Why *Twombly* Is Good Law (But Poorly Drafted) and *Iqbal* Will Be Overturned†

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The conventional wisdom with regard to the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *is that these two cases work together to usher in a new era of pleading. This reading of the cases, however, is wrong. In reality,* Twombly *was a valid application of the uncontroversial principle that a complaint must describe the real-world events on which the suit is based with some degree of factual specificity. The* Iqbal *opinion, unfortunately, mangled this concept by applying it to a complaint that described the real-world events on which the suit was based with sufficient factual specificity. Thus, rather than working in conjunction with each other, the* Twombly *and* Iqbal *cases are actually pulling in opposite directions. This Article explores this issue. It concludes that this tension will ultimately be resolved in favor of the approach in* Twombly.

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INTRODUCTION

In the attempt to decipher what is required to plead a claim for relief in federal court after the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*,[2] commentators have usually combined these two cases as being part of the same "revolution" in pleading.[3] The *Iqbal* case is often credited for clearing up lingering questions regarding the scope of the "plausibility" analysis introduced in *Twombly*.[4] Apart from this issue, however, *Twombly* and *Iqbal* have usually been discussed as a cohesive pair. They have been jointly criticized.[5] Occasionally, they have been jointly praised.[6]

The tendency to view *Twombly* and *Iqbal* as a collective unit has, unfortunately, interfered with efforts to understand pleading doctrine. The cases have dissimilar

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1. 550 U.S. 544 (2007).

2. 129 S. Ct. 1937 (2009).

3. *See, e.g.*, Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 1 (2010) ("*Iqbal* and *Twombly* introduced a new standard for pleading federal claims . . . ."); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (crediting both *Twombly* and *Iqbal* for destabilizing the entire system of civil litigation); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) ("*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* together have changed the old notice pleading standard to a new 'plausibility' regime based primarily on pleading nonconclusory facts."); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 15 (2010) (stating that in *Iqbal* and *Twombly* "the Supreme Court created a new standard for granting motions to dismiss under Rule 12(b)(6)"). *But see* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 849 (2010) ("*Iqbal* screens lawsuits more aggressively than *Twombly*, and does so without adequate consideration of the policy stakes.").

4. *See* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 478–81 (2010) (explaining that the *Iqbal* opinion clarifies that *Twombly* cannot be limited solely to the antitrust context); The Honorable John P. Sullivan, Twombly *and* Iqbal: *The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 49–50 (2009) (same).

5. *See* Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415 (2010) (documenting the widespread academic criticism of *Twombly* and *Iqbal* and the legislative proposals introduced in Congress which would "overrule" the decisions); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (articulating the view that "*Twombly* and *Iqbal* have destabilized both the pleading and the motion-to-dismiss practices" and that "important values of civil litigation are in jeopardy"); *see also* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) ("At best, *Twombly* and *Iqbal* appear to be result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable.").

6. *See* Stephen R. Brown, *Reconstructing Pleading:* Twombly, Iqbal, *and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1267 (2010) (arguing that much of the criticism regarding *Twombly* and *Iqbal* is "unjustified"); Adam McDonell Moline, *Nineteenth-Century Principles for Twenty-First Century Pleading*, 60 EMORY L.J. 159, 159 (2010) (arguing that *Twombly* and *Iqbal* "better reflect the original meaning of the Federal Rules than the caselaw the Court discarded").

analytical foundations. In short, the *Twombly* decision can be justified as merely an application of preexisting principles regarding pleading; the *Iqbal* case, however, was wrongly decided and is destined to be overruled. To jointly criticize both opinions is to throw the baby (*Twombly*) out with the bathwater (*Iqbal*); to jointly praise both opinions is to miss how dirty the bath water is in which the baby is sitting. Until *Twombly* and *Iqbal* are decoupled and considered as separate entities, pleading jurisprudence will continue in a state of disarray.

It is not necessarily surprising that academic commentators have treated *Twombly* and *Iqbal* as one and the same. The Court's *Iqbal* opinion reads as if all that was required in *Iqbal* was a simple application of the *Twombly* decision. It is likely that the *Iqbal* Court even thought as much. The underlying problem is the *Twombly* opinion.

The *Twombly* opinion is muddled on three critical points. All three of these points are necessary to an understanding of the *Twombly* case. The inarticulate manner in which these points were discussed in *Twombly* is largely responsible for the current confusion regarding pleading doctrine; it is also the source of the erroneous decision in *Iqbal*. Because of the ambiguity in the *Twombly* opinion, the *Iqbal* Court interpreted it in a manner that was inconsistent with prior Supreme Court precedent.

First, the *Twombly* opinion does a poor job of pinpointing the critical defect in the plaintiffs' complaint, which was the complete lack of factual specificity provided in the complaint regarding the event on which the defendants' liability was premised.[7] Scholars have often failed to appreciate that *Twombly* was a case about the factual specificity, or the lack thereof, in the plaintiffs' complaint.[8] The *Iqbal* Court appears to have made this same mistake.[9]

Second, the *Twombly* opinion is unclear as to how the "plausibility" analysis, which was introduced in *Twombly*, relates to the question of factual specificity.[10] It is tempting to interpret the *Twombly* opinion such that plausibility is a measure for factual specificity. Under this reading, a complaint has sufficient factual specificity when it includes enough factual detail to be plausible. As such, plausibility is a requirement that every civil complaint filed in federal court must meet. The better reading of *Twombly*, however, is that the plausibility analysis is required only when the factual specificity requirements of Federal Rule of Civil Procedure 8 ("Rule 8") have not been met. Pursuant to this understanding, factual specificity serves as a trigger for the plausibility analysis: only when the complaint has not been drafted with sufficient factual specificity does the plausibility analysis become necessary. This reading of *Twombly* reconciles the case with existing pleading doctrine. However, under this reading, *Twombly* still serves as an incredibly important case of first impression: *Twombly* is the first Supreme Court opinion to determine that

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7. *See infra* Part II.

