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The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard

Michael Eaton
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Michael Eaton*

I. INTRODUCTION

Anyone who has studied law in the past half century is familiar with Conley v. Gibson1 and the Federal Rules of Civil Procedure, which, together, eliminated the rigid code pleading system for civil complaints,2 and ushered in the modern era of “notice pleading.”3 The Supreme Court’s 2007 decision in Bell Atlantic Corp. v. Twombly,4 left many commentators wondering whether “[n]otice pleading is dead.”5 In Twombly, the Court articulated a new standard, which has come to be known as “plausibility pleading,”6 whereby a complaint must “state a claim to relief that is plausible on its face.”7 With its recent decision in Ashcroft v.
Iqbal, the Supreme Court appears to have placed the proverbial final nail in the notice pleading coffin, accepting the “plausibility standard” with open arms. The decision has created serious doubts about the efficacy of the notice pleading system and has raised concerns about plaintiffs’ constitutional rights to access courts.

On May 18, 2009 the Supreme Court delivered the Ashcroft v. Iqbal opinion, ruling that Iqbal—a Pakistani Muslim claiming constitutional violations stemming from his detention as part of a post-September 11th national security protocol—failed to allege factual allegations in his complaint sufficient to survive a motion to dismiss. While Iqbal is significant as a qualified immunity case against high-ranking government officials, the decision is most notable for its effects on the civil pleading standard. Across the country, civil proceduralists and litigators alike watched as the Supreme Court fully embraced the heightened pleading standard articulated in Twombly as the proper pleading standard under Federal Rule of Civil Procedure 8(a)(2). In the first two months following the decision, litigators cited to Iqbal as grounds for dismissing law suits more than five hundred times in what are now known as “Iqbal motions.” Iqbal also spawned a legislative response from Congress, with Senator Arlen Specter of Pennsylvania proposing a bill that would overturn Iqbal’s heightened pleading standard and revive the lower standard articulated in Conley v. Gibson.

More recently, Democratic lawmakers presented the Open Access to Courts Act of 2009, which expands on Senator Specter's proposed legislation by expressly overruling Iqbal and carefully crafting a laxer pleading standard akin to that in Conley.\(^{15}\)

This comment will analyze the competing interpretations of the Iqbal decision and evaluate the extent to which Iqbal altered the standard of pleading from the era of notice pleading.\(^{16}\) It will also examine the real world application of the Iqbal standard by analyzing three recent cases that were dismissed on Iqbal grounds.\(^{17}\) Regardless of which interpretation of Iqbal ultimately finds favor with legal scholars, Iqbal has unquestionably erected substantial barriers to the judicial system for certain plaintiffs that were nonexistent under the notice pleading regime.\(^{18}\) This comment will conclude by exploring various ways to remedy the problem of limited access to courts while balancing the competing institutional goal of preventing frivolous lawsuits from reaching trial.\(^{19}\)

The remainder of this comment is divided into five parts. Part II, which is divided into four subparts, will sketch the historical backdrop of Iqbal.\(^{20}\) Subpart A will look at the evolution of pleading standard jurisprudence, starting with the landmark case of Conley v. Gibson,\(^{21}\) and its progeny.\(^{22}\) Subpart B will analyze the abrupt shift in the pleading standard occasioned by Twombly, the immediate predecessor to Iqbal.\(^{23}\) Subpart C will open with a brief discussion of the Second Circuit's decision in Iqbal v. Hasty.\(^{24}\) This will be

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355 U.S. 41, 47 (1957) (holding that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim").


16. See infra Part IV.A.

17. See infra Part IV.B.

18. See Liptak, supra note 13, at A10; see also Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L. REV. 873, 875 (2009).

19. See discussion infra Part V.; see also Bone, supra note 18, at 875–76.

20. See infra Part II.


22. See infra Part II.A.

23. See infra Part II.B.

followed by an in-depth analysis of the Court’s decision in *Iqbal*, and the Court’s adoption of the “plausibility” pleading requirement from *Twombly*. Finally, subpart D will introduce three recent cases in which courts have applied the *Iqbal* standard in an inconsistent manner.25

Part III will introduce the major problem posed by the *Iqbal* decision: the possibility that meritorious claims will be screened out by the heightened *Iqbal* pleading standard, effectively denying plaintiffs the ability to access the courts for judicial redress.26 This section will also briefly examine the perceived effect the *Iqbal* decision has already had by looking at the response of practitioners and legal scholars.

Part IV is divided into two subparts. Subpart A will examine two competing interpretations of *Iqbal*: the conventional view27—that sees *Iqbal* as bringing about the end of notice pleading—and the competing view—that attempts to reconcile the Supreme Court’s abrupt shift in *Twombly*, with its earlier liberal pleading precedent.28 Subpart B will provide a cross section of the judicial application of the new pleading standard, analyzing the distinct and often inconsistent applications of this standard in the context of the three recent lower-court decisions introduced in Part II.D.29

In Part V, this comment will discuss various alternative means by which a balance can be struck between a heightened pleading standard and liberal access to the judicial system.30 It will also briefly highlight the legislative response to the *Iqbal* decision, including the legislative attempt to overturn *Iqbal* in favor of returning to the earlier “notice pleading” standard from *Conley*.

II. HISTORICAL BACKDROP OF *IQBAL*

A. Notice Pleading: Conley v. Gibson and its Progeny

The Federal Rules of Civil Procedure require that a complaint provide “a short and plain statement of the claim

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25. See infra Part II.D.
26. See infra Part III.
27. See infra note 108 and accompanying text.
28. Steinman, supra note 9, at 1351–56; see infra Part IV.A.
29. See infra Part IV.B.
30. See infra Part V.
showing that the pleader is entitled to relief.”

