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The Impact of *Ashcroft v. Iqbal* on Pleading

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I. Introduction

THIS PAPER WILL ATTEMPT TO COVER A FAIR AMOUNT OF GROUND, examining first the impact that the pleading standard articulated in *Ashcroft v. Iqbal*[1] has had in lower courts, moving to why it has proved so troublesome, then to why it matters, and concluding with some thoughts on how to resolve some of the difficult interpretive issues presented by *Iqbal*. I will proceed as follows. First, I will provide a brief description of *Iqbal*, a case that at this point is familiar to all. Second, I will describe how the case is being applied in lower courts. Third, I will take a brief historical detour to offer some thoughts as to why the case is being subjected to such widely varying interpretations, within and without the circuits. Fourth, I will introduce some empirical data suggestive of the impact that *Iqbal* is having and will have in the area of civil rights litigation. And finally I will offer some modest suggestions as to how best to resolve some of the tensions that have arisen as *Iqbal* has percolated through the lower courts.

II. *Ashcroft v. Iqbal:* A Quick Summary

Ashcroft v. Iqbal[2] initiated, by some accounts, a radical change in civil procedure that started two years earlier with *Bell Atlantic v. Twombly*.[3] In *Twombly*, the Supreme Court adopted a "plausibility" pleading standard in reviewing the sufficiency of an antitrust complaint, overruling in part *Conley v. Gibson*,[4] the 1957 case that ratified the notice pleading regime adopted by the Federal Rules of Civil Procedure.[5] *Iqbal* extended *Twombly* to all civil actions and applied an even more rigorous standard

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1. 129 S. Ct. 1937 (2009).
2. *Id.*
3. 550 U.S. 544 (2007).
4. 355 U.S. 41 (1957).
5. 550 U.S. at 561-63 (reviewing criticisms of *Conley* and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough").

to a civil rights action filed against high level federal officials.[6] The end result is a pleading standard that heightens attention to "conclusory" factual pleading,[7] treats state of mind allegations in a manner at odds with prior precedent,[8] and encourages lower courts to apply their "judicial experience and common sense" to decide whether a plaintiff's[9] legal claims and allegations are sufficient to proceed to discovery.[10] *Iqbal* already has generated significant attention among judges,[11] legislators,[12]

6. 129 S. Ct. at 1950 (explaining that in determining whether a complaint is "plausible," judges may rely on their "judicial experience and common sense").

7. 129 S. Ct. at 1949-50.

8. *Id.* at 1954 (interpreting Fed. R. Civ. P. 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged). The *Iqbal* Court's interpretation of Rule 9(b) is arguably at odds with the Advisory Committee notes to Rule 9. *See* Fed. R. Civ. P. 9, advisory committee's notes to 1937 Adoption (citing ENGLISH RULES UNDER THE JUDICATURE ACT (The Annual Practice, 1937) O. 19, r. 22). The English rules cited by Rule 9 state that when a plaintiff makes allegations as to any "condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?* 104 F.R.D. 143, 146 n.19 (1985). Moreover, as some courts have recognized, the *Iqbal* Court's treatment of Rule 9(b) is in some tension with its prior decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). *See, e.g.*, Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009); Brown v. Castleton State College, 663 F. Supp. 2d 392, 403 n.8 (D. Vt. 2009); *cf.* Kasten v. Ford Motor Co., 09-11754, 2009 WL 3628012, at *7 (E.D. Mich. Oct. 30, 2009) (stating that tension between *Swierkiewicz* and *Iqbal* has yet to be resolved).

9. Pleading standards obviously apply to all parties. Defendants sometimes bring counter-, cross-, or third-party claims, and as such may face the burden of overcoming heightened pleading standards. But in this paper I will use "plaintiff" to refer generally to anyone who brings a claim that is subject to a particular pleading standard.

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

11. At last count, according to Westlaw®, more than 3250 reported decisions have cited to it, and although this may be an inaccurate reflection of its impact, if one examines the number of times that *Twombly* was cited by judges in reported decisions in the six months after it was announced—2400—it is clearly a significant decision.

12. On July 22, 2009, Senator Arlen Specter introduced the Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) which directed lower courts to apply the standard from *Conley. S. 1504, 111th Cong. (2009).* *See* http://thomas.loc.gov/cgi-bin/query/z?c111:S.1504. Representative Nadler has introduced the Open Access to Courts Act of 2009, which would accomplish the same objective. H.R. 4115, 111th Cong. (2009).

and academics both critical[13] and welcoming.[14] My purpose here is first to sketch out the basic holding of the case as it relates to pleading.

Iqbal stemmed from the treatment of Javaid Iqbal, a criminal detainee who was held in the most restrictive conditions of confinement known in the federal detention system (ADMAX SHU) while awaiting trial on charges related to his use of a contrived social security number. Mr. Iqbal was arrested shortly after September 11, 2001, and he alleged that he was treated as a terrorist suspect (despite the lack of any evidence that he was involved in terrorism) solely because of his race (South Asian), religion (Muslim), and national origin (Pakistani). He was held in restrictive conditions, where he was strip-searched every day, shackled whenever he left his cell, housed in solitary confinement, and subjected to discrete instances of misconduct by correction officials working in the MDC. He was told that he was being considered "high security" and called a "terrorist," but like the other Arab and South Asian men who were held on the ADMAX SHU at that time, he was

13. Most of these commentators focus on the significance of the Court's "plausibility" standard. Suja Thomas, for instance, has argued that under *Iqbal*, adjudications of motions to dismiss bear a greater resemblance to summary judgment determinations. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010); *see also* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (maintaining that *Iqbal* has extended the plausibility analysis of *Twombly* in a dangerous direction); Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) (suggesting that the *Iqbal* regime for pleading is a violation of the Seventh Amendment right to a jury trial). Others have focused more precisely on the Court's treatment of discrimination claims. Dawinder S. Sidhu, for example, draws a compelling line of comparison between *Iqbal* and *Korematsu* in the degree to which the Supreme Court accepted a racialized view of national security. Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419 (2010). Kevin Clermont and Stephen Yeazell argue more generally that both *Iqbal* and *Twombly* are destabilizing and should be reconsidered. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

14. Douglas Smith contends that *Iqbal* is a welcome addition to the arsenal that district courts have to screen out meritless cases before they lead to settlements because of the high cost of discovery. Douglas G. Smith, *The Evolution of a New Pleading Standard:* Ashcroft v. Iqbal, 88 OR. L. REV. 1053 (2009). Sheldon Nahmod, although recognizing the dearth of analysis in *Iqbal*, argues that the Court reached the right result with respect to the supervisory liability standard and indeed maintains that the Court should extend its holding in *Iqbal* to claims against municipalities. Sheldon H. Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after* Iqbal, 14 LEWIS & CLARK L. REV. 279 (2010). Scott Dodson takes a comparative approach and suggests that the Court's heightened pleading standard in *Iqbal* and *Twombly* are more in line with other countries and will lead to harmonization with foreign systems. Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2009).

never given an explanation as to what grounds were relied upon to classify him as such.[15]

Mr. Iqbal was eventually released from the ADMAX SHU, after which he pleaded guilty and served a brief prison sentence. He was then removed to his home country of Pakistan. He brought suit in 2004, alleging causes of action under *Bivens* and its progeny, civil rights statutes, and the Federal Tort Claims Act. A handful of high level defendants moved to dismiss his claims, arguing that they were entitled to qualified immunity because the law after September 11 was so unclear that they could not have reasonably anticipated being held accountable for violations of the constitution. The district and appellate courts rejected these arguments,[16] and the defendants petitioned for certiorari, emphasizing the sufficiency of the complaint's allegations of discrimination rather than the issue of qualified immunity.

On May 18, 2009, the Supreme Court released its opinion in *Iqbal*.[17] By a 5-4 vote, the Court held that Mr. Iqbal had failed to allege a plausible claim for relief under the Equal Protection Clause.[18] Justice Kennedy authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Souter, the author of *Twombly*, authored the principal dissent, joined by Justices Stevens, Ginsburg, and Breyer.[19]

After addressing subject matter jurisdiction arguments that had been raised by Mr. Iqbal,[20] and issues relating to supervisory liability that had not been raised by any party, the Court turned to the pleadings. The *Iqbal* majority reviewed the *Twombly* decision in depth, making clear that *Twombly* applied beyond the antitrust context in which it was announced.[21] And from *Twombly* the Court discerned a two step process for evaluating a complaint under Rule 12. First, a reviewing court must examine each allegation in a complaint and exclude from consideration

15. *Iqbal*, 129 S. Ct. at 1942-45.
16. *See* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).
17. 129 S. Ct. at 1937.
18. The Court did not explicitly address plaintiff's claims under 42 U.S.C. § 1985(3), but the reasoning of the Court's Equal Protection holding makes clear that the Section 1985(3) claims were not viable. *Id.* at 1954.
19. Justice Breyer authored a brief dissent in which he emphasized the role that cogent case management by lower courts could play in ameliorating the concerns that liberal pleading rules would interfere with Government functions by imposing burdensome discovery. *Id.* at 1961-62 (Breyer, J., dissenting).
20. Although the Court's reasoning regarding subject matter jurisdiction is important, it is beyond the scope of this presentation to address it.
21. *Iqbal*, 129 S. Ct. at 1949-50.

those allegations that are stated in a "conclusory" fashion.[22] Although the Court did not explain precisely what is meant by conclusory, it did offer some guidance: allegations that are mere "legal conclusions" or that are "[t]hreadbare recitals of the elements of a cause of action" will not suffice at the pleading stage.[23] Once a court adjudicating a motion to dismiss has excluded all conclusory allegations from the calculus, it may conduct the second step, which is to assess the "plausibility" of the connection between the facts alleged and the relief claimed.[24] Thus, the Court held, there is a gap between what a plaintiff has "alleged" and what a plaintiff has "shown," and plausibility analysis fills that gap, informed by the judge's "judicial experience and common sense."[25]

