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Several publications already exist detailing the evolution of American civil pleading standards, the personalities involved throughout, as well as the differing iterations' theoretical and philosophical underpinnings. This Article is written not from the viewpoint of a scholar, but a practitioner. It is the practitioner who drafts, files, and defends against these pleadings. It is the practitioner who provides the "boots on the ground" execution of legislative and judicial directives. It is the practitioner who experiences the aspects of litigation that are not ultimately published in a reporter. And it is the practitioner who must

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explain to his or her clients the meaning of the law, the rulings of the judge, and the ultimate determination of their claims.[1]

As such, the first part of this Article seeks to discern the following for Charles E. Clark's vision of the Federal Rule of Civil Procedure 8,[2] *Conley v. Gibson*'s[3] enunciated notice pleading standard, and the current "plausibility pleading" embodied by the *Ashcroft v. Iqbal*[4] and *Bell Atlantic Corp. v. Twombly*[5] rulings: (1) the practical problems each of these standards sought to remedy; (2) the impact on a claim's chances of proceeding to discovery or undergoing an interlocutory appeal; and (3) the acknowledged concerns arising from this pleading standard. The goal is that by reviewing the benefits and failings of each standard, a clearer picture may form of a standard that would best accomplish the ultimate goal of allowing cases to be decided on their merits.[6]

The second part of this Article will address circuit and district court case law as federal courts have employed the plausibility standard for pleadings over the last decade. It will further discuss the practical effect this has had on how lawyers plead cases and what cases typically survive *Iqbal*/*Twombly* challenges. A few discrete examples of how district courts have employed the plausibility standard will also be provided. Finally, we humbly offer observations and suggestions of a commonsense approach to pleading standards.

I. PART ONE

A. Rule 8's "Short and Plain Statement" Standard

The implementation of the Federal Rules of Civil Procedure (the Rules) in 1938[7] was certainly not the first attempt to reform American procedural pleading rules. The beginnings of American civil jurisprudence hearkened to, and reflected, English common law rules.[8] This common law system, like much of English government and socio-economic structure from its inception to that time, was not created

1. This last duty is perhaps one of the most crucial for a civil society's stability.

2. FED. R. CIV. P. 8; Charles E. Clark, *The Federal Rules of Civil Procedure, 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 450 (1958).

3. 355 U.S. 41, 45–46 (1957), *overruled in part by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), *abrogated in part as stated in* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

4. 556 U.S. 662, 678 (2009).

5. 550 U.S. 544, 562–63 (2007).

6. This Article assumes all readers agree this is a worthy aspiration for litigation.

7. *See* Clark, *supra* note 2, at 436 n.8.

8. *See* Peter Julian, *Charles E. Clark and Simple Pleading: Against a "Formalism of Generality,"* 104 NW. U. L. REV. 1179, 1184 (2010).

with a goal of leveling the playing field between the classes.[9] Thus, the common public was largely denied easy access to the courts or substantive rulings on the merits of their filed claims.[10] Instead, this process relied upon a strictly enforced series of rules about how a pleading must be worded and filed.[11] Some American state courts began to turn away from the English common law system in the Nineteenth century, legislatively adopting instead what became known as "code pleading."[12] Although code pleading eradicated many of the procedural pitfalls of its predecessor, it still contained its own problems: not the least of which was its somewhat arbitrary distinction between the permissible pleading of facts and the impermissible pleading of legal conclusions.[13] New York first adopted a reformed code of civil procedure known as the Field Code in 1848,[14] with other states following soon after.[15] However, other states, most notoriously Illinois, refused to modernize its civil procedure rules. Illinois' stubborn adherence to the common law pleading, in fact, gave fodder for some of the most strident arguments against the judiciousness of common law pleading practice.[16]

The disparate pleading standards of the states throughout the latter part of the Nineteenth century eventually caused inconsistent results in the federal district courts. In 1828, the federal courts began to employ the doctrine of static conformity,[17] which fixed procedural practices within many federal courts to what the forum state's practices were at the time the state formally joined the United States.[18] As the first major reformation to the common law pleading practice was not until 1848, one may imagine that the differences in these federal courts, while significant, were not completely afield of one another. The Conformity Act of 1872,[19] however, amended federal district court procedure to mimic the forum state's contemporaneous procedural rules.[20] At this point,

9. *Id.* at 1184–85.

10. *Id.* at 1185–86.

11. *Id.*

12. *See id.* at 1186.

13. *Id.* at 1186–87.

14. *See* Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L. REV. 238, 241–42 (1942) (citing Field Code of 1848).

15. *See* Alison Reppy, *Common-Law Pleading—Still Survives as the Basis of Modern Remedial Law*, 2 N.Y. L. F. 1, 10 n.25 (1956).

16. *See*, *e.g.*, Henry Winthrop Ballantine, *Need of Pleading Reform in Illinois*, 1 ILL. L. B. 3, 3 (1917).

17. *See* Process Act of 1828, ch. 68, § 1, 4 Stat. 278.

18. *Id.* at 279–82.

19. *See* Conformity Act of 1872, ch. 255, § 5, 17 Stat. 197.

20. *Id.*

several but certainly not all, states had adopted the reformed code pleading standard. The Conformity Act, therefore, caused district courts to apply either common law or code pleading standards, depending on the forum state.[21] Many who called for standardized rules for federal civil practice cited this disparate treatment of litigants' claims as justification for further reformation.

1. Problems Rule 8 Sought to Remedy

As the 1954–1955 Advisory Committee on Rules of Civil Procedure (the Committee) wrote:

The intent and effect of the rules [was] to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.[22]

As the Committee both convened and issued its Final Report in 1937,[23] it sought to homogenize the practice of federal district courts which, collectively, were applying both common law and code pleading standards.[24] Therefore, the distinct issues arising from the application of both standards were considered by the Committee and bear consideration here. As Rule 8 did not adopt either model promulgated by common law or code pleading, the focus here is on all known substantive issues the Committee attempted to address, and not which pleading practice employed each measure.[25]

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21. *See* Julian, *supra* note 8, at 1194 n.118.

22. Clark, *supra* note 2, at 450 (quoting Advisory Committee on Rules of Civil Procedure, *Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, at 19 (Oct. 1955), following Advisory Committee on Rules of Civil Procedure, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for United States District Courts* (May 1954)).

23. Advisory Committee on Rules of Civil Procedure, *Final Report* (Nov. 1937), following Advisory Committee on Rules of Civil Procedure, *Proposed Rules of Civil Procedure for the District Courts of the United States* (Apr. 1937).

24. In the interest of full disclosure, some pre-Federal Rules states were a hybrid of common and code pleading, and others employed civil law. *See*, *e.g.*, Reppy, *supra* note 15, at 11 (grouping such states into four general categories). Again, this Article merely looks at the individual underlying aspects of pleading practice that were deemed problematic by practitioners at the time of the Rules' formulation without labeling the practice to a specific state or system.

25. *See* FED. R. CIV. P. 8.

a. The Fiction of the Need to File in Different "Courts"

Although this issue was addressed by the Federal Courts in 1915,[26] it bears noting that American courts long carried over the delineation between cases brought (and remedies sought) in law or in equity simply as a matter of honoring historical precedent. When the distinction was first made in the English courts, these two types of cases were heard in entirely different courts and tribunals. Over time, however, the forum for these claims consolidated into the same court. Even though equitable and legal cases were being filed in front of the exact same judge, the rules still required that equitable matters be filed under one framework and legal matters under another, and the two had to appear as two separate and distinct actions. As an example, a contract dispute alleging fraud in the inducement of the contract must be styled as an equitable claim, while a contract dispute alleging the contract itself was fraudulent must be styled as a legal claim.[27] As the factual nature of these claims could (and often would) overlap, and the failure to plead the cause of action in the correct style was a fatal defect for the case, many early Twentieth century lawyers began to question the need to penalize "[t]he unfortunate seeker for justice . . . if he speaks into the wrong ear" of the judge.[28]

Although very few would now advocate for the return of a system that essentially duplicates filings (or worse, eradicates a wrongly styled action) for no functional reason other than slavish insistence on formalistic past precedent, several states clung to this practice long after both the federal courts and other states had reasonably simplified the process.[29] This is a prime example of the conviction often articulated by Chief Justice Bleckley, of the Supreme Court of Georgia, that a court cannot blindly follow past precedent for its own sake:

> Some courts live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault, or see that none can be found. With these exalted tribunals, who live only to judge the judges, the rule of *stare decisis* is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad and be discreetly blind to its commission at home[.] Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason for their

26. *See* Ballantine, *supra* note 16, at 7 (discussing amendments by act of March 3, 1915, to Sec. 274 of the Federal Judicial Code).

27. *See id.* at 6.

28. *Id.*

29. *See id.* at 8.

existence would disappear, and their destruction would speedily supervene. Nevertheless, without serious detriment to the public or peril to themselves, they can and do admit now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth unwittingly forsaken. Indeed, reversion to truth, in some rare instances is highly necessary to their permanent well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured to keep the type itself respectable. Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not [*s*]*tare decisis*, but [*f*]*iat justitia ruat coelum*.[30]

b. The Fiction of Requiring Different Pleading Language for Different Causes of Action

Choosing the correct form of pleading was only one pitfall that faced the Nineteenth century practitioner. Once the claim was correctly plead in equity or law, a claim had to precisely word each cause of action to survive.[31] The pleading requirement was not simply that a lawyer had to use clear verbiage in describing the events giving rise to the cause of action—the lawyer was often bound to a single word, which if not invoked, resulted in abject dismissal.[32] This concept is so foreign to modern practice, it is hard for lawyers in our era to envision the full import of what this meant: if a petitioner was found, for instance, to have pleaded a claim *in assumpsit*—an arcane legal action to recover for breach of contract or promise—the word "promised" must be used to survive a challenge as to the adequacy of the pleading.[33]

However, if that same petitioner was found to have pleaded a claim for a debt owed (which may or may not, but often did, arise from breach of

30. Ellison v. Georgia R. & B. Co., 87 Ga. 691, 695–96, 13 S.E. 809, 810 (1891) (emphasis in original). The Latin phrase quoted translates to "Let Justice be done, though the heavens may fall." *See FAQ*, SUPREME COURT OF GEORGIA, https://www.gasupreme.us/faq/ [https://perma.cc/DR9F-AH53] (last visited Jan. 29, 2024). This motto appears within the Nathan Deal Judicial Center to this day.

31. *See* Ballantine, *supra* note 16, at 11.