8. For instance, Professor Steinman's influential article, *Plain Pleading*, does not include the term "factual specificity"; based on this omission and the overall focus of Steinman's article, it is fair to conclude that he does not believe that the question of factual specificity was at the heart of *Twombly* and *Iqbal*. *See generally* Steinman, *supra* note 5.

9. *See infra* Part IV.B.

10. *See infra* Part III.C.

the factual specificity standard of Rule 8 had not been met, and it instructs lower courts on how to proceed in this event—by conducting the plausibility analysis.

This leads to the third point on which the *Twombly* opinion is equally vague: What is the test for factual specificity that triggers the plausibility analysis? The *Iqbal* Court (as well as most commentators) focused on the portion of the *Twombly* opinion discussing the "conclusory" nature of the conspiracy allegations in that case.[11] Thus, in *Iqbal*, the Court proceeded to a plausibility analysis because the allegations of discriminatory intent in that case were "conclusory."[12] It makes no sense, however, for the plausibility analysis to be triggered by the existence of conclusory allegations. Whether an allegation is conclusory is different than whether the allegation is factually specific.[13] The *Twombly* complaint involved a conclusory allegation that was not factually specific;[14] the *Iqbal* complaint, on the other hand, involved a conclusory allegation that was factually specific.[15] By conflating the factual specificity of an allegation with whether that allegation is conclusory, the *Twombly* opinion occasioned the *Iqbal* decision in which the plaintiffs' complaint was dismissed despite having been drafted with as much factual specificity as possible.[16]

Once the confusion stemming from the jumbled *Twombly* opinion is sorted out, the *Iqbal* decision stands out as an eyesore within pleading jurisprudence. It is flatly inconsistent with *Swierkiewicz v. Sorema N.A.*,[17] a unanimous decision by the Supreme Court decided only seven years prior to *Iqbal*. The *Swierkiewicz* decision was not overruled, nor even mentioned, in the *Iqbal* opinion. In addition, the original understanding of Rule 8, as pronounced in *Conley v. Gibson*,[18] would not have required that a plaintiff such as Iqbal even *allege* the defendants' discriminatory intent, let alone demonstrate that allegation's "plausibility."

The organization of this article is as follows: Part I provides a brief history of pleading theory within the United States and a reexamination of the *Conley* decision. Part II demonstrates that *Twombly* was a case in which the factual specificity of the complaint was at issue. Part III explores the different ways in which *Twombly*'s plausibility analysis might relate to factual specificity, concluding that plausibility is triggered only when a complaint lacks factual specificity. Part IV argues that the *Iqbal* Court's fundamental error was to apply the plausibility analysis because of the existence of the conclusory allegation.

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11. *See infra* Part IV.B.
12. *See id.*
13. *Infra* Part IV.D.
14. *Id.*
15. *Id.*
16. *See id.*
17. 534 U.S. 506 (2002).
18. 355 U.S. 41 (1957).

I. HISTORICAL PERSPECTIVE

A. Pleading Eras

To best understand *Twombly* and *Iqbal*, it is helpful to briefly revisit the history of pleading within the United States and how the Federal Rules of Civil Procedure fit into that story. This history has been thoroughly addressed in contemporary scholarship[19] and need not be recounted here in great detail. A cursory recap, however, should prove fruitful to the topics discussed in this paper.

The pleading system inherited from English common law, and used initially by American courts, required a plaintiff to sue on a particular writ.[20] A writ was a recognized legal right to a particular legal remedy under certain factual circumstances.[21] Under the common law form of pleading, it was important that the complaint clearly identify the writ being sued upon.[22] Moreover, each lawsuit could involve only one writ.[23]

This system forced litigants to frame their disputes within the confines of established legal principles.[24] But it was mostly ineffective in achieving clarity

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19. *See, e.g.*, Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 265–68 (2009) (detailing history of pleading from the common law to the Federal Rules of Civil Procedure); Moline, *supra* note 6, at 163–73 (same); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *&* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1111–21 (2010) (same); Sullivan, *supra* note 4, at 8–14 (same).

20. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.1, at 252 (4th ed. 2005) ("At common law the entire procedure system was inextricably interwoven with what was called the writ system."); SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE: ESSENTIALS 24 (2007) ("Almost all the newly independent states initially adopted the English system, complete with the writ and pleading regime . . . ."); STEPHEN C. YEAZELL, CIVIL PROCEDURE 337 (7th ed. 2008) ("Early common law reflected great concern about whether the claim was one of the 30-some actions. . . . As a result, common law pleaders had to recite carefully one of the formulas (*writs*) recognized by those courts." (emphasis in original)).

21. *See* Sullivan, *supra* note 4, at 8 ("Each writ developed its own procedural, factual, and evidentiary requirements and provided specific and unique remedies."); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 747 (1983) (explaining that "common law writs combined both rights and remedies into a 'single form of action'").

22. *See* RICHARD D. FREER, CIVIL PROCEDURE § 7.2 (2d ed. 2009) (explaining the necessity of suing on a particular writ at common law); SHERRY & TIDMARSH, *supra* note 20, at 19–20 (same).

23. *See* DAVID DUDLEY FIELD, WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS? (Jan. 1, 1847), *reprinted in* 1 SPEECHES, ARTICLES, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226, 237 (A. P. Sprague ed., 1884) ("A mistake in the form of the action is generally fatal to the case."); Sullivan, *supra* note 4, at 9–10 ("The common law judges, including Blackstone, were more concerned that the correct writ was chosen than whether a plaintiff could recover damages for an injury.").

24. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 4, at 14 (2d ed. 1947) ("The process of issuing writs came to be strictly limited to cases where precedents

between the litigants as to their competing version of the events that had led to the dispute. Under the common law writ-based pleadings, the factual predicate of the dispute (each party's version of the "story" of the case) was a secondary concern.[25] Because the plaintiff might not have to present her version of the real, disputed facts in the initial writ, a party's factual contentions could be unknown until trial.[26]

As the nineteenth century proceeded, the common law writ system of pleading was gradually replaced by "code pleading."[27] An important event in this transformation was the development of New York's "Field Code" of pleading, as drafted by legal reformer David Dudley Field.[28] The code theory of pleading represented a fundamental shift in what was required from a complaint at the outset of a case.[29] While the common law system of pleading required the plaintiff to identify the basis of the legal doctrine on which relief was sought, the code theory of pleading instead required a plaintiff to tell the "story" of the case from her perspective.[30]

Numerous factors influenced the shift from common law writ pleading to code pleading,[31] but the change was consistent with fundamental jurisprudential shifts during this time period regarding the nature of law and the role of a judge in deciding a case. The common law writ theory of pleading was a good fit for the

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existed, so that a litigant had to bring his claim within the limits set by some former precedent."); Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 793 (2004) (noting that common law pleading was reluctant to recognize relief for "novel claims"); *see also* SHERRY & TIDMARSH, *supra* note 20, at 20–21 (explaining that the writ system limited the types of relief that could be awarded); *cf.* ROBERT WYNES MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 5–6 (1952) (explaining the gradual trend from "rigidity to flexibility" within the history of procedure).

25. *See* YEAZELL, *supra* note 20, at 337 (explaining that it was necessary to include the allegation required for the writ sued upon but that these allegations might reveal little about the underlying factual dispute between the litigants).

26. *See id.* ("[L]itigants could occasionally stumble into trial having little idea what the contested issues would be."); SHERRY & TIDMARSH, *supra* note 20, at 21 (explaining that under the writ system of pleading "there was almost no way for the parties to ferret out facts unless they paid for an investigation").

27. *See* SAMUEL ISSACHAROFF, CIVIL PROCEDURE 20–21 (2d ed. 2009) (describing the "code pleading" reform of American pleading); RICHARD L. MARCUS, MARTIN H. REDISH, EWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 118 (5th ed. 2009) (same).

28. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 340 (1973) (explaining the development and importance of the Field Code).

29. *See id.* ("Stylistically, no greater affront to the common-law tradition can be imagined than the 1848 code. . . . The substance of the Field Code was almost as daring as its style. . . . [T]his was the death sentence of common-law pleading.").

30. *See* CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING § 11, at 29 (1928) ("[C]ode pleading may be referred to as *fact pleading*, in view of the great emphasis placed under the codes upon getting the facts stated.") (emphasis in original); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE § 1202, at 91 (3d ed. 2004) ("Under the codes the emphasis was placed on developing the facts through the pleadings.").

31. *See, e.g.*, FRIEDMAN, *supra* note 28, at 344–46 (arguing that the pleading reform was supported by commercial interests desiring a more predictable procedural context for the resolution of disputes).

natural law conception of law, which permeated the English common law that had been received in America.[32] Under natural law theory, the common law was nothing more than an application of self-evident principles that could be deduced from prior cases and simple logic.[33] The role of a judge, then, was to ascertain the relevant authority and guiding principles that would control the dispute.[34] This top-down, authority-based conception of law was well served by a pleading doctrine that required the plaintiff to identify the controlling law at the outset.

The emergence of code pleading coincided with a rejection of natural law principles in favor of a more instrumental view of the common law and the role of judges.[35] Under this instrumental view, the common law was a product of human will (as opposed to natural law principles) and thus a mechanism or tool by which to achieve particular policy objectives.[36] The role of the judge, then, was to understand how a specific factual dispute implicated larger policy concerns.[37] Obviously, a pleading regime that elevated the importance of the factual context of the dispute over legal doctrine was a natural fit with this new instrumental view of the law and the role of judges. It was important for judges to understand the factual context in order to appreciate the relevant policy issues at stake. Legal doctrine was less important during this time period, as judges generally felt less constrained by precedent and freer to craft "new" rules of decision.[38]

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32. *See* Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1397 (1997) ("American jurisprudents readily accepted Blackstone's natural law orientation."); Barbara A. Singer, *The Reason of the Common Law*, 37 U. MIAMI L. REV. 797, 799–807 (1983) (discussing the natural law foundation of English common law).

33. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) ("In short, common law doctrines were derived from natural principles of justice, statutes were acts of will; common law rules were discovered, statutes were made."); *id.* at 4 ("The generation of Americans who made the American Revolution had little difficulty in conceiving of the common law as a known and determinate body of legal doctrine.").

34. *See id.* at 8 ("The equation of common law with a fixed, customary standard meant that judges conceived of their role as merely that of discovering and applying preexisting legal rules.").

35. *See id.* at 16–30 (describing the emergence of an instrumental view of the common law during the first half of the nineteenth century).

36. *See id.* at 21–23 (explaining the process by which the instrumental view of the common law displaced the natural law conception of the common law).

37. *See id.* at 22–23 (portraying the emerging view among judges during this time as adhering to the "view that they had been given a popular charter to mold legal doctrine according to broad conceptions of public policy").

38. *See, e.g.*, Pierson v. Post, 3 Cai. 175 (N.Y. 1805) ("[O]ur decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career . . . . Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves . . . . [*T*]*empora mutantur*; and if men themselves change with the times, why should not the laws undergo an alteration?") (Livingston, J., dissenting); s*ee* HORWITZ, *supra* note 33, at 24–26 (describing an emerging resistance to "the colonial subservience to precedent" and a willingness to create new rules justified on "functional terms").

The discrepancy between the fact-based regime of code pleading and the doctrine-based regime of common law pleading can be thought of as representing two fundamental ways of thinking—and talking about—the law. Was *Palsgraf*[39] a case about proximate cause and duty in a negligence claim? Or, was *Palsgraf* a story about an exploding package of dynamite, tipped scales, and a severely injured plaintiff? Both descriptions of the case are accurate and merely represent different ways of thinking about—and discussing—the law. The first description of *Palsgraf* describes the case in doctrinal terms, while the second describes the case in terms of a factual story. The difference between common law pleading and code pleading can be understood according to these two ways of thinking about law: common law pleading emphasized doctrine, while code pleading emphasized real-world facts.