As applied to Mr. Iqbal's complaint, the Court first excluded those allegations which it deemed conclusory. The most critical of these was paragraph 96 of the complaint which alleged that 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, and/or national origin and for no legitimate penological interest."[26] The Court also identified two other paragraphs of the complaint as conclusory, one which identified Ashcroft as the "principal architect" of the discriminatory policy and the other which alleged that Mueller was "instrumental" in the policy's adoption.[27] According to the Court, these allegations were to be ignored not because they were "unrealistic or nonsensical," but because they merely recited a critical element of an equal protection violation, which is that a defendant must take action "because of, not merely in spite of," its disparate impact.[28]

Once these allegations were taken off of the table, the Court considered the plausibility of plaintiff's claim for relief against Messrs. Ashcroft and Mueller based on the factual allegations that remained. According to the Court, these were the following: (1) that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,"; and (2) that "[t]he policy of holding post-

22. *Id.* at 1952.
23. *Id.* at 1949.
24. *Id.* at 1950.
25. *Id.*
26. *Iqbal*, 129 S. Ct. at 1951.
27. *Id.*
28. *Id.* (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001."[29] The Court accepted that these allegations "are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin" but that because there were other "more likely explanations, [the allegations] do not plausibly establish this purpose."[30] According to the Court, the alternative lawful explanation for the wholesale detention of Arab, South Asian and Muslim men could be explained by the application of ordinary and unobjectionable law enforcement techniques.[31]

III. Applications of *Iqbal* in the Lower Federal Courts

It is early yet to offer a definitive conclusion of *Iqbal*'s effect on lower courts' treatment of motions to dismiss. In both *Twombly* and *Iqbal* the Court disclaimed any intent to adopt a heightened pleading standard, and lower courts are in a state of confusion as to the precise ramifications of these cases. Indeed, the Supreme Court most recently offered some language on pleading that was more evocative of pre-*Twombly* case law, without even citing to *Iqbal* or *Twombly*.[32]

A. *Lower Court Treatments of "Conclusory" Allegations*

The first key question prompted by *Iqbal* requires courts to distinguish between "factual" and "conclusory" allegations.[33] As noted above, *Iqbal* offers courts some guidance in this inquiry: we are told that an allegation that merely mirrors the elements of a cause of action is conclusory and not to be credited. But the guidance is less than crystal clear. Thus, it is impossible to draw any universalizable conclusions about

29. *Id.* at 1951 (quoting Paragraphs 47 and 69, respectively, of the complaint).
30. *Id.*
31. *Id.* at 1951-52.
32. *See* Skinner v. Switzer, No. 09-9000, 2011 WL 767703, at *6 (Mar. 7, 2011) (citing to Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002), but neither *Iqbal* nor *Twombly*).
33. The Third Circuit described the process for evaluating a complaint after *Iqbal* as follows:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief'.

Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

the way in which lower courts have treated arguments about the conclusory nature of particular pleadings. There are many general matters about which the debate is ongoing. Lower courts have disagreed as to whether allegations which fail to distinguish among defendants are by definition conclusory or not.[34] There has been some disagreement about whether the Form Complaints incorporated by the Federal Rules are now inadequate under *Iqbal*.[35] But there also are some areas for which a majority rule may be emerging. For instance, courts have seemed somewhat willing to forgive thin pleadings when the extent of informational asymmetry between the parties is high.[36] And *Iqbal* has been applied without much discussion to affirmative defenses.[37]

34. *Compare* Penalbert-Rosa v. Fortuno-Burset, 692 F.Supp. 2d 206, 209 (D.P.R. 2010) (holding allegation conclusory because they do not distinguish among different defendants); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (same); Warren v. Luzerne Cnty., No. 3:CV-09-0946, 2010 WL 521130, at *6 (M.D. Pa. Feb. 9, 2010) (same); In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009) (same); Short v. Sanzberro, No: 1:09-cv-00996-OWW-GSA PC, 2009 WL 5110676 (E.D. Cal. Dec. 18, 2009) (failing to distinguish among defendants fatal to section 1983 claim); *with* Brenes-Laroche v. Toledo Davila, 682 F. Supp. 2d 179, 186-87 (D.P.R. 2010) (finding allegations that did not distinguish among different defendants, at least for certain claims, sufficient); Narodetsky v. Cardone Industries, Inc., No. 09-4734, 2010 WL 678288 (E.D. Pa. Feb. 24, 2010) (same); Consumer Prot. Corp. v. Neo-Tech News, No. CV08-1983-PHX-JAT, 2009 WL 2132694 (D. Ariz. July 16, 2009) (finding references to defendants generally sufficient).

35. *Compare* Mark IV Indus. Corp. v. Transcore, L.P., No. 09-418 GMS, 2009 WL 4828661 (D. Del. Dec. 02, 2009) (denying motion to dismisss in patent action because the complaint's allegations conform with Form 18 of the FRCP); *with* Anthony v. Harmon, No. CIV. 2:09-2272(WBS KJM), 2009 WL 4282027, at *2 (E.D. Cal. Nov. 25, 2009) (stating that Form complaints "have been cast into doubt"); Doe v. Butte Valley Unified Sch. Dist., No. CIV. 09-245 (WBS CMK), 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (calling into question whether, after *Iqbal*, the FRCP Form Complaints are still sufficient). *Cf.* Cincinnati Ins. Co. v. Tienda La Mexicana, Inc., No. 5:09-CV-00021, 2009 WL 4363450 (W.D. Va. Dec. 1, 2009) (holding allegation that insured "negligently" caused fire was sufficient to state a claim for breach of insurance contract).

36. Connolly v. Smugglers' Notch Mgmt. Co., No. 2:09-CV-131, 2009 WL 3734123 (D. Vt. Nov. 5, 2009) (holding it is not necessary for FLSA plaintiff to allege specific time periods when she worked overtime, given informational asymmetry); Morgan v. Hubert, 355 F. App'x 466, 472 (5th Cir. 2009) (ordering discovery where "key facts are unknown" and solely within defendant's possession); Young v. City of Visalia, 687 F. Supp. 2d 1141 (E.D. Cal. 2009) (holding plaintiff not required to make separate allegations as to each defendant where plaintiff was not in room where defendants executed search); EEOC v. Scrub, Inc., No. 09 C 4228, 2009 WL 3458530, at *2 (N.D. Ill. Oct. 26, 2009) (holding litigants "entitled to discovery before being put to their proof"); Tompkins v. Lasalle Bank Corp., No. 09 C 3906, 2009 WL 4349532 (N.D. Ill. Nov. 24, 2009) (denying 12(b)(6) motion in discrimination case hinging on whether parent company could be deemed plaintiff's employer or whether parent company might be liable as discovery was necessary to determine liability.); Pasqualetti v. Kia Motors America, Inc., 663 F. Supp. 2d 586, 601 (N.D. Ohio 2009) (finding that where evidence supporting allegations of fraud are in defendants' possession, it is enough for plaintiff to have "articulated a plausible fraudulent intent and scheme").

37. Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150, at *1-2 (W.D.N.Y. Sept. 30, 2009); Tran v. Thai, No. 08-3650, 2010 WL 723633, at *1-2 (S.D. Tex. Mar. 1, 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 648-52 (D. Kan. 2009).

For the most part, however, the lower courts are going in many different directions in interpreting what kinds of allegations are "conclusory" under *Twombly* and *Iqbal*. Sometimes the difficulty is addressing allegations that are a mix of law and fact, such as allegations as to disability,[38] dangerousness,[39] and bribery,[40] to take only a few examples. Relatedly, some courts treat allegations as to whether a private individual is acting under color of law as factual,[41] and others treat it as conclusory.[42] There is similar variation as to allegations regarding corporate status.[43] Even

38. Lawson v. Ellison Surface Tech., Inc., No. 10-11-DLB, 2010 WL 935361, at *1-2 (E.D. Ky. Mar. 10, 2010) (holding allegation that plaintiff is disabled, without alleging facts that show he satisfies this condition, is conclusory). *But see* Doe v. Astrue, No. C 09-00980 (MHP), 2009 WL 2566720, at *13 (N.D. Cal. Aug. 18, 2009) (finding allegation that plaintiff was "otherwise qualified" for benefits was not conclusory).

39. Stevens v. Spegal, No. 4:09CV1394 (ML), 2010 WL 106603, at *2 (E.D. Mo. Jan. 6, 2010) (finding allegations that snow blade constituted a "dangerous condition" and that it presented a "reasonably foreseeable risk of harm" were conclusory); *see also* Altman v. HO Sports Co., No. 1:09-cv-1000 (AWI SMS), 2009 WL 4163512 (E.D. Cal. Nov. 23, 2009) (holding allegations that product did not meet consumer expectations; that product defects were substantial causes of plaintiff's injuries; and that there was an inadequate warning of a "known risk of injury" were conclusory without explanation of why the product did not meet expectations, how it caused injury, and what warnings were insufficient).

40. Dauphinais v. Cunningham, No. 3:08-cv-1449 (VLB), 2009 WL 4545293 (D. Conn. Nov. 30, 2009) (finding the plaintiff's allegation that he believed defendant had bribed state officials was conclusory). *But see* Halpin v. David, No. 4:06cv457 (RH/WCS), 2009 WL 2960936, at *2-3 (N.D. Fla. Sept. 10, 2009) ("that a defendant took a bribe is a factual allegation that must be accepted as true").