The adoption of the “short and plain statement” standard marked a significant departure from the rigid system of code pleading under which the complainant was burdened with pleading “ultimate facts rather than mere evidentiary facts or conclusions.” In the now iconic language from Conley, the Supreme Court coined the term “notice pleading,” holding that “all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” The Court emphasized that the Rules “do not require a claimant to set out in detail the facts upon which he bases his claim,” and instead allow a claimant to rely on discovery to “disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”

In the nearly half-century following Conley, the Supreme Court had several occasions to reconsider the pleading standard, each time refusing to heighten it beyond the notice pleading standard articulated in Conley. In Leatherman v. Tarrant County Narcotics and Coordination Unit, the Supreme Court was confronted with a heightened pleading standard crafted by the Fifth Circuit for civil rights claims alleging municipal liability. The Supreme Court upheld Conley in a unanimous opinion, restating Conley’s holding that “Rule 8(a)(2) requires that a complaint include only a short and plain statement of the claim showing that the pleader is entitled to relief.” The Court acknowledged that Rule 9(b) “does impose a particularity requirement in two specific instances,” but the Court refused the invitation to extend the heightened pleading requirement beyond those

32. See Spencer, supra note 5, at 434 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).
34. Id.
36. Leatherman, 507 U.S. at 165-66 (reiterating respondent’s argument that the Fifth Circuit’s heightened pleading standard was justified by protecting municipalities from time-consuming discovery in respondeat superior claims).
37. Id. at 168.
enumerated exceptions.\textsuperscript{38} Finally, the Court expressed deference to the Federal Rules Amendment process, indicating that “[i]n the absence of . . . an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”\textsuperscript{39}

The Court followed the same logic in \textit{Crawford-El v. Britton}, expressly rejecting a heightened pleading standard in a civil rights case brought by a prisoner against a corrections officer for alleged constitutional violations.\textsuperscript{40} Again, the Court expressed reluctance to use judicial authority to alter the Federal Rules of Civil Procedure, noting that its “cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”\textsuperscript{41} Cognizant of the problems of a lower pleading standard that could permit unmeritorious claims to proceed to trial, the Court suggested alternative means by which trial courts could handle frivolous lawsuits, especially claims against public officials who assert the defense of qualified immunity.\textsuperscript{42} The Court pointed to textual provisions of the Federal Rules of Civil Procedure that could minimize or prevent potentially burdensome discovery, including ordering a reply to the defendant’s answer under Rule 7(a), or granting motions for more definite statements pursuant to Rule 12(e).\textsuperscript{43} Finally, and of greater importance to the later decision in \textit{Iqbal}, the Court suggested the possibility of requiring “specific, nonconclusory factual allegations” in suits against government officials alleging unconstitutional motive.\textsuperscript{44} Nevertheless, despite acknowledging the relative ease with which a plaintiff can allege an unconstitutional motive and the corresponding difficulty of disproving such a

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} (refusing to extend FRCP 9(b) particularity requirements beyond claims of fraud or mistake).
\item \textsuperscript{39} \textit{Id.} at 168–69.
\item \textsuperscript{40} \textit{Crawford-El}, 523 U.S. at 594 (“Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself.”).
\item \textsuperscript{41} \textit{Id.} at 595.
\item \textsuperscript{42} \textit{Id.} at 597–98.
\item \textsuperscript{43} \textit{Id.} at 598. \textit{See} FED. R. CIV. P. 7(a), 12(e).
\item \textsuperscript{44} \textit{Crawford-El}, 523 U.S. at 582–83.
\end{itemize}
motive, the Court rejected a heightened standard of proof.45

More recently, in Swierkiewicz v. Sorema,46 the Supreme Court decided whether a heightened pleading standard should apply in the context of an employment discrimination claim brought under Title VII of the Civil Rights Act of 1964.47 In a unanimous opinion by Justice Thomas, the Court held that "complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a),"48 and must merely "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."49 The Court emphasized that "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits," stating that "[i]ndeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."50 Thus, after Swierkiewicz, the proper role of the courts at the pleading stage is to inquire whether the complaint states a claim upon which relief can be granted assuming that the allegations in the complaint are ultimately proven true.51 As it did in both Leatherman and Crawford-El, the Court once again acknowledged the judiciary's lack of authority to rewrite the pleading standard, emphasizing that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"52

B. Plausibility Pleading: Bell Atlantic Corporation v. Twombly

With its decision in Bell Atlantic Corp. v. Twombly, the Supreme Court seemingly upended fifty years of case law precedent, which had consistently held that a complaint should not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which

45. Id. at 597–99.
47. Id. at 509.
48. Id. at 513.
49. Id. at 512 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
50. Id. at 515 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).
51. Id. at 508 n.1.
would entitle him to relief.” In Twombly, the plaintiffs brought an anti-trust class action suit against incumbent local telephone and internet exchange carriers under section 1 of the Sherman Act. In a split decision, the Court dismissed the plaintiffs’ claim at the pleading stage, finding the complaint contained mere “allegation[s] of parallel conduct and a bare assertion of conspiracy,” which failed to “nudge[] their claims across the line from conceivable to plausible.” With this holding came the advent of “plausibility” pleading, under which a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”

In response to the argument that the Court’s analysis disregarded earlier precedent, the Court explained that, in practice, Conley’s “no set of facts” standard had fostered confusion, and garnered criticism by judges and commentators who “have balked at taking the literal terms of the Conley passage as a pleading standard.” The Court held that the Conley standard “is best forgotten as an incomplete, negative gloss on an accepted pleading standard,” because it would permit a complaint to survive despite the absence of a “reasonably founded hope” that a plaintiff would be able to make a case. In support of the “plausibility” standard, the

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54. Bell AtI. Corp. v. Twombly, 550 U.S. 544, 548 (2007). As stated by the Court, the issue in the case was “whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.” Id. (referencing the Sherman Act, 15 U.S.C. § 1 (West 2006)).
55. Id. at 556, 570.
56. Martinez, supra note 53, at 763.
57. Twombly, 550 U.S. at 570.
58. Plaintiffs argued—citing Swierkiewicz, the most recent case on pleading standards at the time—that similar to claims in the context of employment discrimination, the complaint here need not contain specific facts alleging a prima facie case. Id. at 569. Plaintiffs asserted that “transposing ‘plus factor’ summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise.” Id.
59. Id. at 562.
60. Id. at 563.
61. Id. at 562 (quoting Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
majority reasoned that the standard "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"62

C. The Iqbal Decision: Plausibility Pleading Goes Mainstream

In the immediate wake of Twombly, there were questions about the efficacy of the Court's newly adopted "plausibility" standard outside the antitrust context.63 Confusion within the legal community was compounded by the Court's decision in Erickson v. Pardus,64 in which the Court, just three weeks after Twombly, upheld the sufficiency of a complaint without mentioning the plausibility standard.65 Critics of the new plausibility standard voiced concern that the heightened standard would have an adverse effect on plaintiffs' right to access courts,66 and "[c]oncerns about Twombly have been exacerbated by Iqbal, which eliminated any hope that Twombly might be narrowly confined to complex antitrust cases."67 In Iqbal, Justice Kennedy's majority opinion dispelled any confusion, explicitly holding that, though Twombly involved alleged antitrust violations, "[t]he decision . . . expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."68

In Iqbal, a Pakistani Muslim named Javid Iqbal claimed law enforcement subjected him to unconstitutional actions while he was confined in the Metropolitan Detention Center in Brooklyn, New York.69 Following the September 11, 2001 terrorist attacks, the FBI and Immigration and Naturalization Service arrested Iqbal on charges of fraud and conspiracy to defraud the United States in relation to his identification documents.70 While confined, Iqbal was

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62. Id. at 557 (quoting FED. R. CIV. P. 8(a)(2)).
65. Bone, supra note 18, at 883.
66. Id. at 875–76.
67. Steinman, supra note 9, at 1296.
70. Id. at 147–48, 148 n.1.
designated a “high interest” inmate and separated from the general prison population in a maximum security special housing unit, where prison guards allegedly subjected him to excessive searches and unconstitutional conditions. In response to his detention, Iqbal filed suit against various government officials, including Attorney General John Ashcroft and FBI Director Robert Mueller.