Even with the shift to a system of fact-based pleading during the instrumental period in American jurisprudence, however, legal doctrine never became unnecessary or irrelevant. Although a judge during the instrumental period might have been more inclined to narrowly read precedent or to create new legal rights, in most run-of-the-mill cases, the story told by the plaintiff would have to "fit" within a recognized fact pattern for which legal relief was recognized.[40] Because the plaintiff's complaint under code pleading was fact-driven, it was necessary to match the story told by the plaintiff to a recognized cause of action under existing law. Of course, this inquiry is always necessary in any legal system, but during the common law system of writ pleading, this process would not often be conducted solely from the initial complaint. Because the common law writ system required the plaintiff to plead the writ, or recognized cause of action, at the outset of the case, with scant attention to factual underpinnings, the process of matching facts to law usually occurred after the initial writ was filed by the plaintiff; usually, this was done through a system of back-and-forward pleading between the litigants or at trial.[41] Under code pleading, however, with the plaintiff's version of the facts included in the complaint, it was possible to do an initial screening of existing law

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39. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).

40. *Cf.* RICHARD A. POSNER, HOW JUDGES THINK 8–9 (2008) (explaining that judges must often consult "other sources of judgment" than "conventional legal texts" but that this is necessary only "occasional[ly]").

41. *See* WRIGHT & MILLER, *supra* note 30, § 1202, at 90 ("At common law there was a generally held belief in the efficacy of pleadings. The whole grand scheme was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case."); Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 259 (1926) ("It is true that the common law declaration contained allegations which set forth the pleader's cause in a general way at least; but the emphasis under the common law system of pleading was placed, not so much on getting the facts on record, but rather upon forcing the opposing parties by their successive pleadings to arrive at a single definite issue."). By filing a demurrer, a defendant could assert that the plaintiff had not pled facts that entitled the plaintiff to recovery. MARCUS ET AL., *supra* note 27, at 117. But this was a risky litigation strategy for a defendant: "If defendant filed a general demurrer, for example, that might put the case at issue; if the demurrer were not sustained the plaintiff could win the case because the defendant chose the wrong point to fight." *Id.*

to see if the plaintiff's story was recognized as actionable under existing legal doctrine.[42]

The ability of a judge to match facts to legal doctrine at the pleadings stage depends, in part, upon the specificity with which the plaintiff, in her complaint, has recounted the facts that prompted the dispute. The more specificity included by the plaintiff, the easier it is for a court to adjudge whether the plaintiff has a right to recovery under existing law.[43] For instance, a complaint that describes the formation and breach of a contract to deliver widgets is presumptively actionable.[44] However, if the complaint more specifically describes the defendant as a thirteen-year-old defendant, the claim is not actionable under the legal rule that minors cannot enter into binding contracts.[45]

The question of the factual specificity required under code pleading for a plaintiff's complaint is a history that has been exhaustively recounted and need not be replicated here.[46] While it is a complicated topic, it is safe to make the general observation that as code pleading developed in the late nineteenth century, some courts began to require more and more factual specificity from the plaintiff in her complaint.[47]

This pleading trend towards requiring more factual specificity can again be understood in terms of deeper jurisprudential shifts. The formalist jurisprudential era of the late nineteenth and early twentieth century was a reaction to the instrumental period in American jurisprudence.[48] As with the natural law conception inherited from English common law, the focus during the formalist era again swung towards the idea of law as a top-down process in which legal precedent was more important.[49] Although the formalist era often substituted a

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42. *See* Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 764–65 (2005) (describing demurrer practice under code pleading).

43. *See* YEAZELL, *supra* note 20, at 357 ("The more detail required, the greater the likelihood that a court can sort strong from weak cases at an earlier stage.").

44. *See* Kabehie v. Zoland, 102 Cal. Rptr. 2d 721, 728 (Cal. Dist. Ct. App. 2002) (discussing elements of a claim for breach of contract).

45. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

46. *See, e.g.*, Clark, *supra* note 41, at 259–70 (describing factual specificity required under Code pleading); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (recounting history of factual specificity required under Code pleading era); Moline, *supra* note 6, at 166–69 (same).

47. Courts would sometimes penalize a plaintiff by alleging facts too specifically, as well. *See* Moline, *supra* note 6, at 167–68 ("[J]udges perverted Field's fact pleading into a doctrine of 'ultimate facts,' as distinguished from 'conclusions of law' (facts alleged too generally) and 'evidentiary facts' (facts alleged too specifically).").

48. *See* William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 516–20 (1974) (discussing many different theories as to the relationship between the instrumental period and the formalist period but assuming that some relationship must exist).

49. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 37–39 (1960) (describing the emphasis on precedent and legal doctrine during the formalist era in American jurisprudence); Nelson, *supra* note 48, at 516 ("In talking about a shift from

"scientific" approach to ascertaining controlling legal authority instead of the "self-evidence" principles of natural law,[50] the effect was the same in that judges generally felt more constrained by precedent and less able to react to the particular facts of a case to achieve justice or promote particular policies.[51] The trend under code pleading to sometimes require more specificity, then, fits with the increased importance of legal doctrine and precedent towards the close of the nineteenth century. By requiring a plaintiff to plead her case with more specificity, the relevant legal rules could be more quickly and accurately ascertained and applied.

Code pleading had arisen as a reaction to the doctrine-heavy approach of common law pleading. The Federal Rules of Civil Procedure were also a reaction to the pleading regime of the formalist era that it ultimately replaced.[52] The Federal Rules accepted the fact-centric approach of code pleading; both code pleading and the Federal Rules proceed from the same starting assumption, which is that the primary objective of a complaint is for the plaintiff to present her version of the factual predicate on which the liability of the defendant is based.[53] However, the Federal Rules were drafted with the clear objective that less factual specificity be required than what had sometimes been mandated by judges under code pleading.[54] This is evident from the text of Rule 8,[55] the statements of those who drafted the

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instrumentalism to formalism . . . we are talking about a shift in the style of judicial reasoning in individual cases—a shift from a style in which judges explicitly asked themselves whether a proposed rule would promote economic growth to a style in which judges asked whether a proposed rule was consistent with an existing body of doctrine.").