41. Carpenter v. Kloptoski, No. 1:08-CV-2233, 2010 WL 891825, at *5 (M.D. Pa. Mar. 10, 2010) (holding extensive factual allegations sufficient to support claim of private actor acting under color of law); Huxtable v. Geithner, No. 09cv1846(BTM NLS), 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009) (holding allegation that private lender defendants are effectively acting as government agents for federal loan program was sufficient to allege action under color of law).

42. *See* Claudio v. Sawyer, 675 F. Supp. 2d 403 (S.D.N.Y. 2009) (finding allegation that off-duty officer was acting under color of law was conclusory in the absence of factual showing that officer was acting in capacity as police officer); McCain v. Episcopal Hosp., 350 F. App'x 602, 603-05 (3d Cir. 2009) (holding allegation that private hospitals acted under color of state law was conclusory); Francis v. Giacomelli, 588 F.3d 186, 194 (4th Cir. 2009) (holding Fourth Amendment claim implausible because it "did not allege that the defendants were engaged in a law-enforcement effort"; instead, the facts showed that the defendants' actions were those of a government employer retrieving its property from terminated employees and escorting them off the premises); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (finding allegation that paramilitaries were acting under color of law was conclusory).

43. Robles v. Copstat Sec., Inc., No. 08 Civ. 9572 (SAS), 2009 WL 4403188, at *3 (S.D.N.Y. Dec. 2, 2009) (holding allegations that defendant was sole shareholder, directed the "day-to-day operations," that company "is currently a 'shell entity,' and no longer engages in business," and "maintains few, if any, assets," and that assets "have been transferred to [defendant]" were "rather general," but sufficient to support veil-piercing theory); Cortelco Sys. of P.R., Inc. v. Phoneworks, Inc., No. 09-1371CC, 2009 WL 4046794, at *3 (D.P.R. Dec. 2, 2009) (holding that allegation of alter ego status is conclusory); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (finding allegation that Wal-Mart exercised control over day-to-day employment so as to constitute

allegations relating to the status of plaintiffs, tinged with both legal and factual elements, have been subjected to varying treatment by lower courts.[44]

For the purposes of employment discrimination claims, allegations of a defendant's state of mind are perhaps most significant, and unsurprisingly these kinds of allegations have been heavily litigated post-*Iqbal*. Part of the source of the confusion is that, after *Iqbal*, it is unclear whether *Swierkiewicz* is still good law in employment discrimination cases.[45] There is thus a broad dispute over whether "general" allegations of state of mind are sufficient on their own.[46] Courts

a joint employer was conclusory); Anthony v. Harmon, No. CIV2:09-2272(WBS KJM), 2009 WL 4282027, at *2 (E.D. Cal. Nov. 25, 2009) (holding allegation that each defendant was agent or employee of the other was conclusory); Heartland Barge Mgmt., L.L.C. v. Dixie Pellets, L.L.C., No. 09-00585-KD-B, 2010 WL 703183, at *3-4 (S.D. Ala. Feb. 2, 2010) (finding alter ego allegation conclusory); *but see* Fulst v. Thompson, No. 2:09-cv-775, 2009 WL 4153222 (S.D. Ohio Nov. 20, 2009) (finding allegation that defendant had the authority to "supervise, evaluate, discipline, promote, and/or terminate" sufficient to establish that defendant was plaintiff's employer); Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150, at *6 (W.D.N.Y. Sept. 30, 2009) (holding in FLSA case, allegation that corporate officer made decisions about hours, schedules and benefits was sufficient to add individual as defendant). *Tracy* can be compared to Trustees, Road Carriers Local 707 Welfare Fund v. Goldberg, No. 08-CV-0884 (RRM) (MDG), 2009 WL 3497493, at *4 (E.D.N.Y. Oct. 28, 2009), in which plaintiffs' allegations that the defendant exercised authority and control with respect to employee and employer contributions were conclusory, but plaintiffs' further allegations that defendant was the president and principal shareholder of the company at issue, was the individual responsible for making payment to the fund on behalf of the company, and used such contributions as company assets were sufficiently specific to establish defendant as a fiduciary with respect to the fund.

44. United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 28 (1st Cir. 2009) (holding allegation that relator in qui tam action was "original source" was conclusory when based on allegation that relator had "direct and independent knowledge of information on which the allegations are based, and have provided such information to the United States before filing suit, as required by 31 U.S.C. § 3730(e)(4)."); Haskins v. VIP Wireless Consulting, No. 09-754, 2009 WL 4639070, at *5 (W.D.P.A. 2009) (finding, in FLSA action, allegation that plaintiff was not a salaried employee was not conclusory).

45. *See* Swanson v. Citibank, N.A., 614 F.3d 400, 402-04 (7th Cir. 2010) (affirming *Swierkiewicz* as still good law); Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *4 (E.D. Mich. Oct. 30, 2009) ("[R]ead together, *Swierkiewicz* and *Twombly* require employment discrimination plaintiffs to allege sufficient material facts to state a plausible claim for relief, but do not mandate doing so on every element of the *McDonnell Douglas* prima facie case."); EEOC v. Scrub, Inc., 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009) (affirming *Swierkiewicz* as still good law); EEOC v. Universal Brixius, L.L.C., 264 F.R.D. 514 (E.D. Wis. 2009) (finding immaterial that complaint lacked certain factual allegations that must be proved to sustain a hostile work environment claim). Notably, the Supreme Court recently cited to *Swierkiewicz* in a discussion of pleading, but not to *Twombly* or *Iqbal*. Skinner v. Switzer, No. 09-9000, 2011 WL 767703, at *5-6 (Mar. 7, 2011).

46. *Compare* Brenes-Laroche v. Toledo Davila, 682 F. Supp. 2d 179, 186-87 (D.P.R. 2010) (finding general allegations of defendants' state of mind sufficient); Young v. Speziale, No. 07-03129 (SDW-MCA), 2009 WL 3806296, at *7 (D.N.J. 2009) (finding

differ over whether allegations of discriminatory or retaliatory intent are factual or conclusory.[47] They differ over whether an allegation that

general allegations may be sufficient in deliberate indifference context); Henderson v. Fries, No. 1:09-CV-268-TS, 2009 WL 3246673, at *3 (N.D. Ind. Oct. 5, 2009) (holding sufficient for plaintiff to state that plaintiff had a serious medical need in jail and that jail officials denied him medical attention); Capps v. U.S. Bank Nat'l Ass'n, No. CV 09-752-PK, 2009 WL 5149135, at *1 (D. Or. Dec. 28, 2009) (stating general allegations are assumed to include specific facts necessary to support them); Consumer Prot. Corp. v. Neo-Tech News, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, at *3 (D. Ariz. July 16, 2009) (same); *with* First Med. Health Plan, Inc. v. Caremark PCS Caribbean, Inc., 681 F. Supp. 2d 111, 117-19 (D.P.R. 2010) (finding general allegation of state of mind insufficient); Cuevas v. City of New York, No. 07-Civ-4169 (LAP), 2009 WL 4773033, at *4 (S.D.N.Y. Dec. 7, 2009) (general allegations of *Monell* liability insufficient; complaint was "heavy on descriptive language" but "light on facts"); Fabian v. Dunn, No. SA-08-cv-269-XR, 2009 WL 2567866, at *4-5 (W.D. Tex. Aug. 14, 2009) (holding allegation that defendants acted with deliberate indifference was conclusory).

47. For cases treating discriminatory allegations alone as conclusory, see Penalbert-Rosa v. Fortuno-Burset, 692 F. Supp. 2d 206, 210 (D.P.R. 2010); Delgado-O'Neil v. City of Minneapolis, No. 08-4924 (MJD/JJK), 2010 WL 330322, at *10-11 (D. Minn. Jan. 20, 2010) (holding allegation that defendant took several adverse employment actions "in retaliation" for plaintiff's protected conduct were conclusory); Holmes v. Poskanzer, 342 F. App'x 651, 653 (2nd Cir. 2009) (holding allegation that defendants were "not impartial" was conclusory and, without facts to support actual bias or conflict of interest, could not state due process claim); Nali v. Ekman, 355 F. App'x. 909, 913 (6th Cir. 2009) (holding allegation that defendants were racially biased and had animosity toward plaintiff was conclusory); Short v. Sanzberro, No. 1:09-cv-00996-OWW-GSA PC., 2009 WL 5110676, at *6 (E.D. Cal. Dec. 18, 2009) (allegation of retaliation conclusory absent specific facts to support retaliatory motive for defendants). For cases treating such allegations as factual, see Swanson v. Citibank, N.A., 614 F.3d 400, 404-07 (7th Cir. 2010) (holding allegation of lending discrimination sufficient where plaintiff alleged the kind of discrimination, by whom, and when); Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009); P.W. v. Del. Valley Sch. Dist., No. 3:09cv480, 2009 WL 5215397, *3-4 (M.D. Pa. Dec. 29, 2009) (holding allegation of disability discrimination sufficient where plaintiff alleges that he is a "handicapped person who has a mental impairment which substantially limits his life activities" and who was "denied" a "meaningful educational benefit"); Riley v. Vilsack, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009) (holding that plaintiff's allegations of age discrimination survive because they are "more than conclusions," in that plaintiff alleges that "defendants targeted for outsourcing the job responsibilities of older workers while making comments about their preference for younger workers"); Paris v. Faith Props., Inc., No. 4:08-CV-71 JVB, 2009 WL 4799736, at *5-6 (N.D. Ind. Dec. 8, 2009) (holding plaintiff adequately pleaded retaliation under Title VII where she provided details about her complaints about acts of sexual harassment of discrimination and alleged that her employment was terminated as a result). Retaliation claim sufficient where plaintiff alleged that adverse employment action taken after plaintiff complained of discrimination. Harman v. Unisys Corp., 356 F. App'x. 638 (4th Cir. 2009); Comm. for Immigrant Rights v. Cnty. of Sonoma, 644 F. Supp. 2d 1177 (N.D. Cal. 2009) (holding sufficient for plaintiffs to allege that defendant engaged in a racially biased policy of stopping those perceived to be Latino); Mack v. Wilcox Cnty. Comm'n, No. 09-00101-KD-B, 2009 WL 4884310, at *5 (S.D. Ala. 2009) (holding allegation that black employees paid less than white employees and subjected to other disparate treatment on account of race stated discrimination claim); Miller v. Eagle Tug Boat Cos., No. 09-0401-CG-B, 2009 WL 4751079, at *4-5 (S.D. Ala. Dec. 8, 2009) (holding allegation that white applicants treated differently than plaintiff were sufficient to state plausible Title VII claim); Rouse v. Berry, 680 F. Supp. 2d 233, 238 (D.D.C. 2010) (stating that all employment discrimination plaintiff has to allege is that he was subjected to adverse action "because of" a protected