Iqbal’s complaint alleged that, as part of the FBI’s investigation into the September 11th attacks, “all Arab Muslim men arrested on criminal or immigration charges . . . however unrelated the arrestee was to the investigation—were immediately classified as of interest,” and that defendants had “designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution.” Iqbal identified John Ashcroft as “a principal architect of the policies and practices challenged here . . . [who] authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which [plaintiffs

71. Iqbal, 129 S. Ct. at 1943–44. The Special Housing Unit incorporated the maximum security conditions allowable under Federal Bureau of Prisons regulations, and detainees were kept in lockdown twenty-three hours per day, and allowed little more than an hour outside their cells, during which they were restrained by handcuffs and leg irons, and accompanied by a four-officer escort. Id. at 1943. Iqbal alleged that while detained, jailors “kicked him in the stomach, punched him in the face, and dragged him across” his cell without justification [and] subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others and refused to let him and other Muslims pray because there would be “[n]o prayers for terrorists.” Id. at 1944 (citations omitted).

72. Hasty, 490 F.3d. at 147. Iqbal filed a “Bivens action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 ‘John Doe’ federal corrections officers.” Iqbal, 129 S. Ct. at 1943 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)). In addition to defendants Ashcroft and Mueller, Iqbal also filed suit against Michael Rolince, former Chief of the FBI’s International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in charge of the FBI’s New York Field Office; Kathleen Hawk Sawyer, former Bureau of Prisons (“BOP”) Director; David Rardin, former Director of the Northeast region of the BOP; Michael Cooksey, former Assistant Director for Correctional Programs of the BOP; Dennish Hasty, former Metropolitan Detention Center (“MDC”) Warden; and Michael Zenk, MDC Warden. Hasty, 490 F.3d. at 148.


74. Iqbal, 129 S. Ct. at 1944.
were detained."\textsuperscript{75} Similarly, Iqbal alleged that Robert Mueller, "[a]s FBI Director, . . . was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here."\textsuperscript{76} The complaint specifically claimed that defendants "each knew of, condoned, and willfully and maliciously agreed to subject [p]laintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest."\textsuperscript{77} The defendants, including Ashcroft and Mueller, filed motions to dismiss the twenty-one claims asserted in the complaint, but the district court held that most of these claims were not amenable to resolution on a motion to dismiss.\textsuperscript{78}

On appeal in \textit{Iqbal v. Hasty}, the Second Circuit first addressed the issue of the applicable pleading standard in the wake of the recent \textit{Twombly} decision.\textsuperscript{79} The court interpreted the "conflicting signals" regarding the pleading standard as

\begin{footnotesize}
\textsuperscript{75} First Am. Complaint, \textit{supra} note 73, ¶10. Iqbal was initially joined by co-plaintiff Ehab Elmaghraby, an Egyptian Muslim, who subsequently settled with the United States for $300,000, and thus did not participate in the appeal. \textit{Hasty}, 490 F.3d at 147, \textit{rev'd sub nom} Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

\textsuperscript{76} First Am. Complaint, \textit{supra} note 73, ¶ 11.

\textsuperscript{77} Id. ¶ 96.

\textsuperscript{78} Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sep. 27, 2005). The district court denied defendants' motions to dismiss on the following claims: Claim 1, Fifth Amendment substantive due process claim based on the conditions of confinement; Claim 2, Fifth Amendment procedural due process claim based on confinement in ADMIAX SHU; Claims 3–4, Fifth and Eighth Amendments excessive force claims; Claim 5, Sixth Amendment interference with right to counsel claim; Claims 6–7, Fifth and Eighth Amendments denial of medical treatment claims; Claim 8, conditions of confinement claim; Claim 10, First Amendment claim based on interference with religious practice; and Claim 21, Alien Tort Claims Act claim. The district court granted defendants' motions to dismiss the following claims: Claim 13, Religious Freedom Restoration Act (RFRA) claim based on conditions of confinement; and Claims 14–15, RFRA claims based on interference with religious practice and excessive force. The court granted in part and denied in part the defendants' motions to dismiss on the following claims: Claim 9, Fourth Amendment unreasonable search claim based on strip and body-cavity searches; Claim 11, First Amendment claim based on religious discrimination; Claim 12, Fifth Amendment race-based equal protection claim; Claims 16–17, 42 U.S.C. § 1985(3) claims for conspiracy to deprive the plaintiff of equal protection on the grounds of religion, race, and national origin. \textit{Id}. Defendants appealed the district court's denial of their motions to dismiss on qualified immunity grounds. \textit{Hasty}, 490 F.3d at 151.

\end{footnotesize}
“not requiring a universal standard of heightened fact pleading,” but rather a “flexible ‘plausibility standard.’”\textsuperscript{80} Despite acknowledging the importance of protecting public officials from undue harassment by litigation, the court concluded that “a heightened pleading rule may not be imposed.”\textsuperscript{81} Next, turning to Iqbal’s complaint, the court acknowledged that “some of the allegations in the [p]laintiff’s complaint . . . are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement”; but, nonetheless, it found the allegations sufficient.\textsuperscript{82} Explicitly recognizing the low hurdle a complaint must surmount to survive a motion to dismiss, the court noted that it “need not consider at [that] stage of the litigation whether [the] allegations [were] alone sufficient to state a clearly established constitutional violation.”\textsuperscript{83} Finally, the Second Circuit found the allegations against Ashcroft and Mueller sufficient to “satisf[y] the plausibility standard without an allegation of subsidiary facts because of the likelihood that [the] senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested . . . and designated ‘of high interest’ in the aftermath of 9/11.”\textsuperscript{84}