32. *Id.*

33. *Id.*

contract), then that claim must have never uttered the word "promised," but instead used the word "agreed" unless it wished to prematurely die under a judge's pen.[34] Even the most wordsmithing lawyer would be hard pressed to argue that the difference between "promised" and "agreed" was such to warrant a wholesale rejection of a claim without so much as a glance at its substantive merits. Additionally, there could be, and often were, differences in opinion as to what claim was (or should have been) pleaded within the complaint.[35]

c. The Fiction of Having to Prove all Content in the Pleadings

Another deficiency of common law pleading was it created potential penalties for a plaintiff who included additional background or identifying facts in his or her complaint beyond the bare minimum recitations required to survive a pre-trial challenge.[36] If *any* pleaded fact in a complaint was later disproved at trial, the result could be a wholesale fatality for the judgment or verdict. For instance, in *Spangler v. Pugh,*[37] the debt at issue was found to be half a cent greater than what was originally alleged in the complaint. The result was a remand for new trial.[38] Similarly, a typographical error in a party's name within a complaint, or any misstating of fact, whether material or immaterial, would have the same effect.[39] As stated by Henry Winthrop Ballantine, Dean of the University of Illinois College of Law, in his 1917 call for pleading reform in Illinois:

> The pleader has to steer his course between Scylla and Charybdis, and is driven to state his case in a confusing variety of counts which multiply and complicate the issues. He has to learn just how general he may make his allegations, avoiding all unnecessary detail on the one hand, and the danger of stating conclusions of law or fact on the other. By unnecessary particularity in a descriptive statement, he binds himself to prove this surplusage in addition to the essential facts of the case.[40]

Additionally, this practice clearly incentivized further needless litigiousness between the parties. Because the failure to prove all pleaded facts, material or immaterial, inured to a defendant's benefit, the defense counsel would be remiss in not contesting all aspects of the pleading on

34. *See id.*
35. *See id.* at 11–12.
36. *See* Spangler v. Pugh, 21 Ill. 85 (1859).
37. 21 Ill. 85 (1859).
38. *Id.* at 85–86.
39. *See* Ballantine, *supra* note 16, at 18–19.
40. *See id.* at 19.

the off chance that a misstep by the plaintiff's counsel concerning any inconsequential detail over the course of litigation could present an opportunity for dismissal or delay.

d. The Fiction of Having to Plead to Eradicate all Possible Defenses

In many jurisdictions, adequately pleading a prima facie case was not sufficient to avoid an early challenge for certain causes of action. Not only was a "plaintiff . . . required to make out a *prima facie* case,"[41] but he also had to "refer to all the conditions, positive and negative, which are ultimately essential to a recovery."[42] This included affirmatively pleading within one's complaint to negate any possible defenses to the action, including, but not limited to "contributory negligence, assumption of the risk, and [the] fellow-servant rule,"[43] and showing the performance of all possible conditions precedent to a contract.[44]

e. The Fiction of Not Being Able to Amend a Complaint

Common law pleadings also strictly prohibited the amendment of pleadings after the tolling of the applicable statute of limitations.[45] When coupled with the pleading rules of the day, a failure to include an express statement that was obviously inferable from the overall allegations of the complaint would, if challenged after the statute of limitations expired, prove fatal to the cause of action with no possibility of amendment.[46]

f. Trial by Ambush: A Defendant's Right to Plead General Defenses

Despite the obsessive particularity required, both formalistic and substantive, in a filed complaint, common law pleading allowed a defendant to use a general plea of not guilty to all allegations within certain complaints, upon which a defendant need not expound further until the day of trial.[47] Except for defenses based upon the expiration of a statute of limitations and a few other defenses, a defendant often could leave the opposing party in the dark about what elements of a cause of action would ultimately be challenged, or what defenses would be

41. *Id.* at 20 (emphasis in original).
42. *Id.*
43. *Id.* at 21.
44. *Id.*; *see also* Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 504 (1918).
45. *See* Ballantine, *supra* note 16, at 19.
46. *See id.*
47. *See id.* at 26–28.

asserted and for which evidence would be tendered.[48] Frustratingly enough, however, the ability of a defendant to use a general not guilty plea would depend on the precise cause of action used. If the claim was in trespass, a defendant's "not guilty" would serve only to disclaim the facts alleged by the plaintiff; but, if the claim was in case or in trover, the same plea would also allow a defendant to preserve and assert a bevy of defenses.[49] Dean Ballantine excoriated this continued practice in Illinois in the first decade of the Twentieth century:

> There can be no doubt that the wide scope of the general issue . . . gives the defendant an undue advantage by compelling the plaintiff to produce testimony in regard to many propositions as to which there may be no real ground for dispute. The plaintiff is kept in the dark as to the defenses, affirmative or negative, which the defendant relies upon. This unrestricted denial, employed largely to throw dust in the plaintiff's eyes, is one of the worst abuses of our common law system of pleading, which on the whole favors the defendant as against the plaintiff. A great deal of the time of our courts is taken up proving facts the truth of which is known to both sides. The defendant denies all the plaintiff's allegations merely for purposes of obstruction. The trial thus degenerates into a debate or contest over the ability to produce evidence and get it in. It would save litigants and public thousands of dollars and relieve the strain upon the jurors, witnesses, parties, counsel, and judges, to limit the scope of the trial to the real points in controversy.[50]

g. Unnecessary Motions Practice and Appeals

Analyses of the practical effects of common law pleading made closer in time to the transition to code pleading illustrate the frequency of rulings on procedural pleadings motions as well as the burden such rulings were to the appellate courts. "Under the common-law system [in England] . . . a pleading question [was] decided in every sixth case"[51] and the appellate courts ultimately reversed one in forty-four rulings.[52] England's first attempt at reform, the Hilary Rules,[53] worsened the problem, with one out of every four cases being decided on the pleadings rather than on the substantive merits, and with one out of thirty-three

48. *See id.* at 27–28.

49. *See id.* at 26–27.

50. *Id.* at 29.

51. Whittier, *supra* note 44, at 507.

52. *Id.*

53. *See id.* at 506; 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON PLEADING AND ON THE PARTIES TO ACTIONS, AND THE FORMS OF ACTIONS (1809).

cases reversed on appeal.[54] However, the Judicature Acts of 1873[55] and 1875,[56] which combined courts and streamlined pleading requirements, brought down the rate of procedural pleadings rulings to one in seventy-six, and with a reversal rate of one in six hundred five.[57]

If these numbers appear untenable, in 1917–1918 America, a contemporaneous study of all states not employing any form of notice pleading revealed that the rate of reversal in the appellate courts for rulings made on the grounds of insufficient or erroneous pleadings averaged one reversal in seventeen.[58] Interestingly, no substantive difference in either the rate of rulings on the pleadings or reversals upon appeal was found between common law and code pleading states.[59]

By contrast, at this same time, Michigan had adopted a form of notice pleading and had no ruling on a pleadings question reversed on appeal.[60]

h. The Fiction of Pleading Facts vs Conclusions

Perhaps the most problematic aspect of code pleading was its hyper-differentiation of "fact," "evidence," and "conclusions."[61] Under this analysis, only facts were proper within a complaint, and a court was required to strike all "ultimate facts" and "conclusions" before assessing the adequacy of the pleading.[62] As Charles Clark would write as part of his review of Rule 8 twenty years after its introduction:

The contrast between the New York and federal systems is clearly illustrated by the divergent approaches to the basic question of the manner of stating the case in the complaint. The old code requirement of "stating the facts constituting the cause of action" did perhaps its greatest damage in promoting uncertainty, confusion, and wasted effort in the courts of New York, and a part of the original opposition to federal

54. *See* Whittier, *supra* note 44, at 507.

55. *See* Reppy, *supra* note 15, at 4.

56. *See id.*

57. *See* Whittier, *supra* note 44, at 507.

58. *See id.*

59. *See id.* at 509. The one great exception was Massachusetts. Although it was a modified common law pleading state, the Supreme Judicial Court of Massachusetts had established a long-standing policy of discouraging technical pleadings practice. *See id.* This resulted in significantly less motions practice in the Massachusetts Bar than its common and code pleading brethren. *See id.*

60. *See id.*

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

62. *See id.*

uniform procedure was the fear lest New York practice be forced upon the rest of the country.[63]

Judge Clark's criticism was not unwarranted, for, as all practitioners and most scholars know, "[o]ur present pleadings are full of allegations of law, averments which are compounds of law and fact, and not purely statements of fact."[64] Any number of examples rise to mind: (1) stating that two people are "married"; (2) alleging that a party "promised" another party; or (3) averring that a party did not exercise "reasonable" care. Any of these examples necessarily broaches into a legal conclusion, but the absolute morass that would result in having to plead around, for example, that two people were married without being able to simply say they were married would be untenable as well as serving no added purpose. Concepts of negligence in particular proved to be a never-ending round-robin of magic words *du jour* within the code pleading court systems, which resulted in needless amending of the complaint, continued appellate attention, and cases being dismissed for reasons wholly removed from the merits of the underlying claim.[65]

As Clark and several other of his peers understood, any system of assessing adequacy hinges upon the instructions and guidelines to judges when determining close calls.[66] Certainly, we all agree that filing a complaint stating only "the Defendant injured me through his negligence," would be insufficient under any standard. On the other hand, a one hundred paragraph complaint which painstakingly details every possibly-significant aspect of a simple negligence case would certainly pass muster, although would not be a practical or desirable requirement. The rub, therefore, came in when judges, all with different backgrounds, experiences, and abilities, were individually left to consider whether a complaint met that judge's particular satisfaction of preliminarily establishing the elements of a claim.[67]

i. Concerns

A pervasive criticism of both code pleading and Rule 8 was that their relaxed standards would lead to lawyers becoming careless about preparing cases in the beginning stages of litigation.[68] Additionally,

63. Clark, *supra* note 2, at 449.

64. Whittier, *supra* note 44, at 503.

65. *See id.* at 506, 512.

66. *See* Ballantine, *supra* note 16, at 14; *see also* Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 870 n.74 (2012).

67. *See* Noyes, *supra* note 66, at 870 n.77.

68. *See* Ballantine, *supra* note 16, at 14; Whittier, *supra* note 44, at 514–15.

opponents of notice pleading often threatened that such reforms would cause an expensive, time-consuming influx in caseloads.[69]

i. Laxity in Pleadings

In response to these worries, proponents of Rule 8 pointed to the other safeguards which had been crafted within the Federal Rules of Evidence to force too-broad complaints into conformity: motions for more definite statement;[70] motions for judgment on the pleadings;[71] narrowly tailored discovery;[72] and sanctions for pleadings deemed to be made for bad reasons or otherwise frivolously pleaded.[73] Indeed, many believed:

> [t]he danger of too great laxity and carelessness in pleading may be provided for by rules which will afford a speedy opportunity to correct any defects in pleading to which the opponent wishes to object before trial, as by motion for a better statement of the claim or defense, or more particulars. Obedience to the rules of procedure may be secured by the assessment of costs rather than by forfeiture of rights. Rules which safeguard "due process of law" and are "intended to secure to parties a fair opportunity to meet the case against them and a full opportunity to present their own case" should be distinguished carefully from rules intended primarily "to provide for the orderly dispatch of business."[74]

ii. An Influx in Caseloads

Although the relaxed standard of notice pleading may result in more cases proceeding past the demurrer stage within the trial courts, contemporaneous advocates for the adoption of Rule 8, as detailed above, argued that the added burden and cost to the courts from the resulting appeals of rulings on pleadings in common law and code pleading states far outweighed the impact of any further litigation.[75] Even more importantly, the added benefit of allowing cases to be decided on their merits could not be overlooked:

> We may conclude, then, that in many, perhaps most cases, decisions on demurrer, determining the sufficiency of the facts stated, settle no real

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69. *See* Whittier, *supra* note 44, at 514–15.

70. *See* FED. R. CIV. P. 12(e).

71. *See* FED R. CIV. P. 12(c).

72. *See* FED. R. CIV. P. 26 (although more current versions of this Rule, coupled with Rule 16, provide much more judicial structure and control over discovery than what was originally contemplated). *See* FED. R. CIV. P. 16.

73. *See* FED. R. CIV. P. 11.

74. Ballantine, *supra* note 16, at 35 (quoting *Illinois State Bar Association on Legal Reform*, 1 J. OF AM. INST. OF CRIM. L. AND CRIMINOLOGY 639, 640 (Nov. 1910)).

75. Ballantine, *supra* note 16, at 36–37.

questions concerning the substantial rights of the parties, but are in reality determinations in the law of procedure. It may truthfully be added that they are usually very unimportant determinations. And if this be so, the second assumption, that much is gained by having these questions settled without the expense of a trial, also fails; for one who wastes one hundred dollars a month should hardly be praised because he did not throw away a thousand. The point is that most of these matters need not be decided at all and would never arise under notice pleading. Judicial labor should not be spent upon them. To have serious litigation, involving substantial monetary interests, determined upon such frivolous questions is nothing short of absurd.[76]

iii. Effect

Effective September 16, 1938, the different and distinct causes of action which could be plead, with differing consequences, throughout the common law pleading states were replaced in the federal forum with Rule 8.[77] The Rule's language, requiring "a short and plain statement of the claim showing that the pleader is entitled to relief,"[78] hearkened back to the requirements of code pleading that a complaint be concise and to the point, but this Rule did away with code pleading's arbitrary distinctions between fact, legal, and conclusory pleading.[79] In a simple negligence case, the Committee made clear what would heretofore suffice as adequate pleading[80]:

Form 9.—COMPLAINT FOR NEGLIGENCE

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of One Thousand Dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

Note.