50. *See* C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (1879) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer."); David Dudley Field, *The Magnitude and Importance of Legal Science* (Sept. 21, 1859), *in* 2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 658, 659 (Steven Sheppard ed., 1999) ("The science of the law embraces therefore all the rules recognized and enforced by the State . . . .").

51. *See* LLEWELLYN, *supra* note 49, at 38 (describing the formalist-era momentum towards the idea that "the rules of law . . . decide the cases" and that policy considerations were "not for the courts"); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894) ("[J]udges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers . . . .").

52. *See* ISSACHAROFF, *supra* note 27, at 21 ("The Rules were also intended to resolve the many problems of the common law and state code approaches to the pleading process."); YEAZELL, *supra* note 20, at 357 ("[T]he Rules seek to avoid [the problems associated with the factual specificity requirements under Code pleading] with their 'short, plain statement' requirement.").

53. *See* FRIEDENTHAL ET AL., *supra* note 20, §§ 5.5–.7 at 262–67 (describing the relationship between common law pleading, code pleading, and pleading under the Federal Rules); Moline, *supra* note 6, at 163–76 (same).

54. *See* WRIGHT & MILLER, *supra* note 30, § 1202, at 93 ("Federal civil pleadings differ from the 'fact pleading' of the codes principally in the degree of generality with which the elements of the claim may be stated.").

55. *See* FED. R. CIV. P. 8(a)(2) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief"); *see also* FRIEDENTHAL ET AL., *supra* note 20, § 5.7, at 267 (comparing the language of Rule 8(a)(2) with the Code requirement of a "statement of facts constituting a cause of action").

Rules,[56] and also from the structure of the Rules themselves, which provided generous discovery provisions requiring the parties to provide relevant information as to the facts of the case.[57]

As with the other instances of shifts in pleading theory, the change represented by the Federal Rules can also be understood within the context of larger trends. The Rules were promulgated in 1938 during the jurisprudential shift towards "legal realism."[58] Indeed, legal realists were a driving force behind the reform movement that produced the Federal Rules.[59] Legal realists held different tenets and offered varying perspectives,[60] but one underlying theme of all legal realists was an attack on the sanctity of case-law precedent—particularly, precedents established during the more conservative formalist era.[61] The code pleading era had demonstrated that requiring a plaintiff to plead with more specificity in her complaint facilitated the application of legal doctrine early in a dispute.[62] If less specificity was going to be required under the Rules, then, the application of controlling legal doctrine would less often be possible solely from the plaintiff's complaint. This suited legal realists fine, as they generally doubted the efficacy of legal precedent in the first place and

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56. ADVISORY COMMITTEE ON THE FEDERAL RULES, REPORT OF PROPOSED AMENDMENTS 18–19 (1955) ("The intent and effect of the rules is to permit the claim to be stated in general terms . . . .").

57. *See generally* FED. R. CIV. P. 26–37 (describing the discovery tools available under the Federal Rules).

58. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222–24 (1931) ("FERMENT is abroad in the law."); *id.* at 1224 ("Speak, if you will, of a 'realistic jurisprudence.'"); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931) ("Hence I approach the subject of the call for a realist jurisprudence . . . .").

59. *See* SHERRY & TIDMARSH, *supra* note 20, 26–28 (detailing the early efforts of realist Roscoe Pound towards procedural reform).

60. Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 59 (2003) ("[L]egal realism was less a coherent school of thought than a set of somewhat diverse impulses . . . .").

61. *See* JEROME FRANK, LAW AND THE MODERN MIND 239 (1930) ("[L]aw is uncertain and must be uncertain."); KARL N. LLEWELLYN, THE BRAMBLE BUSH 71 (Oxford Univ. Press 11th prtg.) (1930) ("People—and they are curiously many—who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts of departure from the court-ways of some golden age—such people simply do not know our system of precedent in which they live."); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) ("Behind the logical form [of a Judge's decision] lies a judgment as to the relative worth and importance of competing legislative grounds . . . . You can give any conclusion a logical form."); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 633–34 (1989) ("As members of an oppositional movement, legal realists revolted against forms of so-called 'mechanical jurisprudence,' namely *formalism* and *conceptualism*, which prevailed and dominated the judicial imagination during the so-called *formalist* era of American legal thought." (emphasis in original)).

62. *See, e.g.*, WRIGHT & MILLER, *supra* note 30, § 1202, at 88–89 (explaining that the factual specificity requirements of Code pleading were motivated by multiple policy objectives, including the "speedy disposition of sham claims").

generally viewed cases as turning on fine factual distinctions that might be impossible to comprehend solely from an initial complaint and before the exchange of information allowed for under modern discovery.[63]

B. Conley v. Gibson's *Interpretation of Rule 8*

The Supreme Court's first, and most important, interpretation of what was required under Rule 8 by a plaintiff in her initial complaint comes from *Conley v. Gibson*.[64] The *Conley* case is a staple of modern pleading jurisprudence. Unfortunately, both courts and scholars have misinterpreted the case for decades.[65] Because of this misinterpretation, commentators and courts have sometimes presumed that the Federal Rules completely abolished the requirement that a plaintiff's complaint provide some factual specificity regarding the events on which the defendant's liability is premised.[66] In reality, however, the analytical structure of *Conley*—properly understood—is based on the premise that the Federal Rules maintained some standard for factual specificity in a plaintiff's complaint, albeit much less than what had frequently been required under code pleading.