In \textit{Ashcroft v. Iqbal}, the Supreme Court similarly began with an analysis of pleading standard jurisprudence in light of \textit{Twombly}, identifying two main principles as underlying the plausibility pleading standard.\textsuperscript{85} First, the Court held that the basic principle that a court must accept all allegations in a complaint as true applies only to factual allegations and not legal conclusions.\textsuperscript{86} While recognizing that “legal conclusions can provide the framework of a complaint,” the Court emphasized that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”\textsuperscript{87} Despite the fact that Rule 8 marks a notable departure from the hyper-technical

\textsuperscript{80.} \textit{Hasty}, 490 F.3d. at 157–58.  
\textsuperscript{81.} \textit{Id}. at 158.  
\textsuperscript{82.} \textit{Id}.  
\textsuperscript{83.} \textit{Id}. at 175.  
\textsuperscript{84.} \textit{Id}.  
\textsuperscript{86.} \textit{Id}.  
\textsuperscript{87.} \textit{Id}. at 1949.
code pleading, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 88 The Court rejected the argument that it was imposing a Rule 9(b) particularity requirement, when Rule 8 only requires malice, intent, and knowledge to be alleged generally. 89 "Generally," the Court reasoned, "is a relative term," and the fact that plaintiff's allegations do not fall within the heightened pleading standard of Rule 9(b) "does not give him license to evade the less rigid—though still operative—strictures of Rule 8." 90 Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss," a determination that requires a context specific analysis by the trial judge, who must rely on his or her "judicial experience and common sense." 91

Applying the Twombly pleading standard to Iqbal's complaint, the Court began its opinion by addressing those allegations that it deemed were "not entitled to the assumption of truth." 92 First, the Court found insufficient the charge that defendants

"[K]new 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" . . . [,] that Ashcroft was the "principal architect" of this invidious policy . . . , and that Mueller was "instrumental" in adopting and executing it. 93

The Court found that the complaint, instead of sufficiently pleading conspiracy, amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." 94 The Court clarified that it was not rejecting the allegations on the ground that they were unrealistic or nonsensical, but rather because of their "conclusory nature . . . , [which] disentitles them to the presumption of truth." 95

Next, the Court applied the plausibility standard to the

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88. Id. at 1949–50.
89. Id. at 1954; see also Fed. R. Civ. P. 8.
90. Iqbal, 129 S. Ct. at 1954 (quoting Fed. R. Civ. P. 9(b)).
91. Id. at 1950.
92. Id. at 1951.
93. Id. (quoting First Am. Complaint, supra note 73, ¶¶ 10–11).
94. Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
95. Id.
remaining allegations against Rumsfeld and Mueller. The Court addressed the claim that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by [d]efendants [Ashcroft and Mueller] in discussions in the weeks after September 11, 2001."96 While acknowledging that, taken as true, these contentions were consistent with the complaint’s allegations that plaintiffs were singled out on account of their race, religion, or national origin, the Court found that “given more likely explanations [of national security and public safety], they do not plausibly establish this purpose.”97 The Court further noted that “[a]s between th[e] ‘obvious alternative explanation’ for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”98 Thus, given the more probable explanations, the Court refused to accept Iqbal’s unsubstantiated allegation that defendants adopted the policy with the intent to discriminate.100

The majority identified an additional deficiency in the Iqbal complaint, noting that even if the complaint had given rise to a plausible inference of unconstitutional discrimination, the facts alleged would go to the unconstitutionality of the arrest and detention, not the alleged discriminatory policy.101 Since the plaintiff’s claims alleged an unconstitutional policy based on race, religion and national origin classifications, the complaint needed to contain facts plausibly showing that defendants purposely adopted such discriminatory policies.102 The Court distinguished Twombly, where the actions of subordinates

97. Id. (quoting First Am. Complaint, supra note 73, ¶ 69).
98. Id.
99. Id. at 1951–52 (citation omitted). The Court noted that any legitimate policy directing law enforcement to detain individuals because of their suspected link to the September 11, 2001 attacks would produce a disparate, incidental impact on Arab Muslims, despite the fact that the purpose of the policy was not to target Arabs or Muslims specifically. Id.
100. Id.
101. Id. at 1952.
could bind corporate defendants under the doctrine of *respondeat superior*, since no similar theory of liability applied for the government defendants. Accordingly, the failure of plaintiffs’ complaint to allege a factual basis sufficient to plausibly suggest defendant's discriminatory state of mind failed to "‘nudge[] [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”

**D. Plausibility Pleading Post-Iqbal**

Following the Supreme Court’s decision, *Iqbal* motions to dismiss became commonplace in federal courts with remarkable speed and success. Five hundred cases cited *Iqbal* in the two months following the decision, and the number of citations exploded to nearly three thousand by mid-summer 2009. Three major cases dismissed on *Iqbal* grounds included a suit against a major pharmaceutical company and makers of the antipsychotic drug Seroquel, a claim under the Alien Tort Statute and Torture Victims Protection Act against Coca-Cola, and a claim by a Muslim woman challenging the Federal government’s no-fly list as unconstitutional profiling. The varying interpretations of *Iqbal*, as illustrated by these three cases, will be analyzed in the latter part of this comment.

**III. THE HEIGHTENED PLEADING STANDARD: SHUTTING THE DOOR TO MERITORIOUS CLAIMS?**

The pleading stage marks the entry point for individual

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103. Id.
104. Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
105. Mauro, supra note 13.
106. Liptak, supra note 13, at A10.
access to the judicial system, which is inextricably linked to the distribution of social and political power within our society. Consequently, heightening the pleading standard not only affects the ability of individual plaintiffs to proceed to court-supervised discovery, present evidence to a judge or jury, and obtain a judicial remedy: it also triggers intense societal controversy over the judicial system’s accessibility. Proponents of a heightened pleading standard point to abuses of the liberal pleading system where “meritless plaintiffs ... are able to get past the pleading stage and use the threat of discovery to leverage a large settlement.” Yet opponents note that substantive information about the defendant’s wrongdoing is often not available to plaintiffs. Certain types of plaintiffs, especially those “claiming they were the victims of employment discrimination, a defective product, an antitrust conspiracy or a policy of harsh treatment in detention may not know exactly who harmed them and how before filing suit ... [b]ut [these] plaintiffs can learn valuable information during discovery.” Undoubtedly, Iqbal has generated a growing policy debate that pits advocates of a liberal pleading standard against those who perceive plausibility pleading as a way of weeding out “weak or frivolous lawsuits,” and reducing the federal courts’ caseloads. Some commentators are also concerned that Iqbal’s heightened pleading standard contravenes the Seventh Amendment’s guarantee of a jury trial in civil cases.