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

76. Whittier, *supra* note 44, at 512.

77. *See generally* FED. R. CIV. P. 8; Clark, *supra* note 2, at 436 n.7.

78. FED. R. CIV. P. 8(a)(2).

79. *See* Marcus, *supra* note 61, at 433.

80. *Final Report*, *supra* note 23, at 63.

Perhaps the best examples of the post-Rule 8 pleading environment can be found in two opinions written by Charles E. Clark, the promulgator and primary drafter of Rule 8, in his capacity as a judge on the United States Court of Appeals for the Second Circuit. In *Dioguardi v. Durning*,[81] a *pro se* plaintiff with a less than skillful mastery of written English filed a complaint against a customs collector who had impounded goods imported by the plaintiff and then sold them at public auction.[82] Although the plaintiff's grammar and vocabulary were admittedly lacking, and some of the allegations of his complaint apparently bordered on the hyperbolic, he did ostensibly allege that the collector improperly sold his goods to another bidder who had not surpassed the plaintiff's own bid (in contravention of a pertinent federal statute), and also converted a portion of the impounded goods, as the plaintiff knew there to be more units in the lot than what was ultimately accounted for at the auction.[83] Judge Clark reversed the district court's dismissal of the plaintiff's complaint, finding these bare allegations sufficed under Rule 8's sole requirement that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[84] Although Judge Clark remained doubtful of the plaintiff's ability to prevail at trial or summary judgment, he pinpointed the district court's haste to rid itself of what it thought was an ultimately unmeritorious cause of action as premature, and therefore, in itself wasteful of its and the appellate court's time.[85] "[A]s it stands, we do not see how the plaintiff may be properly deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting."[86] In writing this opinion, Judge Clark touched upon a concept that, in the wake of the Great Depression, the New Deal,[87] and the ongoing social-class leveling Second World War, was becoming more and more crucial to American civics: that all people not only were entitled to equal justice under the law, but that, for the common good and stability of the nation, they must also believe that they were receiving it.[88] If judicial resources were to be wasted, Judge Clark and his compatriots would much rather have them be spent in the trial courts, erring on the

81. 139 F.2d 774 (2d Cir. 1944).

82. *Id.* at 774.

83. *Id.* at 774–75.

84. *Id.* at 775–76.

85. *Id.* at 775.

86. *Id.*

87. *See President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://livingnewdeal.org/wp-content/uploads/2012/01/New-Deal-in-Brief.pdf [https://perma.cc/CTY4-FUAE] (last visited Feb. 26, 2024).

88. *See generally Dioguardi*, 139 F.2d at 774.

side of allowing each citizen to have a chance to be fully heard on the merits of their case, than waste them in the appellate courts arguing over a technicality of legal drafting.

In 1957, just a month before the Supreme Court of the United States would issue its opinion in *Conley v. Gibson*,[89] Judge Clark published another opinion addressing Rule 8's pleading standards. This time, nearly twenty years had passed between the introduction of Rule 8, and in *Nagler v. Admiral Corporation*,[90] Judge Clark's irritation at the federal courts' repeated attempts to carve out claim-specific exceptions to Rule 8 was palpable. *Nagler* was an antitrust and price discrimination case brought by multiple plaintiffs against more than twenty defendants.[91] Some, but not all, moved for dismissal for pleading errors. The district court dismissed the case in its entirety, in part because the complaint failed to identify precisely: (1) the addresses and location of all the defendants; (2) the territory at issue (it was identified as the "Greater New York area"); (3) the time period of alleged wrongdoing (only the applicable statute of limitations was invoked); (4) which defendant engaged in which complained of behavior; or (5) specific examples of concerted action or agreement between the defendants.[92]

As to the first four categories of information, Judge Clark gave little importance to their inclusion, noting "that a similar order in a companion case has resulted only in a complaint doubled in length, with separate paragraphs of iteration in general form of action by individual plaintiffs against individual defendants—a formal compliance, with no gain in useful information that we can perceive."[93] Regarding the fifth, Judge Clark was harsher:

> [A]s we try to visualize practical substitutes we question the adverse implication. For actually this demand seems to come to a call for specific instances, as that Admiral made such and such a discount sale of specified goods to Davega on a particular day at a particular place. Anything short of this, as the practice below is demonstrating, will permit of the vagueness the judges are finding troublesome. And yet such pleading of the evidence is surely not required and is on the whole undesirable. It is a matter for the discovery process, not for allegations of detail in the complaint. The complaint should not be burdened with possibly hundreds of specific instances; . . . at trial where the parties could adduce further pertinent evidence if discovered. They can hardly

89. 355 U.S. 41 (1957).

90. 248 F.2d 319 (2d Cir. 1957).

91. *Id.* at 321.

92. *Id.* at 321, 325.

93. *Id.* at 325.

> know all their evidence, down to the last detail, long in advance of trial.[94]

In rejecting the fermenting notion of certain federal district and appellate courts that particular types of complex litigation fundamentally required a more robust initial pleading than that contemplated by Rule 8, Judge Clark first laid out a basic premise for all civil litigation in the federal courts: "[O]utright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts . . . . Courts naturally shrink from the injustice of denying legal rights to a litigant for the mistakes in technical form of his attorney."[95] Judge Clark then directly addressed the continued calls for bolstered pleading standards:

> [I]t is quite clear that the federal rules contain no special exceptions for antitrust cases. When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a uniform system for all cases—one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a particular case by more definite statement, discovery and summary judgment, and pre-trial conference.[96]

Judge Clark summarized:

> [W]here a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56.[97]

iv. *Conley*'s Notice Pleading

On November 18, 1957, just over a month after Judge Clark's opinion in *Nagler,* the Supreme Court of the United States issued *Conley v. Gibson*.[98] *Conley* involved a claim brought by black railroad employees against their Union for discriminatory treatment. The employees claimed that the Railroad fired forty-five black employees on the pretense that it

94. *Id.* at 326.
95. *Id.* at 322.
96. *Id.* at 322–23 (citations omitted).
97. *Id.* at 323–24.
98. 355 U.S. 41 (1957).

was downsizing. In reality, the downsizing was just a front to allow the Railroad to hire forty-five white employees. The *Conley* plaintiffs alleged the Union knew about this scheme but did not take the same measures to protect them as they did the white Union members. The complaint was dismissed, in part, on the grounds that it failed to state a claim upon which relief could be given.[99] In particular, the allegations made in the *Conley* complaint were that the "petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances" because they were not white.[100] The Supreme Court was unimpressed with the argument that more detail than this needed to be alleged to survive a motion to dismiss.[101]

In now iconic words, it held as a unanimous court:

> In appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[102]

The Court also stated, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[103]

v. Problems Seeking to be Addressed

Directives do not get much clearer in constitutional law. The interesting thing about the Court's language quoted above is that some might argue it was unnecessary enough in the context of this case to almost be dicta. A message was quite deliberately being sent. *Conley* effectively squelched any more open debate about Rule 8 and whether lower courts could impose their own pleading standards for the immediate time being.

vi. Concerns

Clark himself, shortly after the *Conley* opinion was issued, said the notion of notice pleading under *Conley* was "something like the Golden

99. *Id.* at 42–45.
100. *Id.* at 46.
101. *Id.* at 47.
102. *Id.* at 45–46.
103. *Id.* at 48.

Rule, which is a nice hopeful thing; but . . . isn't anything that we can use with any precision."[104] Clark continued to voice his displeasure with notice pleading, worrying that the lack of clarity of the standard would lead to more disparate results within the federal judiciary.[105] In 1961, Judge Clark concurred specially in *Botta v. Scanlon,*[106] a tax action in which officers of a bankrupt corporation sought to void tax penalties imposed by the Internal Revenue Service (IRS) against them for the reason of, "extraordinary and exceptional circumstances."[107] The plaintiffs, however, only plead within their complaint that they would suffer "irreparable harm" if the IRS was not enjoined from pursuing collection of the penalties.[108] Judge Clark, although agreeing with the panel's assessment of the more substantive aspects of the plaintiffs' claim, made a point of also stating that the cursory pleading of "irreparable harm," without more detail, did not satisfy either Rule 8 or *Conley* to show "extraordinary and exceptional circumstances."[109] Judge Clark recognized that even those words "extraordinary" and "exceptional" were subject to a certain degree of subjective interpretation by differing courts, but "[w]hile the cases are not all consistent on the degree of hardship that must be shown, [the] plaintiffs have not qualified under even the most lenient test."[110]

As can be imagined, the defense bar had little in the way of pleasant things to say about notice pleading, and much of it was the same concerns espoused during the introduction of Rule 8. The main thrust of arguments to revive fact pleading centered on the cost to defendants of engaging in discovery before being able to seek judicial relief from a filed suit. Of course, the tension has always been that, in most cases, the documents and evidence relevant to the claim are uniquely within a defendant's possession, custody, and control.

Lastly, concerns over judicial efficiency and a resulting litigation boom seem to permeate most loosenings of pleading standards, and this time was no exception. As discussed previously, however, the discouragement of pre-discovery motions practice tends to have a positive result on judicial dockets.

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104. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L. J. 177, 181 (1958).

105. Clark, *supra* note 2, at 449.

106. 288 F.2d 504 (2d Cir. 1961).

107. *Id.* at 508 (Clark, J., concurring specially) (citing Holdeen v. Raterree, 155 F. Supp. 509, 510 (N.D.N.Y. 1957)).

108. *Id.* at 509.

109. *Id.*

110. *Id.*

vii. Effect

As in the Rule 8 pre-*Conley* era, it was only a matter of time before district and circuit courts began carving out their own personal exceptions to the notice pleading standard. Antitrust, class action, RICO, *qui tam*, and other such complex litigation were the usual genres of claims for which lower courts would impose a quasi-fact-based pleading standard.[111] To a certain extent, an incrementally heightened pleading standard does make some sense for some of these claims. A *qui tam* case, for instance, may involve a whistleblower purporting to have inside or specific information of how a person or corporation has operated unlawfully to the government's detriment. As such, it may follow that when a claimant purports to have special knowledge even before discovery has commenced, he or she may need to make some good faith showing of that knowledge. However, for claimants who have not enjoyed insider or special status with the defendant prior to filing suit, the idea that specific information must be alleged to survive dismissal does, facially, seem absurd. Throughout the 1990s and 2000s, the Supreme Court continued to rebuff attempts to create a heightened pleading standard for certain cases.

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit[112] was a 1993 Fourth Amendment[113] discrimination case brought against a municipality for what the plaintiffs alleged were racially motivated searches of their property for drugs.[114] The United States Court of Appeals for the Fifth Circuit at the time had judicially created a heightened pleading standard for civil rights cases which the district court had applied to dismiss the complaint.[115] Justices Rehnquist, Kennedy, Blackmun, Souter, Stevens, White, O'Connor, Scalia, and Thomas in a unanimous opinion rejected the respondents' argument that "the degree of factual specificity required of a complaint by the Federal Rules . . . varies according to the complexity of the underlying substantive law."[116] The Court wrote:

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity

111. *See, e.g.*, Boston & Me. Corp. v. Town of Hampton, 987 F.2d 855, 865–66 (1st Cir. 1993) (acknowledging that "when the opposing party is the only practical source for discovering the specific facts supporting a pleader's conclusion, less specificity of pleading may be required pending discovery."). *See also* Marcus, *supra* note 61, at 435–37, 447–51.

112. 507 U.S. 163 (1993).

113. U.S. CONST. amend. IV.

114. *See Leatherman*, 507 U.S. at 164–65.

115. *See id.* at 165.