a defendant "knew" or was "aware" of a particular fact is conclusory[48] or factual.[49]

class status); Floyd-Keith v. Homecomings Fin., L.L.C., No. 209-CV-769-WKW, 2010 WL 231575, at *2 (M.D. Ala. Jan. 14, 2010) (finding allegation that the defendants treated her differently from similarly situated white people during the lending process and denied her a loan based on her race was plausible).

48. *See, e.g.*, Choate v. Merrill, No. 08-49-B-W-, 2009 WL 3487768, at *6 (D. Me. Oct. 20, 2009) (finding that in Eighth Amendment case, allegation of supervisors knowledge of and indifference to lack of adequate life-saving equipment and training was conclusory); Milne v. Navigant Consulting, No. 08-Civ-8964 (NRB), 2009 WL 4437412, at *8 (S.D.N.Y. Nov. 30, 2009) (finding retaliation claim implausible where no facts supported allegation that defendant was aware that plaintiff intended to file Title VII claim); Jones v. Hashagen, No. 4:09-CV-887, 2010 WL 128316, at *4 (M.D. Pa. Jan. 12, 2010) (stating plaintiff's allegation that the superintendent "failure to take action to curb Inmate Mitchell's pattern of assaults, known or should have been known to [him], [and] constituted deliberate indifference" is conclusory); Garvins v. Hofbauer, No. 2:09-cv-48, 2009 WL 1874074, at *4 (W.D. Mich. June 26, 2009) (allegation that defendants were "aware" of plaintiff's medical condition insufficient to state claim for deliberate indifference); Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *5-6 (E.D. Mich. Oct. 30, 2009) (holding allegation of defendant's awareness insufficient without some statement of source of awareness); Long v. Holtry, 673 F. Supp. 2d 341, 354 (M.D. Pa. 2009) (holding allegation that defendants developed policy to shut down plaintiffs' foster home and that defendants failed to adequately train and supervise employees regarding seizures and notice process was conclusory in *Monell* case); Smith v. Dist. of Columbia, 674 F. Supp. 2d 209, 212-13 (D.D.C. 2009) (finding allegation that District "knew of" specific systemic problems with medical care in prisons was conclusory).

49. *See, e.g.*, Decker v. Borough of Hughestown, No. 3:09-cv-1463, 2009 WL 4406142, at *4 (M.D. Pa. Nov. 25, 2009) (holding allegation that Defendants "knew or should have known of Plaintiff's right to express himself in such a manner" was sufficient to support failure to train claim in First Amendment *Monell* case); Gioffre v. Cnty. of Bucks, No. 08-4232, 2009 WL 3617742, at *3-4 (E.D. Pa. Nov. 2, 2009) (finding, in § 1983 (Eighth Amendment) case, the following allegations sufficient: plaintiff needed medical examination upon admission; exam was not provided because of policies and practices of prison; defendants had tolerated practice of denying care to preserve resources; and defendants were on notice); Mallinckrodt, Inc. v. E-Z-Em Inc., 671 F. Supp. 2d 563, 569 (D. Del. 2009) (holding in patent case, the plaintiff satisfied the pleading standard for an infringement claim by alleging that defendant "became aware" of patent "shortly after" its issuance and that defendants "actively induced" infringing acts); Lewis v. Jordon, No. 1:09CV21, 2009 WL 3718883, at *5 (M.D.N.C. Nov. 4, 2009) (holding Fourth Amendment claim sufficient where complaint alleged that "Defendant Robinson . . . arrested Plaintiff without probable cause and that Defendants knew there was no probable cause."); Evans v. Tavares, No. 09-C-2817, 2009 WL 3187282, at *2 (N.D. Ill. Sept. 30, 2009) (holding allegation that defendants knew plaintiff had committed no crime but arrested him anyway was sufficient); Shoppel v. Schrader, No. 1:08-CV-284 PS., 2009 WL 1886090, at *6 (N.D. Ind. June 30, 2009) (allegation that county council was on notice that jail was inadequately funded and understaffed, and that another inmate had died because of inadequate medical care, sufficient to state Section 1983 claim based on inadequate funding); Smith v. Sangamon Cnty. Sherriff's Dep't, No. 07-3150, 2009 WL 2601253, at *4 (C.D. Ill. Aug. 20, 2009) (holding allegation of sheriff's knowledge that he had housed plaintiff with a violent inmate was not conclusory); Velazquez v. Office of Ill. Sec'y of State, No. 09-C-3366, 2009 WL 3670938, at *6 (N.D. Ill. Nov. 2, 2009) (holding allegation that plaintiff was arrested without probable cause was not conclusory); AMX Int'l, Inc. v. Battelle Energy Alliance, L.L.C., No. CV-09-210-E-BLW, 2009 WL 5064561, at *2-3 (D. Idaho Dec. 16, 2009) (general allegation of knowledge is sufficient, but not general allegation of

Unsurprisingly, there has been the hint of required fact pleading in certain areas of litigation. Some courts have suggested that discrimination plaintiffs must make some factual allegation about similarly situated individuals who were treated more favorably in order to state a claim for disparate treatment.[50] But a significant number of courts have rejected heightened fact pleading in the discrimination context.[51] Courts have seemed to approach fact pleading in some other civil rights cases as well. Where a Section 1983 complainant alleged that a Mayor participated in and executed raids in which household pets were confiscated and killed, the First Circuit treated that allegation as conclusory and not credited.[52] And in a school disciplinary case, the Second Circuit held that an allegation that defendants were "not impartial" was conclusory without more detail.[53] The Second Circuit has contemporaneously sug-

intent to interfere with contracts); *Decker*, 2009 WL 4406142, at *3 (finding allegation that Mayor "created a policy of using disorderly conduct citations as viewpoint based restictions" and that Mayor was deliberately indifferent and failed to train officers on proper procedures was sufficient to state *Monell* claim); Excelsior Ins. Co. v. Incredibly Edible Delites, No. 09-3198, 2009 WL 5092613, at *2-3 (E.D. Pa. Dec. 17, 2009) (holding allegation that, "[i]n knowing and willful breach of the insurance policy, Excelsior has refused to reimburse or defend that Counterclaim Plaintiffs for their covered claims under the Policy," is alone a sufficient allegation of a breach of a duty to fulfill a contractual obligation); Vaden v. Campbell, No. 4:09cv12-RH/WCS, 2009 WL 1919474, at *3 (N.D. Fla. July 2, 2009) (finding allegation of sheriff's knowledge of deputy's propensity for sexual assault was not conclusory).

50. Lopez v. Bay Shore Union Free Sch. Dist., 668 F. Supp. 2d 406 (E.D.N.Y. 2009) (finding statutory discrimination claim conclusory in the absence of any allegations of different treatment of similarly situated individuals); Jenkins v. Murray, 352 F. App'x 608 (3d Cir. 2009) (same for equal protection claim); McTernan v. City of York, 577 F.3d 521, 532 (3d Cir. 2009) (same for First Amendment religion claim); *see also* Francis v. Giacomelli, 588 F.3d 186 (4th Cir. 2009) (holding discrimination claim implausible where one of plaintiffs was white and complained of exact same treatment as black plaintiffs); Moss v. U.S. Secret Serv., 572 F.3d 962 (9th Cir. 2009) (dismissing First Amendment claim where allegations did not support inference of disparate treatment of similarly situated groups); Hughes v. America's Collectibles Network, Inc., No. 3:09-CV-176, 2010 WL 890982, at *4 (E.D. Tenn. Mar. 8, 2010) (holding, in age-discrimination claim, plaintiff's allegation that she was in "protected class" and that replacement employee was not is insufficient—plaintiff did not allege what her age is and did not allege anything to support a "pattern" of discrimination); *Kasten*, 2009 WL 3628012 (finding age discrimination complaint implausible because plaintiff did not provide age of replacement employee). *But see* Kubicek v. Westchester Cnty., No. 08-CV-372 (KMK), 2009 WL 3720155, at *10-11 (S.D.N.Y. Oct. 8, 2009) (finding employment discrimination complaint sufficient despite failure to identify person who was hired to position to which plaintiff applied, other than that person was African-American "and/or" younger than plaintiff, and despite failure to identify who made discirmninatory hiring decisions).

51. *See supra* note 50 and accompanying text.

52. Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009).