Despite the ongoing policy debate, both sides can agree that after Iqbal the pleading standard is notably higher, and a plaintiff seeking judicial redress must satisfy a “skeptical judicial gatekeeper.” Plaintiffs face a Catch-22 situation under the Iqbal standard, whereby a complaint must state enough factual matter to satisfy the plausibility standard and proceed to discovery, but must do so without the benefit of

111. Bone, supra note 18, at 875.
112. See Steinman, supra note 9, at 1294; see also Bone, supra note 18, at 875.
113. Bone, supra note 18, at 887.
114. See Liptak, supra note 13, at A10.
115. Id.
116. See Mauro, supra note 13.
117. See id.
118. Liptak, supra note 13, at A10.
discovery to gather that information. Accordingly, a remedial measure is necessary to effectively balance the right of plaintiffs to judicial redress while preventing opportunistic claimants from abusing the judicial system.

IV. COMPETING INTERPRETATIONS AND INCONSISTENT APPLICATIONS OF IQBAL

A. Differing Views of Iqbal

While Iqbal appears to have retired notice pleading wholesale, a growing scholarly debate has emerged over the proper interpretation of Iqbal’s effect on pleading standards. The “conventional interpretation” views Iqbal as creating a new role for the trial judge as a “skeptical judicial gatekeeper,” whom the complainant must satisfy before proceeding to the discovery phase. This interpretation is based, in part, on the Iqbal majority’s observation that determining plausibility will require the trial court to “draw on its judicial experience and common sense.” Many have interpreted this phrase as instilling the power to dismiss a claim in the trial judge “simply because the allegations strike him or her as implausible—not based on any testimony or other evidence.”

The generally accepted interpretation also posits that the heightened plausibility pleading standard is a Catch-22, whereby plaintiffs with meritorious claims may need discovery to uncover sufficient factual basis to support their claims; however, faced with heightened pleading standards, their claims are likely to be dismissed for lack of factual basis before they are permitted to proceed to the discovery phase.

119. See Mauro, supra note 13.
120. See Steinman, supra note 9, at 1296–97.
121. Due to the relative recency of the Iqbal decision, the general interpretation has not yet yielded many law review articles, but has garnered considerable attention in the legal news and on legal blogs. Adam Steinman differentiates between the widely accepted interpretation of Iqbal and his proposed interpretation, referring to the former as the “conventional reading of Twombly and Iqbal.” Id. at 1310.
122. Liptak, supra note 13, at A10.
124. Steinman, supra note 9, at 1310.
125. See Mauro, supra note 13.
Legal scholars have noted that a stricter pleading standard "risks screening out meritorious cases when investigation costs are too high for plaintiffs to obtain the necessary information before filing." 126 Furthermore, there may be "information asymmetries" between the parties that significantly disadvantage certain types of plaintiffs. 127 A case in point is Mr. Iqbal, an incarcerated Pakistani Muslim, suing Mr. Ashcroft and Mr. Mueller, two national security titans with vastly superior access to information. 128

In his article, entitled The Pleading Problem, Professor Adam N. Steinman of the University of Cincinnati College of Law offers a competing interpretation of Iqbal. 129 Despite the conventional view that Iqbal and Twombly disregarded fifty years of notice pleading precedent, Professor Steinman advances two core principles to support his proposal that these cases are actually consistent with the Supreme Court's longstanding notice pleading approach. 130

First, Professor Steinman argues that the proper initial inquiry under Iqbal and Twombly is whether an allegation is conclusory, as opposed to a freeform assessment of plausibility. 131 So long as an allegation is not conclusory, it is entitled to a presumption of validity without inquiry into its plausibility. 132 Accordingly, under Professor Steinman's interpretation, it is possible to avoid the plausibility inquiry entirely when the complaint contains "nonconclusory allegations on every element of the claim for relief." 133 Professor Steinman suggests that a complaint that provides non-conclusory allegations on every element of the claim "by

128. See Iqbal, 129 S. Ct. at 1942. Of course, Iqbal implicates other issues in addition to informational inequalities. Specifically, the role of the qualified immunity defense for high-ranking government officials which "free[s] officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" Id. at 1953 (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991)).
129. Steinman, supra note 9, at 1298.
130. Id.
131. Id. at 1314–15.
132. Id. at 1316 (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), rev'g Iqbal v. Hasty, 490 F.3d 143 (2009)).
133. Id.
definition, exceeds the threshold of plausibility.”

As applied to Iqbal and Twombly, Steinman believes the Court dismissed the claims in both cases because they were conclusory, not because they were implausible.

Professor Steinman sees irony in the conventional interpretation of Iqbal and Twombly, which views plausibility as a threat to the liberal pleading system. Steinman notes that “[o]nly conclusoriness is grounds for refusing to accept an allegation as true” whereas “[p]lausibility is grounds for assuming as true something that is not validly alleged in the complaint.” Thus, unlike conclusory allegations, which are “destructive” because they justify disregarding an allegation, plausibility is “generative,” because it “justifies creating an allegation that is not validly made in the complaint.”

Contrary to the conventional interpretation, therefore, Steinman argues that “the plausibility aspect of Twombly and Iqbal makes the pleading standard more forgiving, not less.”

Second, the vast majority of the pre-Twombly case law remains good law. The Twombly decision unequivocally “retired” the Conley “no set of facts” maxim, however, as

134. Id. However, this interpretation may be subject to attack on the grounds that it confuses the concepts of plausibility and possibility. The Twombly court differentiated between “conceivable” and “plausible,” holding that the latter is necessary to survive the pleading stage; however, it may be possible for a complaint to contain non-conclusory allegations on every element, yet not satisfy the threshold “plausibility” requirement. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

135. Steinman, supra note 9, at 1316. (arguing that the Iqbal court disregarded the conclusory allegations of Ashcroft and Mueller’s discriminatory motive, leaving no allegations of such motive remaining, and in Twombly, after the conclusory allegations of illegal agreement were excised, the remaining allegations failed to sufficiently allege a cause of action under the Sherman Act).

136. Id. at 1318–19.

137. Id. at 1319.

138. Id. (explaining that plausibility provides the grounds for the court to assume something is true, despite the fact that it may not have been properly pleaded).

139. Id.

140. Id. at 1320–21 (arguing that important pre-Twombly decisions have not been overruled and thus remain good law, but not specifically addressing Leatherman).

141. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007) (retiring the standard 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
the *Twombly* majority indicates, trial courts rarely took this language literally. Moreover, neither *Twombly* nor *Iqbal* suggest that the Court is now claiming the power to judicially amend the Federal Rules of Civil Procedure, especially given the Court's deference to the Rules Amendment process in earlier decisions.

Furthermore, Professor Steinman notes that the text of the Federal Rules of Civil Procedure and judicial precedent preclude an interpretation of *Iqbal* that would disregard allegations as conclusory solely because the truth of the allegation is not supported by another allegation in the complaint. The very nature of the complaint is such that it contains only allegations and, thus, requiring evidentiary support for each allegation would result in entire complaints being deemed conclusory. The Federal Rules lend support to this view, because a strict evidentiary requirement at the pleading stage conflates the distinction between a motion to dismiss and a motion for summary judgment, with only the latter requiring sufficient evidence to support a claim. Additionally, Professor Steinman points to Rule 11, under which the filer of any document certifies that it is factually supported or will be after an opportunity for discovery, as proof that discovery may be necessary to substantiate an allegation. Similarly, in *Swierkiewicz*, which Professor Steinman argues has not been overruled, the Court expressly rejected the suggestion that a complaint must indicate the availability of supporting evidence because the discovery process "might reveal evidence of discrimination that was not support of his claim which would entitle him to relief").

142. Id. at 562; see also Steinman, supra note 9, at 1331.
143. Steinman, supra note 9, at 1320.
145. Steinman, supra note 9, at 1328–33.
146. Id. at 1329.
147. Id. at 1330 ("If we graft an evidentiary requirement onto the pleadings phase, a Rule 12(b)(6) motion would force a plaintiff, prior to any opportunity for discovery, to present supporting evidence that normally would not be needed until a summary judgment motion was filed.").
148. Id. at 1331 (providing that "factual contentions have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery") (citing Fed. R. Civ. P. 11).
yet known.”

Finally, Professor Steinman refutes the contention that *Iqbal* requires a complaint to contain extensive detail about the acts or events that it alleges. Professor Steinman purports that the form complaints in the Federal Rules of Civil Procedure support this view. Specifically, Form 18 (for patent infringement) and Form 17 (for breach of contract to convey land) deem sufficient general allegations without substantial factual bases. This suggests that the conventional interpretation of *Iqbal* as radically altering the pleading standard is not necessarily accurate because *Iqbal* and *Twombly* can be read as consistent with the Supreme Court’s longstanding notice pleading approach. As discussed in the next section, however, Professor Steinman’s approach, despite being well-reasoned, is not wholly reflected in the case law that has emerged since *Iqbal*.

**B. Application of “Plausibility Pleading” Post-Iqbal**

Three post-*Iqbal* cases offer examples of the inconsistent application of the plausibility pleading standard. An early application—Pennsylvania Employees Benefit Trust Fund v. Astrazeneca Pharmaceuticals—offered a straightforward “conventional” application of the Supreme Court’s *Iqbal*...
pleading standard. In Astrazeneca, the plaintiff, a state-operated health and welfare trust fund, brought claims against Astrazeneca, the maker of an antipsychotic drug, for fraudulent marketing practices, resulting in the submission of medically unnecessary claims for the drug to plaintiff, as well as costs to the plaintiff because of the drug's adverse health consequences. Plaintiff's complaint specifically alleged that through defendant's labeling, sales, marketing, and "documents given or shown to physicians treating [Pennsylvania Employees Benefit Trust Fund] participants and/or PEBTF itself," defendant expressly warranted the drug. Furthermore, the complaint alleged that defendant warranted that Seroquel was fit and appropriate to treat conditions other than those for which the drug was approved, was fit for pediatric use, had no significant side effects other than those identified on the label, and was safer and more effective than less expensive alternative treatments.

The district court held that, because they were conclusory, the allegations in the complaint failed to meet the Iqbal standard of pleading. The court first disregarded the claim that defendant had contacted plaintiff directly, characterizing it as a "naked assertion . . . [that was] vaguely stated . . . [and] entirely unsupported by facts contained elsewhere in the complaint." Consistent with Iqbal, the court held that it "need not credit [p]laintiff's bald allegations . . . for purposes of the motion to dismiss." Likewise, the court dismissed the allegation that the warranty was communicated to plaintiff through intermediary physicians. The trial judge specifically noted that the complaint was "devoid of facts indicating whether and how [p]laintiff itself became apprised of the alleged promises made by defendant . . . and, further, how such alleged promises became part of the 'basis of the bargain' with respect to

159. Id. at *2.
160. Id. at *4.
161. Id. at *4–5.
162. Id. at *8.
163. Id.
165. Id. at *10.
while short of satisfying Iqbal, the complaint would likely have stated enough under Swierkiewicz, the immediate predecessor to Twombly, because it "states a claim upon which relief can be granted assuming that the allegations in the complaint are ultimately proven true." Accordingly, the district court's literal application of Iqbal resulted in the dismissal of a complaint that might otherwise have survived pre-Iqbal.

One recent Eleventh Circuit case, Sinaltrainal v. Coca-Cola, offers a unique example of Iqbal's application, because it marks the intersection of the Iqbal pleading standard and a strictly-defined statutory cause of action. It is also notable for the court's seemingly inconsistent application of the Iqbal standard. In Sinaltrainal, the plaintiffs, who were Columbian trade union leaders, claimed that their employers, Coca-Cola bottlers, collaborated with paramilitaries and local police to murder and torture plaintiffs in violation of federal law. Originally, plaintiffs filed a single complaint; later, however, they amended it and divided it into four separate complaints. Each plaintiff brought a cause of action under the Alien Tort Statute; however, three plaintiffs alleged a conspiracy between the bottling facility management and paramilitaries, which the court considered together, while the fourth alleged a conspiracy with local police, which the court considered separately.