116. *Id.* at 167.

> requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.[117]

In 1997, a different configuration of the Supreme Court considered *Crawford-El v. Britton*,[118] another § 1983 action in which it was alleged that a prisoner's legal documents and correspondence were intentionally withheld and misdelivered.[119] This panel of Justices Rehnquist, Kennedy, Breyer, Souter, Stevens, Ginsburg, O'Connor, Scalia, and Thomas issued an opinion in 1998. Although the case went to the Supreme Court on a summary judgment motion, in dictum the Supreme Court wrote, "the [trial] court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a pre[-]discovery motion for dismissal or summary judgment."[120] Many circuit courts cited *Crawford-El* as justification, at least initially, for continuing some heightened pleading standards, at least in civil rights cases.[121]

In 2002, the exact same Court considered *Swierkiewicz v. Sorema*,[122] a Title VII[123] and age discrimination case arising out of the United States Court of Appeals for the Second Circuit. Justice Thomas delivered the opinion of a once again unanimous Court and rejected any heightened pleading standard.[124] Reiterating the text of Rule 8, as well as the Court's previous ruling in *Leatherman*, the Court in *Swierkiewicz* once again stated that there could be no judicially created exceptions to notice pleading, and the only mechanisms to accomplish this would be by federal statute or amendment to the federal rules, acknowledging that

> [b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie

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117. *Id.* at 168–69.

118. 523 U.S. 574 (1998).

119. *Id.* at 578–79.

120. *Id.* at 598 (quotations omitted).

121. *See*, *e.g.*, Judge v. City of Lowell, 160 F.3d 67, 73 (1st Cir. 1998), *overruled by* Educadores Puertorriquenos En Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004); Shipp v. McMahon, 199 F.3d 256, 261 (5th Cir. 2000), *opinion vacated and superseded on reh'g*, 234 F.3d 907, 909 (5th Cir. 2000); Kain v. Nesbitt, 156 F.3d 669, 673 (6th Cir. 1998); Ramirez v. Dep't of Corr., 222 F.3d 1238, 1241 n.2 (10th Cir. 2000); Benge v. City of Pasadena, 203 F.3d 830 (9th Cir. 1999).

122. 534 U.S. 506 (2002).

123. 42 U.S.C. § 2000e–e-17.

124. *See Swierkiewicz*, 534 U.S. at 508, 515.

> case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.[125]

j. Iqbal and Twombly's Plausibility Pleading

In 2006, the Supreme Court heard *Bell Atlantic v. Twombly*,[126] an antitrust case arising from the breakup of AT&T and the resulting baby bells.[127] The Supreme Court in 2006, however, bore two major distinctions from the Court in *Swierkiewicz*: Chief Justice Rehnquist had been replaced with Chief Justice Roberts, and Justice O'Connor's place was now filled by Justice Alito. Only Justices Stevens and Ginsburg dissented to the majority opinion.[128] *Twombly* was a putative class action by consumers against Bell Atlantic for purportedly colluding with other service providers to stay in distinct sales regions, thus not having to compete with each other, as well as trying to scuttle local startups within the communication industry in contravention of federal law.[129] In support of these allegations, the plaintiffs alleged in their complaint instances of parallel business conduct, opportunities to meet and confer with each other, and a statement from a top executive of the defendant stating that competing within another carrier's district "might be a good way to turn a quick dollar but that doesn't make it right."[130]

Justice Souter wrote the majority opinion, which focused largely on the immense discovery cost which would be imposed upon the defendant if the action was allowed to go forward, and then presented several plausible theories of perfectly benign interpretations of the facts alleged in the complaint.[131] Because the Court was able to fathom these alternate explanations, Justice Souter then addressed *Conley*'s famous standard, writing:

> To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete

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125. *Id.* at 512. Thomas also quoted Wright & Miller's assessment of notice pleading: "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." *Id.* at 512–13 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (2d ed. 1990)).

126. 550 U.S. 544 (2007).

127. *Id.* at 549.

128. *Id.* at 570 (Stevens, J., dissenting).

129. *Id.* at 548–49.

130. *Id.* at 550–51, 572.

131. *Id.* at 558, 564–69.

> allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.[132]

More notable than the majority opinion, Justice Stevens delivered a stinging dissent on this point:

> If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates. . . .[133]

Justice Stevens additionally noted that the new plausible facts standard introduced by the majority in *Twombly* was in fact the antithesis of the philosophy and policy choice embodied in Rule 8, which had remained consistent law for fifty years, or even the Court's ruling a few years ago in *Swierkiewicz*.[134] Justice Stevens stressed that narrowly tailored discovery management should be the correct tool for such actions, and quoted Charles Clark:

> I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally and antitrust cases in particular.[135]

Despite Justice Stevens's clear outrage, *Twombly* was now, in at least antitrust cases, the established standard for pleading.

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132. *Id.* at 562–63.

133. *Id.* at 577–78 (Stevens, J., dissenting) (emphasis omitted).

134. *See id.* at 579–86 (Stevens, J., dissenting).

135. *Id.* at 587 (emphasis omitted) (quoting Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 46–47 (1957)).

In 2009, the Court, the composition of which was unchanged from *Twombly*, issued the opinion of *Ashcroft v. Iqbal*.[136] Iqbal was an undocumented Pakistani Muslim immigrant. Following the 9/11 attacks, Iqbal and over 1,000 other similarly situated people were picked up and detained under federal care. Iqbal alleged that he and other detainees were unlawfully mistreated and, importantly, both John Ashcroft as Attorney General and Robert Mueller as Director of the Federal Bureau of Investigation were personally liable because they orchestrated and condoned the mistreatment inflicted on Iqbal by their subordinates. Ashcroft and Mueller moved to dismiss the complaint, which the district court denied.[137] While their interlocutory appeal to the Second Circuit was pending, *Twombly* was decided.[138] The Second Circuit, however, held that the *Twombly* plausibility standard did not truly abrogate *Conley* and apply to all cases, but was instead an alternative standard to use in cases where such "amplification" was needed.[139] The circuit court determined that this particular case did not rise to that level and therefore affirmed the district court's denial of the motion to dismiss.[140]

Justice Kennedy wrote the majority opinion this time, and the Court was much more divided.[141] Justice Kennedy wrote that *Twombly* had set forth two tenets: First, "that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," inviting judges to strike and disregard allegations within pleadings deemed (by the individual judge) to be "conclusory."[142] Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[143] By way of further explaining what *Twombly*'s plausibility standard meant for judges seeking to apply it, the majority offered the following:

> 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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.[144]

136. 556 U.S. 662 (2009).
137. *Id.* at 662.
138. *Id.* at 669.
139. *Id.* at 670.
140. *Id.*
141. *Id.* at 666.
142. *Id.* at 678.
143. *Id.* at 679.
144. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

The Court then labeled the following assertions as nothing more than conclusory (and therefore disregarded): (1) the defendants

> "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, or national origin and for no legitimate penological interest[;]"[145]

(2) Ashcroft was the principal architect of the policy;[146] and (3) Mueller was instrumental in adopting and executing it.[147] Absent the consideration of these allegations, the majority rejected the complaint's claims as implausible.[148]

Justice Souter wrote the main dissent in this case, not to apologize for opening up the can of worms in *Twombly*, but simply to state that in his opinion this particular complaint's "conclusory" allegations were actually factual and would have passed muster under the new *Twombly* standard because he (and Justices Stevens, Ginsburg, and Breyer), unlike the majority, could find the allegations plausible.[149]

i. Problems Seeking to be Remedied

The most flummoxing aspect of the *Iqbal* and *Twombly* rulings was that, even just prior to these opinions, the Supreme Court had been presented several opportunities to criticize or raise concerns about the *Conley* notice pleading standard and had not. Not only did the Supreme Court not criticize *Conley* at any of these prior junctures, it had defended the standard against circuit court attempts at circumnavigation in cases that ostensibly carried the same concerns touted in *Twombly* that the defendants could be subjected to a costly fishing expedition during discovery.[150] As much as the specter of half-baked complaints ruining defendants before they had a chance to file a motion for summary judgment, the reality was that the vast majority of at least simple negligence complaints filed in federal court during the *Conley* era already far exceeded *Conley*'s minimum standard.[151]

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145. *Id.* at 680 (citations and punctuation omitted).

146. *Id.* at 695.

147. *Id.*

148. *Id.* at 682–83.

149. *Id.* at 680–81, 697–98 (Souter, J., dissenting).

150. 550 U.S. at 557–58.

151. Jason A. Cantone, Joe S. Cecil & Dhairya Jani, *Whither Notice Pleading: Pleading Practice in the Days Before* Twombly, 39 S. ILL. U. L. J. 23, 49–53 (2014).

ii. Concerns

The inherent problem with inviting individual federal judges to decide (or review) pleadings using a "plausibility" standard based on each's own experience and knowledge is self-evident. Moreover, years after Charles Clark tried to fix the problem of jurists arguing what was (permissible) fact and (impermissible) conclusion,[152] the rub in *Iqbal* stems entirely upon a fundamental disagreement between Supreme Court Justices about whether an allegation is a permissible fact or an impermissible conclusion.

iii. Effect

As might be expected, *Iqbal* and *Twombly* encouraged defense counsel to seek dismissals under this new pleading standard that would never have been challenged under *Conley* or any traditional reading of Rule 8.[153] The influx of these motions, at least for the first decade after *Twombly*, is a known fact for those of us in federal practice at that time and was well discussed by several federal district court judges, most notably in Georgia by Judge Clay D. Land in the United States District Court for the Middle District of Georgia, Columbus and Athens Divisions. Judge Land's first outright discussion of the trending filings for motions to dismiss is found in *Pension Benefit Guaranty Corp. v. Divin*[154]:

> In what is becoming a recurring pattern in the "Rule 12(b)(6) Revival Era," counsel for [the] [Director] Defendants . . . seek dismissal of [the] Plaintiff's Complaint for failure to state a claim when their arguments are best suited for summary judgment. The Supreme Court decisions in *Twombly* and *Iqbal* have added this ammunition to the defense counsel arsenal, and its deployment cannot be resisted by those who interpret these cases to harken a return to the days of the ancient special demurrer practice, where cases were dismissed based upon the "art of pleading" rather than whether they placed a defendant on

152. *See* Julian, *supra* note 8, at 1203–04.

153. Published empirical studies differ as to *Twombly* and *Iqbal*'s impact of filed and granted motions to dismiss. *See, e.g.*, Patricia Hatamayar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); William Hubbard, *The Empirical Effects of* Twombly *and* Iqbal (Coarse-Sandor Working Paper Series in L. and Econ., Paper No. 773, 2016); Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After* Iqbal, FEDERAL JUDICIAL CENTER (March 2011). However, from a practitioner's view, and as acknowledged by Judge Land, filing a "*Twiqbal*" motion at the outset of any federal case became a standard defense procedure in the years following *Iqbal*. As time has progressed, certain judges have developed reputations for their respective willingness to entertain such motions. This, coupled with the nature of the filed action, often seems to influence whether such a motion will be filed.