53. Holmes v. Poskanzer, 342 F. App'x 651, 653 (2d Cir. 2009).

gested that *Iqbal*'s requirement of factual detail was a limited one, in a case involving a claim between businesses alleging negligent false statements.[54] There are numerous other cases in which lower courts have treated *Iqbal* as establishing a fact-detailed pleading system, in arguable contrast to the notice pleading system which prevailed pre-*Twombly*.[55]

Many courts also have taken *Iqbal*'s conclusory analysis beyond state of mind allegations. Some courts have held that it is not enough to allege the existence of a contract, for instance, without setting forth the details that establish the formation of a contract.[56] In a patent infringement action, alleging that a product "reproduces the novel distinctive design appearance" of the plaintiff's products without saying something specific about how the product infringes was considered insufficient.[57] Alleging that a defendant cursed at a plaintiff was found to be insufficient to establish emotional distress necessary for an intentional infliction of emotional distress claim without some allegation as to how the defendant caused emotional distress.[58]

There are counter-examples. In a recent case from the Seventh Circuit, the court found that an allegation of lending discrimination was sufficient where the plaintiff's complaint identified "the type of discrimination that she thinks occurs (racial), by whom [the bank, through its manager and outside appraisers], and when (in connection with her effort in early 2009 to obtain a home-equity loan)."[59] In a case from the

54. Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 347 F. App'x 617 (2d Cir. 2009) (suggesting that plaintiff would not have to pinpoint exactly when defendant knew what facts, but simply allege that defendant knew material facts before a critical date).

55. Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) (stating that claim might have survived under *Conley* standard; plaintiff alleged that she was sole female employee in her department and that she was subjected to offensive and insulting remarks based upon her gender); Dorsey v. Georgia Dept. of State Rd. & Tollway Auth., No. 1:09-CV-1182-TWT, 2009 WL 2477565, at *7 (N.D. Ga. Aug. 10, 2009) (holding allegations of "numerous" racially disparaging remarks insufficient to state hostile work environment claim without greater detail establishing that remarks were severe enough to alter the conditions of employment); Carrea v. California, No. EDCV 07-1148-CAS (MAN), 2009 WL 1770130, at *9 (C.D. Cal. June 18, 2009) (dismissing equal protection claim because although plaintiff alleged that no white prisoner was ever treated the same as the plaintiff, there were no factual allegations regarding housing, medical care, conditions of segregation or other treatment of white prisoners); Lopez v. Beard, 333 F. App'x 685 (3d Cir. 2009) (per curiam) (dismissing claim based on HIV status discrimination for lack of detail).

56. Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599, 602-03 (7th Cir. 2009).

57. Colida v. Nokia, Inc., 347 F. App'x 568, 570 (Fed. Cir. 2009).

58. Destro v. Hackensack Water Co., No. 08-04776 (SRC), 2009 WL 3681903, at *5 (D.N.J. Nov. 2, 2009).

59. Swanson v. Citibank, N.A., 614 F.3d 400, 403-05 (7th Cir. 2010).

Southern District of Indiana, a court found that an allegation that the defendant was "deliberately indifferent" to serious medical needs was conclusory, but the same court found factual the allegation that the defendant had "knowledge of the substandard medical care provided to inmates" but "remained indifferent to the medical needs of inmates at the facility."[60] In the Eastern District of Pennsylvania,[61] a district court focused on the notice provided by the complaint and upheld a supervisory liability claim that alleged that defendants had "established, tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates" because of the costs imposed by such medical care.[62] The court did so even though the complaint "lack[ed] much detail," did not "identify the precise policy or practice instituted by Defendants," and were only "barely" more than "a blanket, general assertion of entitlement to relief."[63] There are also examples of cases in which allegations that an employer took some adverse action because of race "barely" established a discrimination claim at the pleading stage.[64]

There are some additional employment discrimination cases in which *Iqbal* seems to have played a less significant role. In *La Grande v. Decrescente Distributing Co., Inc.*,[65] for instance, the Second Circuit emphasized a *Swierkiewicz* standard of pleading for a *pro se* Title VII plaintiff.[66] In *Harger v. Schafer*,[67] a Colorado district judge denied a motion to dismiss an age discrimination claim where the plaintiff alleged that he received fewer benefits than "young female" employees, was "forced to work unpaid overtime" unlike younger employees, "that he was repeatedly called a 'good ole boy who is willing to do the work' by his supervisor, and that a senior [supervisor] questioned whether he

60. Estate of Allen *ex rel.* Wrightsmann v. CCA of Tennessee, L.L.C., No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at *2-3 (S.D. Ind. July 14, 2009)

61. Gioffre v. Cnty. of Bucks, No. 08-4232, 2009 WL 3617742, at *5 (E.D. Pa. Nov. 2, 2009).

62. *Id.* at *1, 5.

63. *Id.* at *4.

64. Smith v. St. Luke's Roosevelt Hosp., No. 08-Civ-4710(GBD)(AJP), 2009 WL 2447754, at *17 (S.D.N.Y. Aug. 11, 2009); *see also* Brenston v. Wal-Mart, No. 2:09-cv-026-PS, 2009 WL 1606935, at *4 (N.D. Ind. June 8, 2009).

65. 370 F. App'x 206 (2d Cir. 2010).

66. In analyzing a disparate treatment claim, the court held that a claim was stated by alleging that the plaintiff's "employer provided merchandising training for only the white workers and that he was not allowed to attend the training even though it was 'part of the job.' " *Id.* at 211 (citing Amended Compl. ¶ 6). The court also found that the plaintiff's retaliation claims were plausible, given his allegation that he was threatened with termination for complaining about "the sexual harassment of a female customer and about a co-worker's racial remarks." *Id.* at 212.

67. No. 09-cv-00126-PAB-MJW, 2010 WL 991571 (D. Colo. Mar. 18, 2010).

was 'to [sic] old for the work.' "[68] Numerous district courts in the Fifth, Sixth, and Seventh Circuits have also permitted relatively spare employment discrimination complaints to survive.[69] Some of these courts have been particularly wary of dismissing claims where a key issue is the subjective state of mind of the defendant.[70]

Despite the existence of cases that articulate broad and narrow interpretations of "conclusory," many courts have also explicitly recognized the significance of *Iqbal* as creating a sea change in pleading. Courts have described *Iqbal* as a sharp break from the past.[71] And courts have acknowledged the harsh results that flow from *Iqbal*'s pleading rule.[72] Judge Merritt, dissenting in an unpublished Sixth Circuit case, expressed his dismay clearly:

> As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple "plausibility," but by requiring

68. *Id.* at *3 (citing Compl. ¶¶ 8, 15, 18-19).

69. *See* Davis v. Collin Cnty. Comty. College Dist., No. 4:09-cv-309, 2010 WL 890246 (E.D. Tex. Mar. 9, 2010) (plaintiff's assertion that a male student was treated differently than her was "barely" sufficient to state a discrimination claim under Title IX); Smith v. City of Jackson, 3:09cv18-DPJ-JCS, 2009 WL 3275553 (S.D. Miss. Oct. 13, 2009) (finding complaint sufficient despite lack of factual detail); Brenston v. Wal-Mart, 2:09-cv-026-PS, 2009 WL 1606935, at *4 (N.D. Ind. June 8, 2009) (holding for ADA claims, a plaintiff need only allege "that he is disabled within the meaning of the ADA and that Wal-Mart discriminated against him because of that disability with enough facts to raise his claim beyond the speculative level as described in *Twombly, Erickson*, and *Iqbal*."); EEOC v. Scrub, Inc., No. 09-C-4228, 2009 WL 3458530, at *1-2 (N.D. Ill. Oct. 26, 2009) (stating, in discrimination case, that "*Iqbal* and *Twombly* did not repudiate general notice-pleading," and emphasizing, citing *Swierkiewicz*, that the "manner of proof is distinct from pleading requirements."); *accord* EEOC v. Univ. Brixius, L.L.C., 264 F.R.D. 514 (E.D. Wis. 2009); Fulk v. Vill. of Sandoval, No. 08-843-GPM, 2009 WL 3679880 (S.D. Ill. Nov. 3, 2009); *Paris*, 2009 WL 4799736.

70. Stroud v. Connor Concepts, Inc., No. 3:09-0895, 2009 WL 4723693, at *3 (M.D. Tenn. Dec. 2, 2009) (citing *Conley* and *Swierkiewicz* and pre-*Iqbal* Sixth Circuit cases in discussing standard for 12(b)(6) motion and explaining that state of mind allegations "are . . . particularly difficult to resolve at the motion to dismiss stage."); *accord* EEOC v. Scrub, Inc., No. 09-C-4228, 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009).

71. Kyle v. Holinka, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (describing *Iqbal* as "implicitly overturn[ing] decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion."); Williams v. City of Cleveland, No. 1:09 CV 1310, 2009 WL 2151778, at *4 (N.D. Ohio July 16, 2009) (describing *Iqbal* as imposing a heightened pleading standard); Young v. City of Visalia, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6 (E.D. Cal. Aug. 18, 2009) ("In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. 'bare allegations') is no longer viable.").

72. Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp.2d 217, 226 n.4 (D.P.R. 2009) (acknowledging that *Iqbal* creates harsh results and stating that *Iqbal* makes political discrimination claims nearly impossible to plead without "smoking gun" evidence); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *10

> the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence. . . .
>
> The antitrust cases decided in both courts of appeals and district courts since *Twombly* and *Iqbal* are few, and most of the cases decided by district courts have yet to reach the courts of appeals. . . .
>
> The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims.[73]

B. *Lower Court Treatment of Plausibility*

When a court considers the plausibility of a plaintiff's claim for relief vis a vis other alternative plausible explanations, a key issue is implied in the analysis: the comparative level of plausibility of the plaintiff's theory versus the alternative explanatory theories. If the plaintiff's theory must be more plausible than the alternative lawful explanations, then it has substantially different consequences than if the alternative lawful explanations have to be significantly more plausible than the plaintiff's theory. The Supreme Court did not resolve this question, other than to suggest, as it did in *Twombly*, that the alternative explanation must be "obvious" in order for the plaintiff's claim to be implausible.[74]

Courts have taken varying approaches to plausibility analysis. Some have insisted that any alternative explanation from the defendant must be much more obvious than the plaintiff's theory of relief to render a claim "implausible."[75] Some have simply insisted that the defendant's

(N.D. Cal. July 27, 2009) ("A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court.").