After restating the holdings of Iqbal and Twombly, the court applied the heightened standard to the cause of action brought by the three plaintiffs alleging a conspiracy between the bottlers and paramilitaries. Under the statute,

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166. Id. at *11–12
167. Steinman, supra note 9, at 1334 (citing Swierkiewicz v. Sorema, 534 U.S. 506, 508 n.1 (2002)).
168. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261–65 (11th Cir. 2009) (deciding causes of actions under both the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350, both of which have clearly defined elements and have been the subject of extensive judicial interpretation).
169. See id. at 1266–69.
170. Id. at 1257.
171. Id. at 1258.
172. Id.
173. Id. at 1260–61.
plaintiffs bore the burden of pleading that the paramilitaries, who allegedly committed the murders and torture, did so under color of law as state actors.\textsuperscript{174} The plaintiffs' complaints alleged that the paramilitary are "permitted to exist," and that "it is universally acknowledged that the regular military and the civil government authorities . . . tolerate the paramilitaries, allow them to operate, and often cooperate, protect and/or work in concert with them."\textsuperscript{175} Consistent with \textit{Iqbal}, the court found the allegations conclusory, not entitled to a presumption of truth and, thus, insufficient to allege state-sponsored action in contravention of the statute.\textsuperscript{176} The court's application of \textit{Iqbal} to the first three plaintiffs' causes of action under the Alien Tort Statute was sound because plaintiffs' allegations amounted to no more than "formulaic recitation that the paramilitary forces were in a symbiotic relationship and were assisted by the Columbian government."\textsuperscript{177}

The remaining cause of action alleged a conspiracy between the bottling facility's management and the local police, rather than the paramilitary.\textsuperscript{178} The complaint alleged that after plaintiffs participated in an organized labor strike against the bottling plant management, the chief of security for the plant falsely accused plaintiffs of planting a bomb in the facility, causing the plaintiffs' arrest and detention.\textsuperscript{179} The complaint further alleged that while in custody, plaintiffs were brutally beaten, threatened at gunpoint, and incarcerated for six months on false charges until they were released after a prosecutor found the charges to be baseless.\textsuperscript{180}

Since the complaint provided more than "[t]hreadbare recitals of the elements of a cause of action," \textit{Iqbal} commands that the court "must accept [it] as true;"\textsuperscript{181} however, the

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  \item \textsuperscript{174} \textit{Id.} at 1266.
  \item \textsuperscript{175} Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1266 (11th Cir. 2009).
  \item \textsuperscript{176} \textit{Id.}\n  \item \textsuperscript{177} \textit{Id.} (explaining that Colombia's mere "registration and toleration of private security forces does not transform those forces' acts into state acts") (citation omitted).
  \item \textsuperscript{178} \textit{Id.} at 1267.
  \item \textsuperscript{179} \textit{Id.} at 1267–68.
  \item \textsuperscript{180} \textit{Id.} at 1268.
\end{itemize}
Eleventh Circuit appeared to jump directly to the "plausibility" of the complaint.\textsuperscript{182} Rather than inquire into whether the allegations were conclusory, the court imported a standard from the Alien Tort Statute jurisprudence, calling the allegation of complicity between the police and the bottling plant security chief an "unwarranted deduction of fact . . . not admitted as true for the purpose of testing the sufficiency of the allegations."\textsuperscript{183} Here, the court glossed over the analysis of conclusory allegations and skipped directly to the plausibility analysis. Yet, according to Professor Steinman's interpretation of \textit{Iqbal}, an allegation is entitled to a presumption of validity without an inquiry into its plausibility, so long as it is not conclusory.\textsuperscript{184} The court opined that the allegations of conspiracy were merely "based on information and belief," and failed to provide the factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."\textsuperscript{185} In so holding, the court offered a perfect example of the difficulty of satisfying a "skeptical judicial gatekeeper," which the \textit{Iqbal} decision fashions as the proper role of the trial judge.\textsuperscript{186}

A third application of the \textit{Iqbal} standard, and perhaps the most interesting, is found in \textit{Ibrahim v. Dep't of Homeland Security}, which, like \textit{Iqbal}, involved a claim of unconstitutional discrimination in post-September 11, 2001 national security procedures.\textsuperscript{187} Ibrahim, a Muslim woman and citizen of Malaysia, challenged the federal government's no-fly list,\textsuperscript{188} claiming it was unconstitutional after she was barred from boarding a plane because her name was flagged despite allegedly having no criminal record and no ties to terrorist activities.\textsuperscript{189} According to Ibrahim, at the order of

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\textsuperscript{182} See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009).
\textsuperscript{183} \textit{Id.} (citing Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)).
\textsuperscript{184} Steinman, \textit{supra} note 9, at 1316 (citing \textit{Iqbal}, 129 S. Ct. at 1950).
\textsuperscript{185} \textit{Sinaltrainal}, 578 F.3d at 1268 (quoting \textit{Iqbal}, 129 S. Ct. at 1949).
\textsuperscript{186} Liptak, \textit{supra} note 13, at A10.
\textsuperscript{188} According to Ibrahim's allegations, the no-fly list consists of watch lists that name individuals perceived to be threats to aviation security, including those prohibited from traveling and those subject to additional screening prior to boarding a plane. \textit{Id.} at *8–9.
\textsuperscript{189} \textit{Id.} at *9.
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defendant John Bondanella, an employee of the Transportation Security Operations Center in Washington, D.C., the San Francisco Police arrested Ibrahim and subsequently detained her for questioning.\footnote{Id. at *10.}

In relevant part, Ibrahim’s complaint against Bondanella alleged that he “directed the [San Francisco Police Department] to arrest Ibrahim although he knew they lacked a warrant, probable cause, or any reasonable belief that she had committed a crime,” and in so doing, “acted in a discriminatory manner, with the intent to discriminate on the basis of Ibrahim’s religious beliefs and her national origin as a citizen of Malaysia.”\footnote{Id. at *30.} Likewise, her complaint against the San Francisco Police Department defendants alleged that Ibrahim “is informed and believes . . . that defendants made the arrest despite these obvious deficiencies because they perceived she was Muslim and a citizen of Malaysia.”\footnote{Ibrahim v. Dep’t of Homeland Sec., No. C 06-00545, 2009 U.S. Dist. LEXIS 64619, at *31 (N.D. Cal. July 27, 2009).}

In its opinion, the district court formulaically recited the \textit{Iqbal} standard as grounds for dismissing Ibrahim’s complaint.\footnote{Id.} Noting that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice,” the court held that plaintiff’s allegations “[were] conclusory and not enough to allow Ibrahim to proceed with her discrimination claims against either the San Francisco defendants or Bondanella.”\footnote{Id. (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), rev’g Iqbal v. Hasty, 490 F.3d 143 (2009)).} However, despite dismissing the bulk of Ibrahim’s constitutional claims, the court permitted one cause of action—the Fourth Amendment claim—to go forward since it was unchallenged by the defendant’s motion to dismiss.\footnote{Id. at *33 (noting that defendants moved to dismiss three of Ibrahim’s constitutional claims, but did not challenge her Fourth Amendment claim, which survived the motion to dismiss at issue here).}