154. No. 08-CV-151, 2010 U.S. Dist. LEXIS 52904 (M.D. Ga. May 27, 2010).

> notice of the essential facts supporting the plaintiff's claim. This Court does not interpret *Twombly* and *Iqbal* to represent such a sea change in the pleading requirements under the Federal Rules of Civil Procedure.[155]

Two and a half years later, Judge Land was even more direct:

> Defendant's Motion to Dismiss . . . is another example of what *Twombly* and *Iqbal* have wrought—a compulsion to file a motion to dismiss in every case. The Supreme Court's statement in [*Twombly* and *Iqbal*], did not seem startling: to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." The additional explanation that the complaint must include sufficient factual allegations "to raise a right to relief above the speculative level," likewise did not suggest that the Supreme Court intended to rewrite Rule 12(b)(6) or abandon notice pleading; and the Court's observation that "a formulaic recitation of the elements of a cause of action" does not suffice did not seem to foreshadow a sea-change in the legal standard governing motions to dismiss. But many lawyers (and judges) have interpreted the Supreme Court's decisions in *Twombly* and *Iqbal* as ushering in a new era for motions practice in federal court. From this Court's perspective and experience, *Twombly* has become the most overused tool in the litigator's tool box.
>
> Since *Twombly* was decided, many lawyers have felt compelled to file a motion to dismiss in nearly every case, hoping to convince the Court that it now has the authority to divine what the plaintiff may plausibly be able to prove rather than accepting at the motion to dismiss stage that the plaintiff will be able to prove his allegations. These motions, which bear a close resemblance to summary judgment motions, view every factual allegation as a mere legal conclusion and disparagingly label all attempts to set out the elements of a cause of action as "bare recitals." They almost always, either expressly or, more often, implicitly, attempt to burden the plaintiff with establishing a reasonable likelihood of success on the merits under the guise of the "plausibly stating a claim" requirement. While these cautious lawyers, who have been encouraged by *Twombly* and *Iqbal,* have parsed the *Twombly* decision to extract every helpful syllable, they often ignore a less well known (or at least less frequently cited) admonition from *Twombly:* "Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" Blinded by the *Twombly*/*Iqbal* compulsion, many lawyers fail to appreciate the distinction between determining whether a claim for relief is "plausibly stated," the inquiry required by

155. *Id.* at *2.

> *Twombly/Iqbal,* and divining whether actual proof of that claim is "improbable," a feat impossible for a mere mortal, even a federal judge.
>
> This Court obviously understands that not all motions to dismiss suffer from this *Twombly/Iqbal* compulsion, but many do, and the present one certainly does. Accordingly, it is denied.[156]

Candidly, capable judges interested more in the administration of justice than their own dockets or agenda have continued and will continue to read Rule 8, which has remained unchanged, in a reasonable and measured fashion. However, rules and guidance are rarely needed to control the reasonable or well-meaning. Reintroducing both the discretion to determine "plausibility" within an individual judge's own understanding and the fixation on finding and rejecting what an individual judge deems to be a conclusory allegation simply invites judges, at best, to focus on the procedural over the substantive, and, at worst, to backdoor rationalize their own desire to rid their docket of cases they believe, for a plethora of reasons, to be undesirable.

Lest one believe that there is no way our jurisprudence system could return to the Field Code days of being thrown out for using the word "promised" versus "agreed" or some other hyper-technicality, and therefore the criticisms of *Twombly* and *Iqbal*'s plausibility/fact model are hyperbolic. Consider Justices Thomas and Alito's recent dissent in *Hamm v. Smith*:[157]

> Here, Smith challenged the State's chosen method of lethal injection based on the proposed alternative of execution by nitrogen hypoxia. As the plaintiff, Smith was required to "plea[d] factual content" making it plausible that he could establish the availability element of his claim. Smith, however, did not even *attempt* to plead facts indicating that Alabama "could readily use [nitrogen hypoxia] to execute him." Instead, he alleged only that, "*[a]s a matter of law*, nitrogen hypoxia is an available and feasible alternative method of execution." And the Eleventh Circuit considered this threadbare allegation sufficient to satisfy Smith's pleading burden on the availability element.[158]

That two of our highest judiciaries in the U.S. could straight-facedly think, then write, and then publish that they would throw out an entire

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156. Meyer v. Snyders Lance, Inc., No. 12-CV-215, 2012 U.S. Dist. LEXIS 175537, at *1–3 (M.D. Ga. Dec. 12, 2012) (citations omitted). *See also* Am. Fam. Life Assurance Co. of Columbus (AFLAC) v. OoShirts, Inc., No. 17-CV-16, 2017 U.S. Dist. LEXIS 215228 (M.D. Ga. May 17, 2017); Gomez v. Scepter Holdings, Inc., No. 17-CV-42, 2017 U.S. Dist. LEXIS 160567 (M.D. Ga. Sep. 29, 2017).

157. 143 S. Ct. 1188 (2023).

158. *Id.* at 1189 (Thomas, J., dissenting) (emphasis in original) (citations omitted).

Eighth Amendment[159] claim on the grounds that the petitioner used the phrase "*[a]s a matter of law*, nitrogen hypoxia is an available and feasible alternative method of execution" instead of "Alabama 'could readily use [nitrogen hypoxia] to execute him'"[160] is, in the most technical terms possible, bananas. It is not only wordsmithing in its most inane form, but it also belies a fundamental arrogance for the people relying on our judicial system to at least make a pretext of ensuring the even administration of our citizens' constitutional rights.

II. PART TWO

A. Two District Court Experiences in the World of Twombly and Iqbal

The difficulty in attempting any broad canvas of how the myriad of federal district courts have employed the plausibility pleading standard is that many cursory orders remain accessible only through PACER and are therefore nearly impossible to find through topical or key word searches with any ease.[161] To the extent the data can be distilled, the bare numbers hardly tell the story. However, almost all practitioners who have done this long enough (whether they admit it or not) have a few real-world stories of how a haphazard or disingenuous application of the *Iqbal* and *Twombly* standard impacted a case.

In the unpublished case *Bass v. Duke* Energy *Business Services, LLC*,[162] the United States District Court for the Northern District of Georgia dismissed a plaintiff's claims for negligent hiring, retention, supervision, entrustment, and punitive damages.[163] The case involved a rear-end collision where the plaintiff claimed personal injuries. The plaintiff filed suit in state court alleging negligence. The plaintiff also alleged claims against the striking driver's employer company for negligent hiring, retention, supervision, negligent entrustment, and punitive damages.[164] The defendants removed the case to federal court and immediately moved to dismiss these claims, which the district court granted, prior to the plaintiff having the opportunity to seek discovery on

159. U.S. CONST. amend. VIII.

160. *Hamm*, 143 S. Ct. at 1189 (Thomas, J., dissenting).

161. Likewise, in our experience, plaintiffs often do not appeal partial rulings on motions to dismiss for a number of strategic or practical reasons that have little to do with the merits of the dismissed claim. Any scholarly attempt to use the rate of affirmances or reversals on appeal to assess the propriety of district court rulings should take this under consideration.

162. No. 21-cv-02587 (N.D. Ga. Dec. 20, 2021).

163. *Id.* at *12.

164. *Id.* at *2–3.

these claims.[165] During discovery, the defendants refused to produce any information about the driver's collision history or the driver's qualification file which should contain information such as the driver's prior accidents, pre-employment drug screen, training, prior employment history, motor vehicle and citation records.[166] That kind of information, however, is usually only accessible to the driver and their employer as the vast majority of the information is not available in the public record. The district court dismissed these claims after a hearing.[167] Nonetheless, after the plaintiff obtained some background information about where the driver had lived, the plaintiff was able to obtain a partial driving history on the driver through open records requests and found a less than desirable driver history for the striking driver. With that information, the plaintiff then moved to amend the complaint to reassert the claims of negligent hiring, retention, supervision, negligent entrustment, and punitive damages.[168] The district court, without giving the plaintiff the opportunity of discovery on these claims, denied the motion to amend, claiming that it was untimely.[169]

This case is not a unique experience, but it underscores the box that plaintiffs are trapped in. Without allowing the plaintiff any discovery in *Bass*, the district court granted the defendants' motion to dismiss, claiming that the plaintiff did not plead sufficient facts that would satisfy *Iqbal* and *Twombly*. Because the district court granted the motion, the plaintiff was unable to seek the driver's record during discovery because discovery in federal court is limited to the "claim or defense."[170] With the negligent hiring claims eliminated, the defendants (who certainly knew all along of the defendant-driver's driving history), steadfastly prohibited any discovery regarding the driver's background or qualifications.[171]

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165. *Id.* at *12.

166. Pl.'s Resp. to Def. Partial Mot. to Dismiss, Bass v. Duke Energy Business Services, LLC, No. 21-cv-02587, at *13 n.2 (N.D. Ga. Oct. 15, 2021).

167. Order, Bass v. Duke Energy Business Services, LLC, No. 21-cv-02587, at *12 (N.D. Ga. Dec. 20, 2021).

168. Pl.'s Br. in Supp. of Pl.'s Mot. for Leave to Amend Compl., Bass v. Duke Energy Business Services, LLC, No. 21-cv-02587 (N.D. Ga. Dec. 30, 2021); Pl.'s Reply Br. in Supp. of Pl.'s Mot. for Leave to Amend Compl., Bass v. Duke Energy Business Services, LLC, No. 21-cv-02587 (N.D. Ga. Jan. 27, 2022).

169. Order, Bass v. Duke Energy Business Services, LLC, No. 21-cv-02587, at *6, 7 (N.D. Ga. April 20, 2022).

170. *See* FED. R. CIV. P. 26(b)(1).

171. In Georgia, a plaintiff has independent claims against the trucking company for negligent hiring, retention, supervision, and entrustment. *See* Quynn v. Hulsey, 310 Ga. 473, 477, 850 S.E.2d 725, 729 (2020).

The result of not permitting discovery into plausible claims is that the foundational purpose of the law is thwarted: the revelation of the truth is ended, and the rule of law is undermined. For example, consider a commercial trucking company who routinely flouts the requirements of the Federal Motor Carrier Safety Regulations[172] by hiring drivers without a proper background check and pre-employment drug screens. Assume the company hires a truck driver with a history of drug use while driving a commercial vehicle and assume the driver then is involved in a crash with a plaintiff while under the influence of drugs. When the plaintiff files suit, if the plaintiff knows only that the driver was impaired during the wreck, the plaintiff cannot in good faith allege that the driver was negligently hired and, accordingly, can neither obtain discovery of the driver's employment screening, nor ever obtain evidence sufficient for some jurists to meet the mandates of *Iqbal* and *Twombly*. The result is then that the company's flouting of the rules remains unaddressed by a jury and the public remains at risk. This has not been lost on counsel defending these claims in federal court.

In *White v. Cox*,[173] the United States District Court for the Western District of Missouri dismissed an inmate plaintiff's Section 1983 claim where it was alleged that the prison officials failed to treat the plaintiff for a spider bite.[174] The plaintiff's complaint alleged, "[i]t is believed that through further investigation and discovery it will be demonstrated that [the] [d]efendant Sheriff Cox has policies or procedures which discourage inmates of the Livingston County Jail [from being] seen by qualified health care providers."[175] The court found that the "[p]laintiff's complaint does not provide any facts underlying why he believes these policies exist or what the policies might entail."[176] The plaintiff's response to the motion to dismiss noted that discovery would be needed to determine the specific policies that were in effect.[177]

The court, applying the *Iqbal* and *Twombly* standard, dismissed the plaintiff's complaint, concluding that "the complaint does not contain sufficient factual matter to state a claim to relief."[178] Thus, the trap-plaintiff was forced into was either: (1) allege, without the opportunity of discovery or having the policies, the allegations of policy violations with a hope that discovery would reveal the specific policies; or

172. 49 C.F.R. § 382.305 (2021).

173. No. 12-6149-CV, 2013 U.S. Dist. LEXIS 96038 (W.D. Mo. July 10, 2013).

174. *Id.* at *4.

175. *Id.* at *4–5.

176. *Id.* at *5.

177. *Id.*

178. *Id.* at *6.

(2) allege, by way of guesswork, what the polices say, with the risk being misrepresenting the facts and abusing the obligation of candor to the court. The plaintiff, having taken the first approach, had the case dismissed by the court without an opportunity for discovery.[179]

B. A Tour of Crossed Circuits

In the wake of the *Iqbal* and *Twombly* decisions, the standard for "plausible" pleadings has been far from a bright-line test. On the contrary, both the district and the circuit courts have struggled to consistently apply this test. A look into each of the circuit courts highlights the issues that come with attempting to follow the *Iqbal* framework. To be clear, what follows is not intended to be an analysis of the seminal case in each circuit or a determination of which courts have the "more correct" framework from an *Iqbal* standpoint. Rather, just a brief passing glimpse into select post-*Iqbal* opinions in each circuit demonstrates the sometimes inconsistent and incoherent results flowing from the malleable plausibility standard.

