explanation of the basis for the decision. Indeed, in districts where magistrate judges manage discovery and pre-trial scheduling, it will frequently be exercised in the chambers of non-Article III judges.¹⁷⁴ While immediate appeal is available from a magistrate judge to an Article III district judge, even there, review will not be plenary.¹⁷⁵

¹⁷² See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“Until this threshold immunity question is resolved, discovery should not be allowed.”).

¹⁷³ See *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (stating that “an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a ‘final’ judgment subject to immediate appeal”); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding a denial of qualified immunity turning on an issue of law is an appealable final decision); cf. *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (holding that denial of a summary judgment motion asserting qualified immunity is not immediately appealable if the denial turned on the district court's conclusion that there was a triable issue of fact rather than on a legal determination).

¹⁷⁴ See, e.g., *McLafferty v. Deutsche Lufthansa A.G.*, 2008-2 Trade Cas. (CCH) ¶ 76,354 at 112,462 (E.D. Pa. 2008) (explaining that it is for the district judge to decide the motion to dismiss, but that “it is within my discretion to stay discovery pending his decision, and I will do so”).

¹⁷⁵ See 28 U.S.C. § 636(b)(1)(A) (2006) (“A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.”).

For years now, Professor Resnik has been drawing our attention to the way in which our civil justice system has moved far in the direction of difficult-to-review, hidden, and discretionary power.¹⁷⁶ While the ability of district courts to allow discovery prior to a decision on a 12(b)(6) motion offers an important way to tame *Twombly*, it also exacerbates this trend. And perhaps, in some sense, this is precisely what we should expect from a procedural scheme built on the fundamental premise that “judges were to have discretion to do what was right.”¹⁷⁷

¹⁷⁶ See Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 192 (2003) (noting that “it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (“Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.”); Judith Resnik, *Uncovering, Disclosing, and Discovering: How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 534 (2006) (noting that “over the last several decades, new modes of dispute resolution and new venues for adjudication have diluted the opportunities for effective public access”); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1103 (2006) (“The literal and material presence of adjudication stems in part from its performative qualities: much of the activity occurs in buildings open to the public. . . . [But a]s court-based processes focus on facilitating settlements, and as courts outsource their evidentiary work to administrative agencies and private dispute resolution providers, the power and effects of decision making become less readily accessible.”).

¹⁷⁷ Subrin, *supra* note 75, at 944; see *id.* at 964 (noting that Clark “almost always opted for judicial discretion”); *id.* at 973 (“For Clark, procedural history was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges.”); *id.* at 1001 (“The answer of proceduralists such as Pound and Clark was to rely on expertise and judicial discretion. Give judges all the facts and a litigation package that includes every possible theory and every possibly interested party, and the judges—largely on an ad hoc basis—will figure out what the law and remedy should be.”); see also CLARK, *supra* note 19, at 233-34 (“[G]eneralities of allegation should not be objectionable in themselves, so long as reasonably fair notice of the pleader’s cause of action is given. The matter should be one within the fair discretion of the trial court in most cases.”); Burbank, *supra* note 63, at 543-44 (noting that a “foundational assumption of modern American procedure is that judicial discretion is to be preferred to formalism” and that this is “hardly surprising when one considers that the chief architects of the original 1938 Federal Rules were steeped in knowledge of the costs of inflexibility associated with the common law and code procedure, infatuated with the flexibility of equity (to the point of ignoring its costs), and thoroughly versed in both the ethos of progressive regulation and the lessons of legal realism”); Clark, *supra* note 164, at 551 (“I can make my speech very short indeed . . . by saying that the only fundamental change effected by the Federal Rules is that there will no longer be any fundamentals in procedure.”); Clark, *supra* note 102, at 308 (“The practically universal trend of reform has been in favor of . . . a large measure of discretion accorded to the trial judge”); Clark, *supra* note 81, at 315 (“After all, general admonitions will not constitute the real procedure of a court; that is determined by what the judges actually do with the rules in practice. The federal rules are flexible enough, so that a considerable latitude in their application is permitted a trial court.”); cf. Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and*

CONCLUSION

I do not mean to suggest that these methods of taming *Twombly* will operate, singly or together, as panaceas. Different judges with different life experiences will have different baseline assumptions about the way the world operates and reach different conclusions about plausibility. Some judges will be more open to revising their assumptions in light of new information than others. District judges and magistrate judges will exercise their discretion regarding discovery differently. The same case may well be decided differently in different districts or indeed in different chambers in the same building. But I do think, at least in the hands of careful lawyers, and wise district judges and magistrate judges, that these methods of taming *Twombly* are important tools in the changing shape of federal civil pretrial practice.

Conley v. Gibson, 52 HOWARD L.J. 73, 75 (2008) (arguing that legal realists and supporters of *Conley* thought that procedural rules should “encourage plaintiffs to lay their stories before the court without reference to fixed categories of legal claims and allow judges to adjudicate in response, as the facts require”).