The surviving allegation occasioned a unique application of the \textit{Iqbal} standard, essentially resulting in a judicial portage around \textit{Iqbal}’s heightened pleading standard. The trial judge explicitly recognized the difficulties a heightened pleading standard poses for plaintiffs, bemoaning that “[a]
good argument can be made that the *Iqbal* standard is too demanding” because “[v]ictims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery.” However, the judge acknowledged that his hands were tied by *Iqbal* because the court “must follow the law as laid down by the Supreme Court.” Nevertheless, recognizing that discovery would proceed on the surviving Fourth Amendment claim, the court indicated that Ibrahim would be permitted to inquire into facts that bore on the incident during a limited and carefully managed discovery, and if discovery uncovered evidence of discrimination, she would be permitted to amend her complaint to reassert her deficient discrimination claims at that time. Furthermore, the court explicitly requested that no summary judgment motions or judgments on the pleadings be filed until after the limited discovery was completed. Accordingly, the surviving allegation permitted the trial court to fashion a judicial remedy that complied with *Iqbal*’s rigorous standard, but mitigated its harshness.

V. PROPOSAL

As of today, civil pleading jurisprudence stands disconnected from the long tradition of liberal notice pleading and is in a state of upheaval because of the competing policy objectives of judicial economy and unfettered access to the courts. A judicially-fashioned solution, like that presented in *Ibrahim*, is one possible resolution to this problem, yet its efficacy is highly questionable. While the trial court’s judicial creativity permitted Ibrahim’s claim to survive to amend another day, it is unlikely that all cases challenged under *Iqbal* will present similar opportunities. Moreover, the chance that a sympathetic trial judge will always be willing, or able, to help a plaintiff’s claim proceed to discovery is dubious at best. Finally, the case-by-case nature of this

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196. *Id.*
197. *Id.*
198. *Id.* at *33, *40.
200. *Id.* at *33.
201. *See Mauro, supra note 13.*
remedy would produce inconsistencies and seriously undermine the policy objective of preserving scarce judicial resources.

A second alternative remedy for the problems posed by *Iqbal*'s heightened pleading standard would call for a return to the “careful case management” approach, whereby a case is permitted to proceed to the discovery phase under strict judicial supervision. The Supreme Court expressly rejected this as an unfeasible alternative in *Twombly*, noting that:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

The *Iqbal* Court espoused a similar view, pointing to the special circumstances of qualified immunity for government officials, which are entirely inconsistent with the careful case management approach. Similarly, Judge Easterbrook, of the Seventh Circuit, recognized the systematic difficulties of careful case management, explaining that “[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.”

Given the substantial precedential and scholarly discontent with careful case management, it is unlikely that it can provide an adequate solution to the *Iqbal* pleading problem.

A third solution would be legislative action—an approach that has already been attempted following the *Iqbal* decision in May, 2009. In July, 2009, Senator Arlen Specter introduced the “Notice Pleading Restoration Act of 2009.” The succinct bill proposed by the Pennsylvania Democrat

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204. *Id.*
205. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (noting that the purpose of the qualified immunity defense is to allow government officials to avoid discovery, which can be disruptive and time consuming), rev'g Iqbal v. Hasty, 490 F.3d 143 (2009).
207. *See supra* notes 203–06 and accompanying text.
209. *Id.*
stated, in relevant part, that “a Federal Court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson.”

More recently, Representative Jerrold Nadler, on behalf of himself and nine other Representatives, introduced the Open Access to Courts Act of 2009 in the House of Representatives. Much like Senator Specter’s bill, Representative Nadler’s bill would restore pleading to where it stood after Conley; however, the latter is far more explicit with regard to its proposed standard. The bill specifically reiterates the “no set of facts” standard articulated by the Court in Conley, but goes further by invalidating the pleading standard articulated in Iqbal. The bill provides that “[a] court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”

Furthermore, the bill includes a provision protecting the formal Rules Amendment process, which provides that the bill shall govern “except as otherwise expressly provided by an Act of Congress . . . or by amendments made after such date to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference under this chapter.” While the Open Access to Courts Act of 2009 will, if passed, certainly provide resolution in the form of a brute force removal of the civil pleading standard imposed by Iqbal, this solution’s desirability is less clear. If there is any truth to the Twombly majority’s observation that “Conley has never

210. *Id.* §2.
212. *Id.*
213. “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.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).
214. H.R. 4115.
215. *Id.*
216. *Id.*
been interpreted literally,” and has “puzzl[ed] the profession for 50 years,” then the passage of the bill may not provide a cogent resolution.

The best alternative would be a formal amendment to the Federal Rules of Civil Procedure, which would provide a definitive interpretation of the underlying pleading standard. Moreover, a formal amendment would benefit from the vetting process to which all Rules amendments are subjected, which would foster public comment and debate and subject the amendment to careful scrutiny. The Rules Amendment process would also likely be the least contentious avenue to a resolution because of the legitimacy that accompanies such close scrutiny; furthermore, it is certainly supported by Supreme Court precedent. The Supreme Court has repeatedly expressed deference to the Rules Amendment process, first in Leatherman, and again in Crawford-El. Thus, whether or not the Open Access to Courts Act of 2009 is enacted, an amendment to the Rules is likely the best and only means by which a uniform pleading standard for all federal courts can be ensured.

VI. CONCLUSION

Despite ongoing scholarly debate over Iqbal’s implications, proponents and critics alike can agree that the post-Iqbal judicial landscape is far less hospitable to plaintiffs than the pre-Twombly and Iqbal era. In a decision that has resonated throughout the legal profession,

218. Id. at 563.
220. See supra note 39 and accompanying text.
221. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) (“In the absence of... an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).
222. Crawford-El v. Britton, 523 U.S. 574, 595 (1998) (“[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”).
223. See Steinman, supra note 9, at 1296.
224. See Mauro, supra note 13.
the Supreme Court appeared to depart from the comfortable consistency of over fifty years of notice pleading precedent, replacing it with a new plausibility standard. While proponents of the new standard cite judicial economy and avoidance of frivolous claims, opponents vigorously argue that *Iqbal* is really a "padlock on the courthouse door." This debate will only grow in the coming months and years as *Iqbal* motions become more and more commonplace in federal courts around the country. The best answer to this problem is decisive action that will produce a scrutinized and carefully vetted, durable solution—a solution that the Rules Amendment process can provide.

225. See Steinman, *supra* note 9, at 1293.
227. *Id.*
228. *Id.*