1. United States District Court of Appeals for the First Circuit

As with many of the circuit courts, in determining whether a plaintiff has plead sufficient facts to state a plausible claim for recovery, the First Circuit has "emphasize[d] that the complaint must be read as a whole" and taken a more lenient approach to such pleadings, finding that "there need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action" and "[f]or pleading purposes, circumstantial evidence often suffices to clarify a protean issue."[180]

Similarly, even in post-Iqbal cases, the First Circuit has permitted greater latitude in the plausibility standard where "a material part of the information needed is likely to be within the defendant's control," finding that "it is reasonable to expect that 'modest discovery may provide the missing link' that will allow the appellant to go to trial on her claim."[181] In Saldivar v. Racine,[182] when finding a plaintiff's allegations insufficient to state a claim, the court noted that the case was distinguishable from other cases (1) because there was a "gap between the allegations in the complaint and a plausible claim [that] is wider than it was in [other] cases[;]" (2) because the claim was "not plausible simply by appeal to

179. *Id.*

180. Garcia-Catalan v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (punctuation and citations omitted).

181. Saldivar v. Racine, 818 F.3d 14, 23 (1st Cir. 2016) (quoting Menard v. CSX Transp., 698 F.3d 40, 45 (1st Cir. 2012)).

182. 818 F.3d 14 (1st Cir. 2016).

common sense[;]" and (3) because "the missing link that is common to the claims . . . has not been alleged 'upon information and belief,'" as it had been in distinguishable cases.[183]

Though there had been some discovery permitted in *Saldivar* prior to the amended complaint that was before the court at the time, the distinctions drawn seem to imply that the court would be more lenient with such complaints that have a narrow "gap" between allegations and claims. Such complaints that are close enough to plausibility that an appeal to the common sense (or the inference of liability referred to in *Iqbal*) pushes the complaint across the plausibility line, and such complaints that allege the "missing link" upon information and belief available to the plaintiff may survive. Not all courts appear to permit each of these avenues, though, and what "inferences" a court will make is yet another inconsistently applied area of the law throughout the circuits.

2. United States Court of Appeals for the Second Circuit

The Second Circuit, similarly, has attempted to provide some clarity on what exactly will suffice as a "plausible" complaint:

> [T]he court's task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side: Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between or among plausible inferences or scenarios is one for the factfinder . . . . The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.[184]

This standard of "plausible" here seems to give the benefit of the doubt to a plaintiff, but at the same time, it seems to contradict the standard set by the Supreme Court of the United States requiring allegations of more than conduct that is merely "consistent with" liability.[185] Part of this inconsistency may be what "inferences" the court is drawing (or is willing to draw). In *Iqbal*, the Court stated 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

183. *Id.* at 23.

184. Lynch v. City of New York, 952 F.3d 67, 75 (2d Cir. 2020) (citations omitted).

185. *Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (quotations omitted).

misconduct alleged."[186] It seems that the Court's command, then, is that at least one "inference" the courts are permitted to draw is the inference that the defendant may be liable for the suit as a whole if the plaintiff's allegations are accepted as true.

Prior to evaluating the facts as a whole and seeing whether the "gap," to borrow the language of the First Circuit, is sufficiently bridged to allow the court to make the ultimate inference as to the defendant's liability, there may be primary inferences relating to the individual elements that a court may draw to see whether certain facts have been specifically alleged or been connected to the nexus of the element or cause of action.[187]

In practice, the standards continue to become commingled. For example, the plain text of Federal Rule of Civil Procedure 9[188] makes clear that "malice . . . may be alleged generally," whereas "a party must state with particularity the circumstances constituting fraud or mistake" when such allegations are made.[189] Given this specific exclusion and the juxtaposition of these statements, it would seem that the courts would not require such "particularity" in alleging the circumstances surrounding purported malice.[190] Nevertheless, in evaluating the plausibility of a malice claim, the Second Circuit seems to require just that:

> The hurdles to plausibly pleading actual malice, though significant given the First Amendment interests at stake, are by no means insurmountable. Although actual malice is subjective, a court typically will infer actual malice from objective facts, understanding that a defendant in a defamation action will rarely admit that he published the relevant statements with actual malice. And of course whether actual malice can plausibly be inferred will depend on the facts and circumstances of each case. For example, a plaintiff may allege that a story [was] fabricated by the defendant if the defendant provides no source for the allegedly defamatory statements or if the purported source denies giving the information. Or the plaintiff may point to the fact that the allegedly defamatory statements were based wholly on an unverified anonymous telephone call or were published despite obvious [specified] reasons to doubt the veracity of the informant or

186. *Id.*

187. *See, e.g.*, *id.* at 683 ("The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part.").

188. FED. R. CIV. P. 9.

189. *Id.*

190. *See id.*

> the accuracy of his reports or despite the inherently improbable nature of the statements themselves.[191]

Anticipating the criticism of the practical difficulties of such allegations of malice, the Second Circuit noted that several plaintiffs had been successful:

> In practice, requiring that actual malice be plausibly alleged has not doomed defamation cases against public figures. To the contrary, district courts in and out of our Circuit have inferred actual malice at the pleading stage from allegations that referred to the nature and circumstances of the alleged defamation or previous dealings with the defendant.[192]

Despite the contrast found in Rule 9, the requirements of "the nature and circumstances" or "previous dealings" to allege plausible malice seems akin to a "particularity" requirement rather than the general allegations that the Rules permit. When considered in light of the diverging interpretations the Second Circuit allows, such a requirement seems to cut against giving the plaintiff the benefit of the doubt. Indeed, if a person made a false statement regarding the plaintiff, would there not be equally plausible inferences that (1) the person was mistaken or (2) the person acted with malice? Under what circumstances a court is willing to draw these inferences, it seems, continues to be a bit of a guessing game.

3. United States Court of Appeals for the Third Circuit

The Third Circuit, similarly, has applied the *Iqbal* standard in a seemingly inconsistent manner. To illustrate the application, consider *Xi v. Haugen*,[193] where the court held that the plaintiff's Fifth Amendment[194] claims were not plausibly alleged:

> Here, the Complaint's allegations of discriminatory purpose are wholly conclusory and the circumstantial evidence to which Xi points does not support an inference of discrimination. The only direct allegations of discriminatory intent are that Haugen's investigation was predicated at least in part on the fact that Professor Xi is racially and ethnically Chinese, and that Haugen considered Professor Xi's race and ethnicity in providing false information with the intent to secure false charges,

191. Biro v. Conde Nast, 807 F.3d 541, 545 (2d Cir. 2015) (citations and quotations omitted).

192. *Id.* at 546–47.

193. 68 F.4th 824 (3d Cir. 2023).

194. U.S. CONST. amend. V.

> [b]ut such conclusory allegations are not entitled to be assumed true. Xi also posits that the government had dismissed the indictments of three other Chinese-American scientists prior to trial, but the Complaint does not allege that Haugen had any involvement in those indictments, let alone explain the basis for their dismissal, so it sheds no light on the intent of the particular agent in this particular case. We may not fill this gap in Xi's pleading with speculation. Xi posits that because there was no factual basis to indict him, what motivated Haugen to ignore the lack of probable cause and falsify information must have been racial or ethnic bias. But there also may be nondiscriminatory explanations for Haugen's investigation, and the possibility of a discriminatory motive is insufficient. Where, as here, the allegations are merely consistent with liability, the claim stops short of the line between possibility and plausibility of entitlement to relief, so Xi's Fifth Amendment claim was properly dismissed.[195]

Given the facts as available to Xi as the plaintiff in the case, particularly in a case where a specific intent is alleged,[196] one would think that the unsupported indictment alone may allow a court to draw a reasonable inference that a lack of a factual basis would lend support to the statement of a plausible claim for discriminatory motive. Under the First Circuit approach, if Xi had alleged the motive "upon information and belief," would he have been more successful? Would the Second Circuit have allowed the alternative of plausible inferences to go to the fact finder or hold Xi to the higher standard that, because other plaintiffs may state claims more plausibly, so must this one? Nevertheless, the Third Circuit, in the very same case, permitted Xi's Fourth Amendment claims (in contrast to his Fifth Amendment claims that were insufficiently stated) to go forward:

> Xi fares better with his Fourth Amendment claims, however. Those claims—brought under the rubrics of malicious prosecution, fabrication of evidence, and unreasonable search and seizure—all turn on whether the Government investigated, searched, and prosecuted him without probable cause. Because a grand jury indictment "constitutes prima facie evidence of probable cause to prosecute," and the search and seizure here were conducted pursuant to duly authorized warrants, we begin with the presumption that Haugen acted with probable cause. But that presumption may be rebutted by a plausible allegation that the indictment was "procured by fraud, perjury or other corrupt means," or that Haugen "knowingly and

195. *Id.* at 840–41 (citations, quotations, and emphasis omitted).

196. *See* FED. R. CIV. P. 9.

> deliberately, or with a reckless disregard for the truth, made [materially] false statements or omissions" in the warrant application.
>
> Xi has met that pleading standard here because the Complaint alleged at least seven discrete instances of Haugen intentionally, knowingly, and/or recklessly providing false information that led to Xi's prosecution. It alleged, for example, that before charges were filed, the inventor of the pocket heater informed Haugen that the emails in question described an "entirely different" device from the pocket heater—one that Xi himself had invented, and that the pocket heater technology was not "revolutionary," but "widely known." It also alleged that Haugen accused Xi of "a scheme to obtain the pocket heater technology" at a point in time when, as Haugen knew or recklessly disregarded, that technology did not yet exist, and that Haugen knew or recklessly disregarded that Xi never sent samples or test results from the pocket heater to colleagues in China, but only engaged with them in normal academic collaboration. Such detailed allegations are hardly the "naked assertion[s] devoid of further factual enhancement" that would justify dismissal.[197]

The contrast between these findings is curious. If the complaint were considered as a whole, would the specific instances alleged in the Fourth Amendment violation not lend credence to the more likely inferences under the Fifth Amendment claims and help to bridge the gap?

4. United States Court of Appeals for the Fourth Circuit

Even in situations where a court may find that a plaintiff's allegations are factual rather than conclusory, the allegations must also avoid being too "speculative." As the Third Circuit case above demonstrates, the line between fact and conclusion can be somewhat blurred as well; specifically, whether someone "considered" race would seem, at least in part, to be a factual conclusion that was shy of the legal conclusion of discrimination. Even where material relating to such elements is stated more specifically, or upon "information and belief," the requirement that the allegations be non-speculative and made in a non-conclusory manner may be difficult to overcome. For example, in a discrimination case similar to that of the Third Circuit, the Fourth Circuit found a complaint lacking:

> Kashdan's Title IX claim also fails under a selective-enforcement theory. To state a selective-enforcement claim, a plaintiff must plausibly allege that regardless of his guilt or innocence, his gender was a but-for cause of the severity of the sanctions or of the decision to

197. *Xi*, 68 F.4th at 841 (citations and punctuation omitted).