In *Conley*, black railroad employees sued their union in federal court under the Railway Labor Act after they were fired from employment with the railroad and white workers were hired to fill their positions.[67] The plaintiffs alleged that the defendant union had discriminatorily failed to protect the fired workers in the same way that it had protected white union members.[68] The union filed a motion to dismiss the complaint under, inter alia, Rule 12(b)(6) for failure to state a claim under Rule 8;[69] the motion was granted by the district court.[70]

At the Supreme Court level, the union argued that the motion to dismiss for failure to state a claim under Rule 8 was justified by two arguments.[71] The first was that the plaintiffs had not pled their factual story with sufficient specificity.[72] The Court rejected the union's argument, explaining that:

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63. *See, e.g.*, Ricketts v. Pennsylvania R.R. Co., 153 F.2d 757, 768 (2d Cir. 1946) (Frank, J., concurring) ("I believe that the courts should now say forthrightly that the judiciary regards the ordinary employee as one who needs and will receive the special protection of the courts when, for a small consideration, he has given a release after an injury. As Mr. Justice Holmes often urged, when an important issue of social policy arises, it should be candidly, not evasively, articulated. In other contexts, the courts have openly acknowledged that the economic inequality between the ordinary employer and the ordinary individual employee usually means the absence of 'free bargaining.' I think the courts should do so in these employee release cases.").

64. 355 U.S. 41 (1957).

65. *See infra* note 89 and accompanying text.

66. *See Conley*, 355 U.S. at 41–42.

67. *Id.* at 41, 43.

68. *Id.* at 43.

69. *See id.*

70. *Id.*

71. *Id.* at 46–47.

72. *Id.* at 47.

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, 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 on which it rests.[73]

The union's second argument was that the plaintiffs had failed to state a legal claim for relief because the union's duty not to racially discriminate amongst its members under the Railway Labor Act ended "with the making of an agreement between union and employer."[74] Because the plaintiffs' complaint alleged discrimination only after the formation of a bargaining agreement between the union and the employer, the union argued that dismissal of the complaint was proper.[75] The Court also rejected this argument, explaining that the prohibition against racial discrimination under the Railway Labor Act extended to "protection of employee rights already secured by contract."[76] In discussing the union's argument regarding whether the statutory prohibition on discrimination extended beyond the time at which an agreement had been reached by the union and employer, the Court issued the infamous "no set of facts" language: "[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[77]

There are several important conclusions that can be drawn from the manner in which the Court disposed of the arguments in *Conley*. The first, and somewhat obvious, is that the two arguments asserted by the railroad were legitimate grounds on which to attack the validity of a complaint under Rule 8. The Court did not reject the two grounds put forward by the railroad because they were nonsensical or legally baseless; the Court rejected the railroad's two separate grounds because they were not warranted in this litigation context.[78]

Before exploring this point further, it is probably helpful to briefly address terminology. Under modern parlance, the union's argument regarding the factual specificity contained in the *Conley* complaint was a "factual sufficiency" challenge to the complaint[79] while the argument regarding the applicability of the Railway

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73. *Id.* (footnote omitted) (quoting Rule 8 of the Federal Rules of Civil Procedure).

74. *Id.* at 46.

75. *See id.*

76. *Id.*

77. *Id.* at 45–46 (citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Continental Collieries v. Shober, 130 F.2d 631 (3d Cir. 1942); Leimer v. State Mut. Life Assurance Co., 108 F.2d 302 (8th Cir. 1940)).

78. *See id.* at 45–48 (rejecting the railroad's arguments because they were not warranted under the facts of the case but not suggesting that the arguments were baseless under the law).

79. *See, e.g.*, Clermont & Yeazell, *supra* note 3, at 830 ("Second, as to factual sufficiency, the plaintiff practically must plead facts and even some evidence."). This concept is also sometimes expressed by the term "formal sufficiency." *See, e.g.*, THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 60 (2004) (using and explaining the term); SHERRY & TIDMARSH, *supra* note 20, at 111 (same); A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 434 (2007) (same).

Labor Act was a "legal sufficiency" challenge.[80] I believe this modern language is somewhat confusing. Both of the union's arguments in *Conley* were about the legal sufficiency of the complaint under Rule 8. In this sense, then, distinguishing between "factual" and "legal" sufficiency is potentially problematic because it suggests that one inquiry involves a question of law while the other is a question of fact. To avoid the potential confusion created by the legal sufficiency and factual sufficiency terms, I propose two new terms for the two different types of challenges that were made in *Conley*. First, a challenge to the specificity of the story contained in the pleading will be termed a "factual specificity challenge." Second, a challenge to the legal theory relied on by the plaintiff will be termed a "legal theory challenge." Clearly distinguishing and understanding these two different types of challenges is of critical importance to the topics developed in this Article.

The Supreme Court in *Conley* implicitly acknowledged the validity of both the factual specificity and legal theory challenges made by the union when it addressed both arguments rather than dismissing them out of hand. Of course, the notion that a complaint can be dismissed when it fails to allege facts that, if proven, would justify recovery—a legal theory challenge—is not controversial or noteworthy. Under each pleading era, courts have dismissed complaints when the factual story described in the complaint was either inconsistent with a viable legal theory of recovery or not compatible with a logical extension of existing law.[81]

The *Conley* Court's disposition of the factual specificity challenge by the railroad, however, is important. Recall that the Federal Rules were a reaction to the practice of some courts under code pleading to require the plaintiff to draft the complaint with detailed factual specificity.[82] In *Conley*, the railroad was asserting the exact type of challenge that had so often proven successful under code pleading, but which the rules had been drafted to address. Was such a challenge still fertile ground for testing the validity of a complaint under Rule 8?

The Court answered this issue by opining that the "decisive" response to the union's factual specificity challenge was that the rules "do not require a claimant to set out in detail"[83] the factual allegations which form the basis of the dispute. According to the Court, the factual specificity issue would be analyzed by whether the plaintiff's complaint had provided the "defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[84]

Let us ignore, for the moment, the question of how much factual specificity is required to comply with the "fair notice" standard described in *Conley*. A more fundamental conclusion is possible from the Court's "notice" standard for factual

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80. *See, e.g.*, Clermont & Yeazell, *supra* note 3, at 830 ("First, as to legal sufficiency, the judge decides any pure issues of law in the traditional way for a Rule 12(b) (6) motion."). This concept is also sometimes expressed by the term "substantive sufficiency." *See, e.g.*, ROWE, JR., *supra* note 79, at 60 (using and explaining the term); SPENCER, *supra* note 79, at 434 (same).