73. *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 912-14 (6th Cir. Oct. 2, 2009) (Merritt, J., dissenting) (internal citations omitted).

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

75. Arkansas Pub. Ret. Serv. v. GT Solar Int'l, Inc., No. 08-cv-312-JL, 2009 WL 3255225 at *4 (D.N.H. Oct. 7, 2009) (holding defendants' alternative explanation does not render plaintiff's complaint implausible because defendant's explanation is not "obvious"); Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (stating defendant's explanation has to be "so overwhelming, that the claims no longer appear plausible."); Destro v. Hackensack Water Co., No. 08-04776 (SRC), 2009 WL 3681903, at *3 (D.N.J. Nov. 2, 2009) (holding plaintiff's claim plausible where there "could" be a violation of duty of fair representation); Gonzalez v. Kay, 577 F.3d 600, 607 (5th Cir. 2009) (holding plaintiff can state a claim where "reasonable minds can differ" about whether particular conduct violates the FDCPA).

explanation be more plausible than the plaintiff's.[76] Thus, a court has found that rather than believe that a warden transferred a prisoner because of deliberate indifference to contagious diseases, it was "more likely" that the warden relied on the advice of competent professionals and was not deliberately indifferent.[77] Similarly, a court hearing a retaliation claim filed by a prisoner found it "more likely" that the prisoner was transferred to segregation for his own safety and not because of retaliation for his complaints.[78] Finally, some courts have failed to address the quantum of plausibility at all, while suggesting that it is a high hurdle for plaintiffs to overcome.[79]

Along with determining the quantum of plausibility, lower courts have had to take up the Supreme Court's invitation to use their "judicial experience and common sense" to mediate the plausibility analysis. In the Southern District of New York, for example, a court dismissed a Section 1983 claim against the City of New York which had alleged that a Fourth Amendment violation was the result of an unwritten City policy, finding it more plausible to believe that the officer who carried out the search "was a rogue officer who disobeyed City policy."[80] In a suit against a Tennessee County under a "class of one" theory of equal protection, the Court found an "obvious alternative explanation" for the differential treatment of the plaintiffs was that the defendants "made a mistake in applying the law," not that they singled out the plaintiffs for

76. In re *Travel Agent Comm'n Antitrust Litig.*, 583 F.3d at 910 (finding where defendants' explanation is "just as likely" as plaintiffs' explanation, plaintiffs' claim is implausible); Phillips v. Bell, 365 F. App'x 133, 139-43 (10th Cir. 2010) (finding complaint implausible because "more plausible" reasons exist for alleged conduct); Blanchard v. Yates, 2009 WL 2460761, at *3 (E.D. Cal. July 27, 2009).

77. *Blanchard*, 2009 WL 2460761 at *3.

78. Lacy v. Tyson, No. CV-1-07-0381-JMR, 2009 WL 2777026, at *4 (E.D. Cal. Aug. 27, 2009).

79. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 262 (4th Cir. 2009) (dissent characterizing the majority as applying an incorrect "rule that the existence of any other plausible explanation that points away from liability bars the claim."); Errivares v. Transp. Sec. Admin., No. DKC 09-1138, 2010 WL 610774, at *2 (D. Md. Feb. 17, 2010) (holding allegation of conversion is not plausible where facts show only that defendant's employee "could have acted wrongfully"). *But see* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 597 (8th Cir. 2009) ("Just as a plaintiff cannot proceed if his allegations are merely consistent with a defendant's liability, so a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct."); al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) (holding that claims are plausible so long as they are not unreasonable); United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854-55 (7th Cir. 2009) (clarifying that pleading not exclude all alternative possibilities to be plausible).

80. 5 Borough Pawn, L.L.C. v. City of New York, 640 F. Supp. 2d 268, 299-300 (S.D.N.Y. 2009).

pernicious reasons.[81] Arguably, courts could also rely on their experience and common sense to amplify a plaintiff's pleadings by taking notice of some particularly well-recognized problem.[82]

The case of *King v. United Way of Central Carolinas, Inc.*,[83] provides a nice framework for understanding the significance of both conclusoriness and plausibility together. In *King*, the plaintiff, an African-American woman, alleged that she had been terminated because of her race, gender and age.[84] The magistrate judge recommended dismissal but the district court reversed, for reasons described below. The magistrate judge recommended that her discrimination claim be dismissed because it found that her allegations of termination "because of" discrimination were conclusory, relying on *Iqbal*, and further found that it would not draw an inference of discrimination from her factual allegations that the committee that terminated her was composed entirely of men and that the person who replaced her was a white man.[85] Instead of crediting the plaintiff's allegation that she was terminated in part because of community discomfort with an African-American woman receiving high compensation, the magistrate judge found it more plausible to believe that the plaintiff was terminated because of the public reaction to the disclosure of her high compensation and that the person who replaced her replaced her not because of race but because he "is a respected local figure."[86] In other words, the magistrate judge accepted the plaintiff's allegation that she was terminated because the community was uncomfortable with her high salary, but did not believe that the discomfort was related to her being a black woman. The report and recommendation of dismissal was ultimately rejected by the district court, however, because the district court found that plaintiff's allegations were sufficient to state a claim of discrimination under the *Swierkiewicz* test.[87] In so doing the district court focused solely on the plaintiff's allegations that she was a

81. Arnold v. Metro. Gov't of Nashville, No. 3:09-cv-0163, 2009 WL 2430822, at *5 (M.D. Tenn. Aug. 6, 2009); *see also* Chassen v. Fidelity Nat. Fin. Inc., No. 09-291 (PGS), 2009 WL 4508581, at *10 (D.N.J. Nov. 16, 2009) (holding allegation that defendants were part of RICO enterprise was conclusory, in part based on the court's "common experience").

82. Chao v. Ballista, 639 F. Supp. 2d 170, 177-78 (D. Mass. 2009).

83. No. 3:09CV-MR-DSC, 2009 WL 2432706 (W.D.N.C. Aug. 6, 2009) (report and recommendation rejected in part by King v. United Way of Central Carolinas, Inc., No. 3:09CV164-MR-DSC, 2010 WL 1958128 (W.D.N.C. May 14, 2010)).

84. *Id.* at *5.

85. *Id.* at *9.

86. *Id.*

87. *See* King v. United Way of Cent. Carolinas, Inc., No. 3:09CV164-MR-DSC, 2010 WL 1958128, at *5 (W.D.N.C. May 14, 2010).

member of a protected class, that she was qualified and performed well, and that she was terminated and replaced by a white man.[88] The district court appeared not to consider any alternative explanations offered for the adverse employment action, at least to the extent that they were found outside of the four corners of the complaint.

IV. Sources of Confusion

As described above, the lower courts' treatment of *Iqbal* is hardly a model of consistency, especially as it relates to state of mind allegations. In some ways, this is a reflection of the opinion itself, which never articulated precisely what is meant by "conclusory" and to a lesser extent, "plausibility." Indeed, the decision's treatment of some of the plaintiff's allegations as factual and others as conclusory is particularly difficult to resolve.[89] In addition, to the extent that *Iqbal* announces a new pleading standard, it is to be expected that there will be difficulty adjusting, given the well-established *Conley* standard that governed pleading in the federal courts for several decades. Nonetheless, I want to suggest here that another distinct reason that interpreting *Iqbal* has posed significant difficulty is because the Court has, without clear acknowledgment, abandoned the historical understanding of the words "conclusory" and "plausible." Thus, it is not simply that the Court has ushered in a new pleading regime, but that the Court has done so without coming up with a new way of describing what pleading is for.

Let us start with the word "conclusory." If one looks at the use of the word in Supreme Court opinions prior to *Iqbal* and *Twombly*, the court distinguished between factual statements and conclusory assertions not at the pleading stage, but at procedural stages in which evidence was to be presented. Thus, in summary judgment opinions, the Court clarified that "conclusory" statements in affidavits were to be disregarded.[90] Indeed, in these cases the Court specifically distinguished between the Rule 12 stage of proceedings, at which conclusory statements were per-

88. *Id.*

89. In particular, *Iqbal* treats paragraph 69 of the complaint as factual and paragraph 96 as conclusory, but it is difficult to discern the structural difference between the two paragraphs. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

90. Doe v. Chao, 540 U.S. 614, 617-18 (2004) (on summary judgment, referring to evidence of emotional distress as "conclusory" because based only on plaintiff's allegations that he was "torn. . . all to pieces" and "greatly concerned and worried"); Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 181-84 (2000) (on summary judgment, distinguishing between affidavits and testimony of members of Friends of the Earth, and those in *Lujan* which were "conclusory"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885-89 (1990).

missible, and the Rule 56 stage, at which they were not.[91] The same point was made in the criminal procedure,[92] procedural due process,[93] and discovery[94] contexts: conclusory assertions have no role to play in affidavits, where evidence must be provided.

To the extent that the Court historically discussed the word "conclusory" in the context of pleadings, it was always with the understanding that conclusory allegations would suffice at the pleading stage.[95] The occasional Justice criticized the majority when it resolved constitutional questions on the pleadings, precisely because the only information available was based on "conclusory" allegations and not the factual evidence that would be developed through a hearing.[96] Indeed, the Court

91. *Lujan*, 497 U.S. at 885-89 ("As set forth above, Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. . . . [Rule 12(b)], unlike [Rule 56], presumes that general allegations embrace those specific facts that are necessary to support the claim.").