> initiate the challenged disciplinary proceeding in the first place. A plaintiff like Kashdan can do this by plausibly showing that a similarly situated person of the opposite sex was treated more favorably.
>
> Kashdan's allegations fall short of this standard. Kashdan alleges "upon information and belief" that GMU does not formally investigate female professors accused of sexual- or gender-based harassment at the same frequency as males, and that when GMU does find female professors in violation of its policies, it sanctions them less severely. Although a plaintiff may initially plead parts of his case "upon information and belief," his allegations may not be wholly conclusory. Kashdan's allegations on this score are far too speculative, and as the district court reasoned, Kashdan's complaint "is devoid of facts supporting the allegations that were pleaded upon information and belief." In other words, Kashdan's "allegations of selective enforcement are not supported by any well-pled facts that exist independent of his legal conclusions." Accordingly, we affirm the district court's dismissal of Kashdan's Title IX claim.[198]

That a facility "does not investigate [accused] female professors" would appear to be a fact;[199] rather than a legal conclusion that the facility discriminates, the statement appears to contain fact. Nevertheless, the Fourth Circuit deemed these allegations "too speculative," even upon information and belief.[200] Under this approach, it would appear that. before weight is given to any factual statement that comes close to a conclusion,[201] a plaintiff must allege specific instances and occurrences as examples, contrary to the command of Rule 8(d)(1)[202] that each allegation be "simple, concise, and direct."[203]

5. United States Court of Appeals for the Fifth Circuit

The Fifth Circuit, too, has attempted to distinguish the "facts" from the portions of a complaint it will disregard, finding that "[w]hile the court must accept the facts in the complaint as true, it will 'not accept as true conclusory allegations, unwarranted factual inferences, or legal

198. Kashdan v. George Mason Univ., 70 F.4th 694, 701–02 (4th Cir. 2023) (citations omitted).

199. *Id.* at 701.

200. *Id.* at 702.

201. While *Iqbal* also prohibits the recitation of elements or labels and conclusions, the decision also specifies that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." 556 U.S. at 678.

202. FED. R. CIV. P. 8(d)(1).

203. *Id.*

conclusions.'"[204] The listing of both "conclusory allegations" and "legal conclusions" makes clearer that the court will not accept any "label" as a factual conclusion, but at the same time, it will refuse to accept "factual inferences" that are unwarranted. The necessary question, then, is what makes a certain inference unwarranted?

In *Arnold v. Williams*,[205] the Fifth Circuit analyzed the facts as alleged by the plaintiff:

> The complaint alleges that Arnold found Williams lingering in an odd part of the curtilage—under the carport—at an odd hour—2:00 a.m—and that Williams immediately asked for identification from Arnold when he emerged. There is nothing in the complaint to suggest that Williams knocked; to the contrary Arnold alleges that "he was awoken by the sound of someone outside his door." Arnold alleges actions that would fall outside the "implicit license" afforded private visitors. These details make plausible the allegation that Williams's search of the curtilage of Arnold's home was unreasonable insofar as it infringed on Arnold's reasonable expectation of privacy and exigent circumstances were lacking.[206]

The allegations in this case were sufficiently specific for the court to hold that the claim that the search was "unreasonable" would be plausible. However, this analysis goes to the plausibility of the legal conclusion (namely, that the search was unreasonable) rather than the plausibility of any factual statements. The analysis the Fifth Circuit used appears to be whether the ultimate issue raised by the plaintiff was plausible rather than the plausibility of any of the specific factual allegations contained therein. It remains equally unclear whether (and when) the courts will apply the plausibility requirement both to the microanalysis of specific factual allegations and to the macroanalyses of both the elements and the cause of action as a whole.

6. United States Court of Appeals for the Sixth Circuit

In discussing the typical distinction between legal conclusions and factual allegations without addressing other factual "labels" as the Fifth Circuit does, in a retaliation case, the Sixth Circuit stated that "[w]hen determining whether [the plaintiff's] complaint meets this standard 'we accept as true its factual allegations and draw all reasonable inferences

204. Arnold v. Williams, 979 F.3d 262, 266 (5th Cir. 2020) (quoting Gentilello v. Rege, 627 F.3d 540, 544 (5th Cir. 2010)).

205. 979 F.3d 262 (5th Cir. 2020).

206. *Id.* at 268 (citations omitted).

in his favor, but we disregard any legal conclusions[,]'"[207] and demonstrated the circumstances under which the courts may exercise "common sense[:]"

> This matter comes before us on appeal from a motion to dismiss for failure to state a claim under Rule 12(b)(6). The pleading standard is generally construed quite liberally. A complaint must contain enough "factual matter" to raise a "plausible" inference of wrongdoing. "The plausibility of an inference depends on a host of considerations, including common sense." Common sense would dictate that [plaintiff] Ryan's refusal to resign was done with the knowledge that his case would likely be put before the appropriate faculty body for further investigation. There is no reason to think that there are some magic words Ryan would have needed to use to assert his due process rights. Given the context of his refusal to resign, it seems at least plausible that he had asserted his due process rights. As we are required at the Rule 12(b)(6) stage to construe the complaint generously towards the plaintiff, we proceed as if he had asserted his rights.[208]

Applying this "common sense" standard, the Sixth Circuit used such "common sense" to infer the assertion of certain prerequisites.[209] However, what the analysis also demonstrates is that there are certain "leaps" the court is willing to make—such as determining that it is "at least plausible" that a plaintiff asserted his due process rights—yet certain others that a court is not willing to accept.[210] The issue with such an analysis, though, if applied to both allegations of what a plaintiff and defendant would have done under given circumstances, is that "common sense" often dictates what a person of ordinary prudence would have done under the circumstances (which, in the case of lawsuits, is often not the case: precisely why there is a lawsuit at hand).

7. United States Court of Appeals for the Seventh Circuit

In a statement that again sounds similar, yet not identical, to the standards expressed for a motion under Rule 12(b)(6) for failure to state a claim, the Seventh Circuit has held that they will "construe the complaint in the light most favorable to [the] plaintiff, accept all well-pleaded facts as true, and draw reasonable inferences in [the]

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207. Ryan v. Blackwell, 979 F.3d 519, 524 (6th Cir. 2020) (citing *Rudd v. City of Norton Shores*, 977 F.3d 503, 511 (6th Cir. 2020)).

208. *Id.* at 524–25 (citations omitted).

209. *Id.*

210. *Id.*

plaintiff's favor."[211] The question remains, though, which inferences will be "reasonable" based on the facts known, or available, to a plaintiff at the time of filing. Particularly in cases where proof of a subjective state of mind (that Rule 9 specifically permits to be alleged generally) is a necessary element, it can often be difficult for a plaintiff to have access to specific facts underlying such a subjective motive, as Taha v. International Brotherhood Of Teamsters[212] demonstrates:

> Taha also failed to plead a plausible bad faith claim. Whether a union acted in bad faith calls for a subjective inquiry and requires proof the union acted (or failed to act) due to an improper motive. A conclusory allegation of bad faith conduct, without more, does not show illegality. Put another way, Taha must allege "more than a sheer possibility" that the union acted unlawfully. But "sheer possibility" is all Taha has offered. Taha presses only one fact to support his charge of bad faith conduct: Stripling and Starck discussed airline tickets before the JBA hearing. Yet he does not allege a causal or even correlative relationship between that conversation and the quality of Stripling's representation. Nor does he link the Stripling/Starck conversation to the union's refusal to pursue arbitration. Twombly instructs plaintiffs to "nudge[] their claims across the line from conceivable to plausible." Taha's claims backslide from conceivable to plumb speculation when he concedes: "Why the [u]nion representative folds is not entirely clear—quid pro quo for the airline tickets, or perhaps some other motive lurks." This conjecture also assumes the union "folded" without any facts to support that allegation. Rule 8(a)(2) requires a plaintiff to state more than raw guesswork to survive a Rule 12(b)(6) challenge. Because Taha never elevates his bad faith claim from speculative to plausible, the district court properly dismissed it.[213]

The issue with such standards is that there is often little more than an end result, general circumstances, and conjecture that a plaintiff has available to him to prove a defendant's state of mind. Specifically, when Rule 9 does not require particularity in pleading for such a state of mind, the labeling of certain factual statements (such as that the union "folded") as guesswork while at the same time pointing to an absence of a "link" between a conversation and the union's refusal to pursue arbitration appears not to draw inferences in favor of the plaintiff. Indeed, any "link" alleged between certain conversations and what "motive" certain defendants would have would be no more than mere

211. Taha v. Int'l Bhd. of Teamsters, Loc. 781, 947 F.3d 464, 469 (7th Cir. 2020) (citing *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013)).

212. 947 F.3d 464.

213. *Id.* at 472 (citations omitted).

conjecture as well at the initial pleading stage. Yet again, what "reasonable inferences" a court will draw, and when it will draw them, remains a mystery.

8. United States Court of Appeals for the Eighth Circuit

An issue with the pleading standard also comes by way of certain courts' preconceived notions of what an ideal complaint should look like or of what a typical case of a certain cause of action consists. In practice, this prejudice can cause courts not only to look for whether plaintiffs have alleged sufficient facts to state their allegations, but also to determine whether plaintiffs have alleged the facts sufficient to dispel the court's suspicions of what "common sense" dictates may have happened in a given case. For example, in reversing a district court's determination of failure to state a claim, the Eighth Circuit dealt with such a case alleging a breach of fiduciary duty in the management of an investment plan:

> The district court erred in two ways. It ignored reasonable inferences supported by the facts alleged. It also drew inferences in [the defendant's] favor, faulting [the plaintiff] for failing to plead facts tending to contradict those inferences. Each of these errors violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party. Twombly and Iqbal did not change this fundamental tenet of Rule 12(b)(6) practice.
>
> The district court correctly noted that none of [the plaintiffs] directly addresses the process by which the Plan was managed. It is reasonable, however, to infer from what is alleged that the process was flawed. . . . If these allegations are substantiated, the process by which appellees selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty. Thus the allegations state a claim for breach of fiduciary duty.[214]

The Eighth Circuit's approach, decided in the wake of *Iqbal*, appears to give greater deference and more lenience to the inferences that a court will make than what other circuits have shown in the cases cited herein. For example, the statement in the *Braden* complaint that the revenue sharing payments in Braden were not made in exchange for services rendered but were a "quid pro quo" seems, on its face, quite similar to the statements other circuits have disregarded as conclusory labels.[215] What this approach recognizes, though, is that such factual allegations—some

214. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595–96 (8th Cir. 2009) (citations and punctuation omitted).

215. *Id.*

of which may be the sum of smaller factual snippets and transactions such as would comprise a "quid pro quo" system—may be substantiated by evidence during discovery, and in such circumstances, reasonable inferences from the factual allegations taken as true will suffice to put a defendant on notice of a claim and allow plaintiffs to advance with their suits.

9. United States Court of Appeals for the Ninth Circuit

Like its sister circuit, the Ninth Circuit also struggled to harmonize its existing precedent (to the extent possible) with the *Iqbal* decision. In the years after *Iqbal* and *Twombly*, the Ninth Circuit attempted just such a reconciliation:

> [i]f there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible, [the] plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). [The] [p]laintiff's complaint may be dismissed only when [the] defendant's plausible alternative explanation is so convincing that [the] plaintiff's explanation is implausible.[216]

Yet, the courts did not give all such plaintiffs equal treatment under the purported standard. In an attempt to distinguish a seemingly inconsistent decision, the Ninth Circuit analyzed its case law:

> A more recent examination of Rule 8(a) confronted the application of the plausibility standard to a complaint with less factual support than that in Starr. We affirmed the dismissal of the complaint in Century because, "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render [the] plaintiffs' allegations plausible." Unlike Starr, where the plaintiff's plausible complaint survived a motion to dismiss by offering facts that tended to exclude the defendant's innocuous alternative explanation, we held that the complaint in Century established only a "possible" entitlement to relief, and thus could not support further proceedings.[217]

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216. Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis in original).

217. Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996–97 (9th Cir. 2014) (citing In re Century Aluminum Co. Secs. Litig., 729 F.3d 1104 (9th Cir. 2013) (citation omitted).