81. *See supra* note 41 (discussing availability of demurrer under common law pleading); *see generally supra* text accompanying notes 40–45 (discussing dismissal of complaint under code pleading).

82. *See supra* notes 48–52 and accompanying text.

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

84. *Id.*

specificity: there is *some* standard for factual specificity which must be met in order to comply with the requirements of Rule 8. The *Conley* Court did not say that factual specificity was no longer required under the Federal Rules of Civil Procedure. The Court acknowledged that the intent of the rules was to require less factual specificity, but it nevertheless articulated a standard for measuring factual specificity and concluded that the standard had been met in the case before the Court.[85]

Unfortunately, this very basic proposition—that there is *some* standard for factual specificity required under Rule 8, albeit a more lenient standard than what had existed under code pleading—has sometimes been obscured by a misinterpretation of the *Conley* opinion. This misinterpretation arises from the *Conley* Court's disposition of the union's legal theory challenge. Before analyzing the underlying substantive law of the Railway Labor Act, the Court uttered the famous phrase: "[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."[86]

The location of this phrase within the *Conley* opinion, in the portion discussing the union's legal argument regarding the proper interpretation of the Railway Labor Act, makes it abundantly clear that this phrase was intended to guide a court in considering a legal theory challenge. A few other scholars have very recently come to the same realization;[87] probably, like me, they were forced to reexamine *Conley* in their efforts to make sense of the Court's retirement of this language in *Twombly*. Previously, however, commentators had often mistakenly assumed that the "no set of facts" language governed the factual specificity analysis.[88] Having thus erred,

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85. Other commentators have interpreted *Conley* in a similar manner. *See* WRIGHT & MILLER, *supra* note 30, § 1202, at 94 ("Thus, the Court [in *Conley*] recognized . . . that [Rule 8] does contemplate the statement of circumstances, occurrences, and events in support of the claim presented.").

86. *Conley*, 355 U.S. at 45–46.

87. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7–9 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) (concluding that *Conley*'s "no set of facts language" related to "legal sufficiency"); Emily M. Sherwin, *The Story of* Conley*: Precedent by Accident*, *in* CIVIL PROCEDURE STORIES 281, 301 (Kevin Clermont ed., 2004) (same); Wendy Gerwick Couture, Conley v. Gibson*'s "No Set of Facts" Test: Neither Cancer Nor Cure*, 114 PENN ST. L. REV. PENN STATIM 19, 19 (2010) (same); Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455–56 (2010) (same).

88. *See, e.g.*, Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 21 (2008) (discussing *Conley*'s "no set of facts" language as going towards the factual specificity requirements of Rule 8); Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 CAMPBELL L. REV. 119, 164 (1993) (explaining the view that *Conley*'s "no set of facts" language can be interpreted such that "Rule 12(b)(6) can perform virtually no factual interception function"). Other commentators have made a similar error in interpreting *Conley*'s "no set of facts" language by failing to distinguish between the factual specificity and legal theory inquiry. *See* Couture, *supra* note 87, at 28 n.62 ("Subsequent courts and commentators have contributed to the confusion between the 'no set of facts' legal sufficiency test and the 'fair

scholars presumed that the *Conley* "no set of facts" language eviscerated any factual specificity analysis of a plaintiff's complaint. For example, numerous scholars have uttered phrases similar to the following: "Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."[89] This conclusion is wrong because it ignores the factual specificity requirements of Rule 8. The "notice pleading" test for factual specificity established under *Conley* was obviously intended to be a more lenient approach to factual specificity than what had existed under code pleading, but, as discussed above, it is clear that a plaintiff's complaint must tell a story with at least *some* factual "meat" or detail.

To be fair to those who have had misinterpreted *Conley*'s "no set of facts" language as going towards factual specificity, some of the blame for this confusion should be attributed to the *Conley* opinion, which was not a model of clarity. First, the *Conley* opinion was not as clear as it could have been in separating out the different types of challenges that were being made to the complaint. Although the Court responded to both the factual specificity and legal theory challenges made by the union, it lumped them together in the *Conley* opinion as "respondents' final ground."[90] The union had asserted two other arguments in support of the district court's dismissal of the complaint—one based on subject matter jurisdiction and one based on the failure to join an indispensable party. Thus, the Court was technically correct to group the union's factual specificity and legal theory challenges together, because both challenges attacked the legal sufficiency of the pleading under Rule 8. The Court could have been more blatant, however, in distinguishing between the two different methods for demonstrating that a complaint fails to state a claim under Rule 8.

Second, in articulating the "no set of facts" standard, the Court again failed to carefully identify the standard as going to the legal theory challenge only. The Court stated 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."[91] To clarify that the standard being described went to a legal theory challenge, the Court should have stated that "a complaint should not be dismissed [because the plaintiff's legal theory is without merit] unless it appears beyond doubt that the plaintiff can prove no set of facts." As written, the Court's phrasing gives the appearance that the "no set of facts" language is an all-encompassing standard for determining a Rule 12(b)(6) challenge to a complaint. Finally, the *Conley* "no set of facts" language further obfuscates the issue by asking what the plaintiff "can prove."[92] This tends to suggest that an examination of the likely truth of the facts that have been pled by the plaintiff is appropriate at the pleadings stage. Of course,

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notice' factual sufficiency test by conflating the two standards and treating them as synonymous.").

89. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); *see also* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 3.6, at 190 (5th ed. 2001) (concluding the same regarding *Conley*'s "no set of facts" language); Miller, *supra* note 5, at 99 (reasoning that "literal application" of *Conley*'s "no set of facts" language "seems unworkable").

90. *See Conley*, 355 U.S. at 45–46.

91. *Id.* at 45.