92. Illinois v. Gates, 462 U.S. 213, 276-77 (1983) (holding affidavit in support of search warrant cannot be based on conclusory assertions); Machibroda v. United States, 368 U.S. 487, 495-496 (1962) (finding, in habeas context, a hearing is not always required, "no matter how vague, conclusory, or palpably incredible his allegations may be."); United States v. MacCollom, 426 U.S. 317, 326-27 (1976) (plurality opinion) (finding, in habeas context, that in forma pauperis petitioner was not entitled to transcript because his allegations of ineffective assistance of counsel were "conclusory" and "naked" of any factual allegations—petitioner only said he had been denied effective assistance of counsel without any additional elaboration).

93. N. Ga. Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601, 606-07 (1975) (noting that pre-judgment seizure procedures were insufficient where statute only required "conclusory" allegations not based on any personal knowledge of the facts); Mitchell v. W.T. Grant Co., 416 U.S. 600, 605-06 (1974) (upholding pre-judgment attachment where affidavit is more than merely conclusory).

94. Schlagenhauf v. Holder, 379 U.S. 104, 116-19 (1964) (holding that, where Rules 34 and 35 required "good cause" for order requiring inspection of documents or physical examination of persons, it was not enough to base an order on "mere conclusory allegations of the pleadings").

95. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514-15 (2002) (rejecting defendant's argument that "allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits" and saying that Rule 8(a) can only be changed by amending federal rules or by Congress); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 124-26 (1979) (finding complaint sufficient although it was "more conclusory and abbreviated than good pleading would suggest").

96. Papasan v. Allain, 478 U.S. 265, 299 (1986) (Powell, J., concurring and dissenting in part) (criticizing court for accepting "conclusory" allegations that unequal spending on school districts created disparity); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 319 (1963) (Stewart, J., dissenting) (recognizing that although "conclusory allegations" are sufficient for procedural purposes at the pleading stage, there should be an evidentiary requirement to justify an order relating to the constitutionality of a statute); Griffin v. Illinois, 351 U.S. 12, 32-33 (1956) (Harlan, J., dissenting) (objecting to resolution of constitutional question (whether indigent defendants are entitled to free transcript of criminal proceedings for direct appeal) based solely on conclusory allegation of indigence).

even had an understanding that it would be unfair in certain contexts to ask more of plaintiffs because of the informational asymmetry that is present in so many cases challenging governmental conduct.[97] But allegations that were deemed so conclusory as to be disregarded were true legal conclusions: they simply stated the elements of a cause of action and no more, with no facts whatsoever.[98] In this light, an allegation was factual and non-conclusory so long as it could be proven or disproven by historical facts.[99]

One can go through the same exercise with "plausible," which the Court in *Twombly* and *Iqbal* says is something more than "possible" but less than "probable." In fact, as a historical matter, a claim or theory was "plausible" precisely when it was "conceivable" or "possible." This is brought to light most forcefully by considering equal protection challenges, in which the Court has routinely treated "plausible" synonymously with "possible" or "conceivable."[100] The Court has used the word in similar ways in the context of habeas claims.[101]

97. Comm'r v. Shapiro, 424 U.S. 614, 624-30 (1976) (holding, in Anti-Injunction Act proceeding involving tax collection, that it was sufficient for taxpayer to allege in conclusory fashion that there were not circumstances under which Government would prevail—Court reasoned that where Government has not provided a basis for its tax assessment, the taxpayer cannot plead any specific facts because they reside with the Government).

98. O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (finding "conclusory" allegations that "petitioners 'have engaged in and continue to engage in, a pattern and practice of conduct . . . all of which has deprived and continues to deprive plaintiffs and members of their class of their' constitutional rights and, again, that petitioners 'have denied and continue to deny to plaintiffs and members of their class their constitutional rights' by illegal bond-setting, sentencing, and jury-fee practices."); Black Unity League of Ky. v. Miller, 394 U.S. 100, 100-01 (1969) (per curiam) (terming conclusory allegations of "harassment" by the Kentucky Un-American Activities Committee; plaintiffs failed to respond to motion to dismiss and Court held that "in this procedural context the trial court could take appellants' conclusory allegations as insubstantial and could dismiss the complaint for failure to allege sufficient irreparable injury to justify federal intervention at this early stage."); W. E. B. DuBois Clubs of America v. Clark, 389 U.S. 309, 310-13 (1967) (dismissing claim for injunctive relief where Congress had provided procedures for challenging sanctions of the Subversive Activities Control Board and where complaint only contained "no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to 'harass' appellants and that harassment was the intended result of the Attorney General's announcement that he had filed a petition with the SACB"); Schilling v. Rogers, 363 U.S. 666, 676-77 (1960) (finding allegation that administrative action was "arbitrary and capricious" was conclusory).

99. *Cf.* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1091-95 (1991) (recognizing, in securities fraud action, that "conclusory" statements about the value of a stock (alleged to be false and misleading) are "factual" in the sense that they can be proven or disproven by historical facts).

100. Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528-29 (1959).

101. Engle v. Isaac, 456 U.S. 107, 122-23 (1982) (equating plausible with "colorable" in habeas case); Hopper v. Evans, 456 U.S. 605, 613-14 (1982) (referring to

The Court is not precluded from using words differently at different times. Nor is the Court precluded from abandoning a prior meaning of a word in the same context, as it may be doing here. But, particularly with its use of the word "conclusory," doing so without acknowledgment creates the potential for substantial confusion.

V. Empirical Data on Effect of *Iqbal*

It is still early in the game to assess the effect that *Iqbal* is having on lower court dockets, although one might predict that *pro se* litigants will have the greatest difficulty in overcoming its pleading burden. Data from Patricia Hatamyar, who looked at dismissal rates in published cases, suggests that there has been a significant impact on civil rights claims.[102] But looking at published case reports is incomplete.[103]

The Federal Judicial Center is in the midst of studying dismissal rates pre- and post *Iqbal* and *Twombly*, and although the results have not been finalized, preliminary data indicate some reason for concern. Most notably, in civil rights cases in which motions to dismiss were filed, the dismissal rate was about 26% before *Twombly* and 37% after *Iqbal*.[104] This reflects an absolute increase in the dismissal rates of 11%. Another way to express this is that motions to dismiss in civil rights claims were 40% more likely to be granted post-*Iqbal*.

But looking at dismissal rates has its own drawbacks. First, because cases are dismissed, one has no way of knowing whether the dismissals were "false negatives" or not. In other words, we do not know whether the cases that were dismissed would have ultimately succeeded or

"plausible" claim that defendant would have pursued a different strategy if he had received effective assistance of counsel).

102. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U.L. REV. 553, 556 (2010) (estimating that motions to dismiss were four times more likely to be granted after *Iqbal* as they were during the *Conley* era, after controlling for relevant variables); *see also* Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009) (showing effect of *Twombly* standard on published opinions regarding employment discrimination cases); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1837 (2008) (reporting a civil rights dismissal rate of 41.7% under the pre-*Twombly* standard and 52.9% under *Twombly*, using only reported cases between 2006 and 2007).

103. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 134, n.74 (2011).

104. *See* Statistics Division, Admin. Office of the U.S. Courts, *Motions to Dismiss Information on Collection of Data*, U.S. COURTS.GOV (revised July 28, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_081210.pdf.

failed. Second, the rate of dismissal is of limited utility if defendants are emboldened by decisions like *Iqbal* to bring motions to dismiss in contexts where they never would have been considered in the past. Thus, although the rate of dismissal may stay the same (or even decrease) after a case like *Iqbal*, this could obscure the fact that a broader range of cases are being subject to dismissal than before.

In response, I conducted a preliminary study aimed at determining whether we should expect "thinly" pleaded cases to be more or less likely to have ultimate merit than cases in which the pleadings have more detail. In other words, does the detail with which a claim is alleged correlate with the merit of the claim? There is very little empirical work that addresses this question, although Stephen Choi has looked at the heightened pleading standard of the PSLRA and demonstrated that it does not do a good job of filtering for merit.[105]

In the interest of time and space, I will briefly describe the methodology and outcome of the study. The methodology was comprised of three steps: first, I looked to appellate cases decided during the years 1990 to 1999 to identify a set of cases in which the pleadings would likely be subject to dismissal under an *Iqbal/Twombly* standard, but which were considered sufficient under *Conley*'s liberal rule; second, I followed those cases after they had been remanded to the district court to determine their ultimate resolution, generating an estimate of the "success"[106] of thinly pleaded cases during this time period; and third, I compared the rate of success in the thinly pleaded cases I identified with the success of all cases litigated during the same time period for which there are records supplied by the Administrative Office of the United States Courts ("Administrative Office").

The data, reported in the most recent volume of the Indiana Law Journal, suggest that dismissing based on thin pleading is not a very good way of filtering for merit.[107] This finding is consistent across case types, including prisoners' rights, employment discrimination, and other civil

105. *See* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that despite Congress's intent the PSLRA likely deterred the filing of a substantial number of meritorious cases).

106. The difficulty of settling on a precise measure of success cannot be overestimated, but compared to most empirical studies, I defined success narrowly as either a judgment or a settlement. *See, e.g.*, Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726-27 (1988) (including voluntary dismissals and dismissals for failure to prosecute, along with settlements and judgments, as successful outcomes).