The standard applicable to the motions to dismiss appears to have changed, then, from one of two plausible explanations to an explanation that must "tend to exclude" other explanations, consistent with *Iqbal's* requirement of pleading facts that are more than merely consistent with liability. But the "factual" distinctions drawn in each case do not fully repudiate the standards set in the older cases, leading to somewhat unpredictable standards; indeed, in later attempting to make sense of these rulings and set out the "settled" standard, the Ninth Circuit itself recognized that there was "some tension among the Court's pleading-standards cases."[218]

10. United States Court of Appeals for the Tenth Circuit

The Tenth Circuit has similarly quarreled with the distinction between "fact" and "conclusion" and what inferences a court will draw. For example, in a discrimination case, the Tenth Circuit noted that application of a heightened pleading standard would be "troublesome" in such a context "because in employment discrimination cases where the employers are large corporations, the employee may not know who actually fired her or for what reason."[219] Nevertheless, despite the recognition of such a problem, the court still allowed the labeling of assertions as conclusory to doom a plaintiff's complaint.[220]

The allegations the court labeled as conclusory, such as that the reasons for termination were "false" seem to be, at a minimum, on the border between factual and conclusory. Would the plaintiff have fared better if she had listed out each reason given by the defendant for the termination and stated that it did not happen? It would seem that rather than drawing out each of these reasons separately, the more "simple, concise, and direct" manner in which to include these facts would be a statement that all such reasons are not true.[221] Whether the stated reasons were given with intent to cover up a true motive, on the other hand, would be the legal conclusion. Nevertheless, even in light of the allegations the court saw remaining, there could be two possibilities to tie the termination to a discriminatory motive: either "speculation" as this court labels it, or the "inference" between facts, results, and motive that a court is permitted to make.

218. Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014).

219. Khalik v. United Air Lines, 671 F.3d 1188, 1193 (10th Cir. 2012).

220. *See id.* at 1193–94.

221. *See* FED. R. CIV. P. 8(d)(1).

11. United States Court of Appeals for the Eleventh Circuit

Practically, even if a plaintiff is aware what facts a court would desire from a plaintiff, the precise level of particularity required for some sets of facts or what number of facts will be "sufficient" remains a mystery. In situations where the plaintiff knows only the name of the tortfeasor and the harm that accrued, such details may be hard to hammer out in sufficient concrete detail prior to discovery. For example, in an identity theft case, the Eleventh Circuit illustrated what level of detail was needed to allege plausible causation:

> In discussing causation, [p]laintiffs allege that "AvMed's data breach caused [the plaintiffs'] identity theft," that the facts [the] [p]laintiffs allege have "sufficiently shown that the data breach caused [the] identity theft," and that "but for AvMed's data breach, [the plaintiffs'] identit[ies] would not have been stolen." Although at this stage in the proceedings we accept [the] plaintiffs' allegations as true, we are not bound to extend the same assumption of truth to [the] plaintiffs' conclusions of law. These claims state merely that AvMed was the cause of the identity theft—a conclusion we are not bound to accept as true. . . .
>
> Generally, to prove that a data breach caused identity theft, the pleadings must include allegations of a nexus between the two instances beyond allegations of time and sequence. . . .
>
> Here, [the] [p]laintiffs allege a nexus between the two events that includes more than a coincidence of time and sequence: they allege that the sensitive information on the stolen laptop was the same sensitive information used to steal [the] [p]laintiffs' identity. [The] [p]laintiffs explicitly make this connection when they allege that Curry's identity was stolen by changing her address and that Moore's identity was stolen by opening an E*Trade Financial account in his name because in both of those allegations, [the] [p]laintiffs state that the identity thief used [the] [p]laintiffs' sensitive information. We understand [the] [p]laintiffs to make a similar allegation regarding the bank accounts opened in Curry's name even though they do not plead precisely that Curry's sensitive information was used to open the Bank of America account. The Complaint states that Curry's sensitive information was on the unencrypted stolen laptop, that her identity was stolen, and that the stolen identity was used to open unauthorized accounts. Considering the Complaint as a whole and applying common sense to our understanding of this allegation, we find that [the] [p]laintiffs allege that the same sensitive information that was stored on the stolen laptops was used to open the Bank of America account. Thus, [the] [p]laintiffs' allegations that the data breach caused their identities to be stolen move from the realm of the possible into the

> plausible. Had [the] [p]laintiffs alleged fewer facts, we doubt whether the Complaint could have survived a motion to dismiss. However, [the] [p]laintiffs have sufficiently alleged a nexus between the data theft and the identity theft and therefore meet the federal pleading standards.[222]

To its credit, the court does view the complaint as a whole in determining which facts will suffice to plead a plausible case of causation. In many cases, though, the plaintiff will be left to guess what the tortfeasor specifically did. Under these circumstances, if hopeful plaintiffs know that another has opened credit cards in their name but have no idea why or how, a mere statement that the thief "caused" the damage would be insufficient, leaving a harmed party little, if any, right to redress. Only if the plaintiff happens to correctly guess the facts as to what occurred can the plaintiff get discovery. Causation, in particular, is an issue to which it is difficult to pin "facts" to when the injured party has been left in the dark precisely due to the nature of the tort, such as identity theft. The facts that the court in *Resnick* found move the allegations from "possible into the probable" likely will not be available to many plaintiffs, and if this is the case, where allegations of detailed information concerning the accounts opened or the information stolen are required as a minimum threshold, the plaintiff must know most of the details of the case before the outset of litigation.

12. United States Court of Appeals for the District of Columbia Circuit

The D.C. Circuit somewhat clarified the "inference" issue, holding that "in addition to the court being able to draw a 'reasonable inference' as to the ultimate liability of the defendant, at the motion to dismiss stage, the court will 'construe the complaint liberally,' granting the [plaintiff] 'the benefit of all inferences that can be derived from the facts alleged.'"[223] In practice, this dual-inference system seems to benefit plaintiffs that may have failed under other circuit approaches. For example, in the case below, the plaintiff-Foundation sought to engage in protests, including chalking "Black Pre-Born Lives Matter" on sidewalks, but after being stopped, filed a discrimination action against the agencies stopping its members.[224] Following the district court's dismissal of the complaint, the DC Circuit reversed:

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222. Resnick v. AvMed, Inc., 693 F.3d 1317, 1326–27 (11th Cir. 2012) (citations omitted).

223. Frederick Douglass Found., Inc. v. D.C., 82 F.4th 1122, 1135 (D.C. Cir. 2023) (quoting *Zukerman v. USPS*, 961 F.3d 431, 436 (D.C. Cir. 2020)).

224. *Id.* at 1131.

> We find the Foundation has plausibly alleged its members were similarly situated to individuals expressing "Black Lives Matter" across a range of relevant prosecutorial factors, including the strength of the case, available evidence, culpability, and the resources required to obtain a conviction . . .
>
> The District argues it is not plausible that individuals at the Foundation's small rally were similarly situated to individuals at the Black Lives Matter protests. First, the District maintains the Black Lives Matter protests were much larger, involving tens of thousands of people flooding the streets of downtown Washington. In light of the intensity and scale of the protests, the District was concerned that making arrests for defacement would drain police resources and distract officers from other priorities, such as ensuring public safety and addressing widespread looting and property damage.
>
> We do not doubt these are legitimate prosecutorial factors that will be part of the merits assessment of whether the Foundation has demonstrated its members were similarly situated. Nonetheless, at the motion to dismiss stage, the Foundation's allegations allow us to reasonably infer that its protesters were similarly situated to at least some of the Black Lives Matter protesters.[225]

Under the approach of the Ninth Circuit, it may not be as clear in this case that the evidence offered by the plaintiff would tend to exclude the legitimate prosecutorial factors. Rather, this approach seems more in congruence with the circuits allowing either of the multiple plausible theories alleged by the plaintiff to prevail.

To be clear, the above survey is not intended to say that any of these cases are typical or characteristic of the particular circuits. Rather, the typical practice the above cases are intended to illustrate is the inconsistent application of the *Iqbal* standard among the circuits and how the "plausibility" standard has been anything but an objective benchmark, leaving practitioners little guidance as to how any one particular case may fare in the appellate courts.

III. PART THREE

> "It's important to have a sound idea, but the really important thing is the implementation."
>
> ~Wilbur Ross[226]

225. *Id.* at 1138–39.

226. *Wilbur Ross: Finding His Calling*, at 3 (Sept. 5, 2008).

Truthfully, no one can reasonably argue that pleading a fact is not preferable to a conclusion, or that a claim should not ideally be "plausible" from a bare reading of the complaint. To paraphrase Federalist No. 51,[227] if one reasonable jurist could consider and rule upon all motions to dismiss in all filed federal cases using the current pleading standard, the standard would work fine.[228] However, if the federal judiciary had one universal reasonable jurist, very few of these guidelines would really be necessary. That, of course, is not reality.

The reality is that there are over 670 federal district court judges[229] who have, since May 18, 2009, been ostensibly invited to bring their own personal experience and "common sense" into whether they can utterly disregard an allegation within a complaint because they do not agree with its wording, and/or whether they personally believe what the plaintiff is alleging is true. They have been asked to do this in a void, without the benefit of any piece of evidence or the testimony of any lay or expert witness. These some 670 district court judges are overseen by thirteen appellate courts (containing ninety-four judicial districts), comprised of judges with their own personal experiences and common sense. As was borne out nearly a century ago, there is no way that this number of legal minds can reach any sort of meaningful consensus about what is, or is not, an impermissible conclusion, or what may, or may not, be a "plausible" set of facts giving rise to a cause of action.

A pleading standard should serve two useful purposes: (1) to instruct the practitioner as to how to frame a complaint and what level of detail to include so the opposing side has sufficient notice of the claim; and (2) to ensure that all judges are analyzing the sufficiency of the pleading, when challenged, with as much consistency and integrity as possible. In our experience, the majority of district judges already read and apply Rules 8 and 12 with the ultimate goal of merit-based resolutions. The purpose of a standard is not to guide these judges who are already competently performing their duties, but to ensure that the judges who may be prone to conscious or unconscious bias, or who prefer docket control over substantive rulings, are not allowed to run unfettered within their lifetime appointment. As Charles Clark surmised long ago, the benefit of a lessened pleading standard is that it defers the exercise of discretion[230]

227. THE FEDERALIST NO. 51 (James Madison).

228. *See id.*

229. *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/LL5C-C985] (last visited Jan. 29, 2024).

230. Appeals of Rule 12(b)(6) dismissals are reviewed *de novo*. However, by invoking a judge's experience and common sense to determine plausibility, in effect the Supreme Court of the United States has asked judges to use their discretion in making these rulings.

until after both sides have been given a full opportunity to collect and show the court as much evidence as they can to either prove or defend against the claim at issue.[231]

The reality of litigation is also that sometimes it is impossible for a plaintiff to allege anything more than indicia of wrongdoing at the outset of an action. The current pleading standard allows a judge to strike any allegation of an unsupported conclusion, rely on any alternate explanation he or she wishes to justify a dismissal, and then refuse to reconsider the issue even if later discovery reveals evidence supporting the dismissed claim. Under this very real occurrence in federal court, which stems entirely from a judge's too-broad interpretation of what constitutes a "conclusion," when the evidence pertinent to the claim is uniquely within an opposing party's possession, custody and control, a plaintiff must either risk violating Rule 11's[232] mandate by concocting evidence in the complaint, or risk foregoing the claim. Notice pleading, despite its faults, did not circumvent the seeking of truth in favor of semantics.

Putting ideological explanations aside, perhaps part of Conley's downfall resulted from previous panels of the Supreme Court refusing to accede to differing circuit courts' acknowledgements that, in some particular claims, it is reasonable to assume that the plaintiff may have more specific knowledge of the evidence at the beginning stages of litigation.[233] In short, as many judges already do, assessing a complaint with a keener eye toward what specific facts a plaintiff may reasonably know and possess at the outset of litigation may help form a more reasonable pleading standard that moves in between the tactical laxity of notice pleading and the slippery slope of allowing judges to reintroduce fact pleading at the motion to dismiss stage. As with most aspects of life, often the best answer lies on neither end of a continuum. For now, however, the current plausibility pleading standard is only as good as the judge applying it.

231. Clark, *supra* note 2.

232. FED. R. CIV. P. 11.

233. Conley v. Gibson, 355 U.S. 41 (1957).