107. *See* Reinert, *supra* note 103 at 161-66.

rights cases.[108] In essence, the data suggest that filtering for thin cases is almost like randomly dismissing cases—it will reduce caseloads, but if the idea is to focus judicial and other resources on "meritorious" cases, then there is no evidence (yet) that it works.

VI. Suggestions for Resolving Issues of Conclusoriness and Plausibility

As I suggested at the outset, in many ways it is too early to take the pulse of courts as to the significance of *Iqbal*. But the lower court decisions that have applied it so far suggest some troubling trends. First, there is a high level of confusion and discord in the lower courts. Applications of "conclusory" range far and wide, and even within the same courthouse there are varying interpretations. Uniformity and predictability in this area is important, if parties are to avoid costly and time-consuming motion practice. Nonetheless, there are important ways in which a holding that a particular allegation is conclusory may have limited impact on a litigant's ability to obtain relief. After all, as long as a plaintiff has leave to amend, it may be possible to replead in such a way as to avoid making conclusory allegations, especially where parties are represented by counsel; even the *Iqbal* Court acknowledged that factual allegations are to be taken as true and that all inferences are to be drawn in favor of the plaintiff.

Nonetheless, I think courts would be well-advised to begin discussing precisely what is meant and intended by reliance on "conclusory" as an indicator of whether an allegation will be credited or disregarded. One option is to focus on "conclusory" as a way of ensuring that a defendant receives sufficient notice of the relevant conduct that the plaintiff alleges violates the law. This is most likely the understanding of conclusory that is most consistent with history and prior precedent, but it is certainly in tension with *Twombly* and *Iqbal*. At the other extreme, courts may want to disregard conclusory allegations so as to force plaintiffs to disclose all of the information at their disposal at the beginning of the lawsuit. This reading of conclusory may be more consistent with *Iqbal*, but it also requires, as many lower courts have recognized, some moderation in situations where there is serious informational asymmetry.[109]

Dealing with plausibility raises difficult issues as well. If a court decides that a plaintiff's theory of relief is implausible in comparison to other alternative explanations, it is not obvious that the court's conclu-

108. *Id.* at 162.

109. Adam Steinman has some very useful commentary in this area. *See* Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

sion would change upon repleading. It therefore strikes me that it is worthwhile for litigants and courts to think carefully about the correct standard for plausibility. This may be accomplished by focusing on the relationship between the plausibility required by Rule 8 and the ultra-heightened pleading standard mandated by the Private Securities Litigation Reform Act (PSLRA). The same Term that the Supreme Court decided *Twombly*, it also announced *Tellabs Inc. v. Makor Issues & Rights*,[110] a case interpreting the pleading standard for the PSLRA. Specifically, the Court in *Tellabs* defined "plausibility" for the purposes of the PSLRA as equipoise: that is, if the plaintiff's theory of relief was "at least as compelling" as the alternative explanations, the complaint would survive a motion to dismiss under the PSLRA.[111] If we accept the common wisdom that the PSLRA sets up a super-heightened pleading standard (higher than the particularity required for fraud allegations under Rule 9(b)), then it follows that plausibility for the purpose of Rule 8 is met even if the plaintiff's theory is less plausible than alternative explanation. Indeed, it would be incoherent to interpret plausibility any other way: requiring that a plaintiff's theory be more plausible than alternatives would lead to the conclusion that Rule 8's pleading standard is more demanding than the PSLRA standard.[112]

The above interpretation of plausibility was recently adopted by a magistrate judge in the Eastern District of Texas.[113] The magistrate conducted an extensive analysis of the plausibility problem and concluded as follows:

> [T]he critical inquiry is whether a plaintiff's claim is "conceivable" (*not enough* for Rule 12) or "plausible" (*sufficient* for Rule 12). Iqbal, 129 S. Ct. at 1951. Logically, this leads one to conclude that in most instances, a plaintiff's factual allegations (and the associated inferences) need not tell a *more* plausible story than alternative explanations; at most, such allegations need only tell a story that is *as* plausible as the alternatives. Further, even when the story in a pleading's factual allegations is marginally *less* plausible, but still plausible, it should be sufficient for purposes of Rules 8 and 12. The majority in *Swanson* put it this way:
>
> > As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen.[114]

110. 551 U.S. 308, 324 (2007).

111. *Id.*

112. W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp., 344 F. App'x 717, 721 (2d Cir. 2009).

113. Escuadra v. Geovera Specialty Ins. Co., 739 F. Supp. 2d 967, 980 (E.D. Tex. 2010).

114. Swanson v. Citibank, 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original).

> The interpretation suggested above (i.e., that Rules 8 and 12 usually require factual allegations that tell a story as plausible as the alternatives) best accords with the varied levels of pleading within the federal system. There are three main levels of pleading: Rule 8, which is the most liberal; Rule 9(b), which requires heightened pleading for fraud and mistake (but not for other states of mind) and is *slightly elevated* compared to Rule 8; and the pleading required by statutes like the Private Securities Litigation Reform Act (PSLRA), which has been described as *"super heightened"* pleading. During the same term that the Supreme Court decided Twombly, it also announced *Tellabs Inc. v. Makor Issues & Rights*[115] . . . a case interpreting the pleading standard for the PSLRA. Specifically, *Tellabs* stated that to satisfy PSLRA pleading, the inference of *scienter* required for the cause of action must be "more than merely plausible or reasonable-it must be cogent and at least *as compelling as any opposing inference of nonfraudulent intent.*"[116]
>
> Thus, if the plaintiff's theory of relief is "at least as compelling" as the alternative explanations, a PSLRA complaint will survive a motion to dismiss. If, under a super heightened pleading regime, a plaintiff's factual allegations and liability theory must only be as plausible as alternative explanations, it is incoherent to suggest that Rule 8's standard is as high or even higher than the PSLRA by requiring a plaintiff in a normal liberal pleading regime to also provide facts that tell a *more* plausible story than alternative explanations. Requiring a plaintiff's theory to be more plausible than alternatives would mean that Rule 8's pleading standard is *more* demanding than the PSLRA. It also would disregard both *Twombly* and *Iqbal* which made clear that Rule 8 does not establish a probability requirement.[117]

It is also worthwhile to consider the Seventh Amendment and due process implications of dismissing a case on plausibility grounds.[118] The Seventh Amendment requires that, in all cases that would have been tried before a jury at common law, the jury's role to determine facts must be preserved.[119] The right to jury trial applies in employment discrimination actions, even for relief that has been characterized as equitable.[120] Thus, although the Court has discounted the Seventh Amendment implications of heightened pleading regimes created by Congress or the Federal Rules,[121] the *Iqbal* rule is the product of neither.[122] Obvi-

115. Tellabs Inc. v. Makor Issues & Rights, 551 U.S. 308 (2007).

116. *Tellabs Inc.*, 551 U.S. at 314 (emphasis added).

117. *Escuadra*, 739 F. Supp. 2d at 980-82 (footnotes omitted) (citations to Swanson v. Citibank, 614 F.3d 400, 404 (7th Cir. 2010), and Tellabs Inc. v. Makor Issues & Rights, 551 U.S. 308 (2007), omitted in text).

118. U.S. CONST. amend. VII.

119. *Id.*

120. Hetzel v. Prince William Cnty., 523 U.S. 208 (1998); Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990); Chauffeurs, Local No. 391 v. Terry, 494 U.S. 558 (1990).

121. *See Tellabs, Inc.*, 551 U.S. at 327 ("No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims.").

122. Indeed, to some extent the Court's hesitance to impose heightened pleading as a matter of judicial fiat, *see Swierkiewicz*, 534 U.S. at 515; Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1997), may reflect Seventh Amendment concerns.

ously, to the extent that a court is making, at the motion to dismiss stage, a factual determination that is constitutionally committed to the jury, there are significant Seventh Amendment concerns.[123] Whether application of an *Iqbal*-type standard always results in serious Seventh Amendment issues is not necessary to address here, but there are certain cases where courts may cross the Seventh Amendment line.

Finally, there are due process concerns whenever a court bases a decision on factors that have not been disclosed to the parties. Nearly every court of appeals has concluded that *sua sponte* dismissals for failure to state a claim are inappropriate without providing an opportunity to amend, unless there is no possibility that an amendment could cure the defect.[124] Thus, one could argue that just as a court would not issue a *sua sponte* dismissal without giving a plaintiff the opportunity to cure, so should a court be wary of dismissing a case based on undisclosed "judicial experience" or "common sense," without giving the pleader an opportunity to rebut whatever inferences may be drawn from those intuitions.

VII. Conclusion

Iqbal may ultimately prove to be a historic anomaly. It may be modified through legislation or through the Rules amendment process. It may also be with us for quite some time. However long its rule remains extant, it will play a significant role in mediating access to courts for civil rights and other litigants.

123. For a more developed argument on these lines, see Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009); Kenneth S. Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?* 88 NEB. L. REV. 467 (2010).

124. *See* Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 7 (1st Cir. 2007); Perez v. Ortiz, 849 F.2d 793 (2d Cir. 1988); Roman v. Jeffes, 904 F.2d 192, 196, n. 8 (3d Cir. 1990); Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (applying rule in habeas context); Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998); Wagenknecht v. United States, 533 F.3d 412, 417 (6th Cir. 2008); S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Co., 302 F.3d 667, 678 (7th Cir. 2002); Williams v. Dep't of Corr., 208 F.3d 681 (8th Cir. 2000); Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir. 1984); Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 806 (10th Cir. 1999); Clark v. Maldonado, 288 F. App'x. 645, 647 (11th Cir. 2008) (limiting to pro se complaints); Razzoli v. Fed. Bureau of Prisons, 230 F.3d 371, 377 (D.C. Cir. 2000). These cases often arise in the context of pro se complaints, but not every circuit has so limited the rule.