92. *Id.*

this is flatly wrong. The critical question at the pleadings stage is not what will ultimately be proven but instead what has been alleged by the plaintiff.[93]

As mentioned above, a few other scholars have recently recognized that the "no set of facts" language in *Conley* was used in discussing the legal theory rather than factual specificity challenge in that case.[94] The full import of this realization, however, has not yet been fully explored. Recognizing that the "no set of facts" language was intended to apply to a legal theory challenge analysis allows certain insights to be reached about the nature of both a legal theory challenge and a factual specificity challenge under Rule 8.

The first insight relates to the analysis required for a legal theory challenge. In analyzing whether the facts alleged by the plaintiff in the complaint are actionable under legal doctrine, the "no set of facts" language from *Conley* instructs district courts on how to proceed when necessary facts are either missing from the complaint or are ambiguously described. District courts are to "fill in the gaps" such that the facts necessary for asserting a viable legal claim are assumed in favor of the plaintiff as long as those assumed facts are not inconsistent with what has been actually pled by the plaintiff. Thus, if the cause of action in consideration requires A, B, C, and D, but plaintiff has pled only A, C, and D, *Conley*'s "no set of facts" test requires that B be assumed so long as B is not inconsistent with the factual story told in the plaintiff's complaint. Thus, only in scenarios in which the plaintiff has pled A, C, D, and *not B* could the district court dismiss based on a substantive legal validity challenge. Stated differently, the "no set of facts" language instructs courts not to dismiss a complaint pursuant to a legal theory challenge unless it is clear on the face of the complaint that recovery is prohibited.

The second insight involves the "notice" standard for factual specificity adopted in *Conley*. By instructing district courts to fill gaps in a plaintiff's factual story when necessary for adjudging the substantive legal merit of the plaintiff's claim, considerable light is shed on the standard under Rule 8 for the factual specificity that is necessary to state a claim. The *Conley* "no set of facts" language contemplates scenarios in which a complaint can survive a factual specificity challenge even though the facts necessary to state a viable legal claim are omitted or ambiguous. There is no reason for a district court, in considering the viability of the plaintiff's legal theory, to assume facts in order to perform this analysis if the complaint is nevertheless deficient because it has not stated the facts with sufficient specificity. To draw on the analogy in the above paragraph, if a plaintiff's complaint alleging only A, C, and D fails to state a claim because of a lack of factual specificity, there is no reason to proceed to the question of how to judge the validity of the plaintiff's legal theory in light of the missing B allegation. The district court could dismiss the complaint, or give the plaintiff an opportunity to amend, but "filling in the gap" in favor of the plaintiff would be unnecessary.

This understanding of *Conley*, in which a plaintiff is not always required to plead all of the facts that will ultimately need to be proven in order to recover from the defendant, is confirmed by the Court's citation to a trio of appellate court

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93. *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.").

94. *See supra* note 80.

decisions, including the celebrated case of *Dioguardi v. Durning*.[95] The *Dioguardi* case was written by Judge Charles Clark,[96] who was the principal architect of the Federal Rules of Civil Procedure.[97] The *Dioguardi* case involved a "home drawn" complaint that told a somewhat ambiguous story about bottles of tonics which had been sold at a public auction.[98] For instance, the complaint "does not make wholly clear"[99] how the tonics had come into the defendant's possession. The district court had granted the defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim under Rule 8.[100] In reversing the dismissal, Judge Clark admonished the district court for "judicial haste which in the long run makes waste."[101] Although Judge Clark's opinion acknowledged the ambiguities in the plaintiff's factual story,[102] he emphasized that factual specificity under the rules did not require the plaintiff to plead every fact which would ultimately be necessary under existing legal doctrine for recovery: "Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' . . . ."[103]

Moreover, in some of his nonjudicial opinions, Clark again expressed the view that a plaintiff's complaint need not allege all of the facts that will ultimately need to be proven for the plaintiff to recover. Writing in 1948 about the "notice pleading" standard that would eventually be associated with the newly drafted Federal Rules, Clark stated: "The prevailing idea at the present time seems to be that notice should be given of all the operative facts going to make up the plaintiff's cause of action, except, of course, those which are presumed or may properly come from the other side."[104] Later in the same book, Clark similarly opined: "[C]ertain matters of the kind which the law will conclude from the other facts pleaded, or of which the court has judicial knowledge, or which lie in the knowledge more of the defendant than the plaintiff, need not be set forth even though they are material operative facts."[105]

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95. 139 F.2d 774 (2d Cir. 1944).

96. *See generally id.*

97. *See generally* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958).

98. *See Dioguardi*, 139 F.2d at 774.

99. *Id.*

100. *Id.*

101. *Id.* at 774–75.

102. *See id.* at 775 (describing the complaint as "inartistically" drafted).

103. *Id.*; *see also id.* at 774. ("We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced . . . ."). Judge Clark's opinion in *Dioguardi v. Durning* was partly the impetus for a resolution which was adopted at the Ninth Circuit Judicial Conference in 1952 that proposed amending Rule 8(a)(2) to read as follows: "[A] short and plain statement of the claim, showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." *See* WRIGHT & MILLER, *supra* note 30, § 1216, at 239. This proposal was referred to the Advisory Committee on the Civil Rules, where it was rejected. *See id.*

104. Clark, *supra* note 41, at 271.

105. *Id.* at 275.

The *Conley* Court's citation to Clark's *Dioguardi* opinion is telling not only because of the ideas expressed by Clark in that opinion but also because of the views that Clark had expressed in other contexts about the rules which he fathered.[106] Moreover, Clark was not alone in his view; other commentators expressed the same view during this time.[107]

Conley, properly understood, stands for the proposition that a plaintiff can meet the notice test for factual specificity even though factual allegations that are necessary to support a legal right to recovery are missing.[108] Factual specificity is governed by the notice standard, and although increased specificity will usually assist a judge in determining the relevant law governing the case, this is not a purpose attributed to the factual specificity analysis. All of the factual allegations necessary to state a cause of action need not be pled.

Why does this interpretation of *Conley* matter in trying to understand *Twombly* and *Iqbal*? After all, the Court retired the misunderstood "no set of facts" language in *Twombly*.[109] Moreover, leading commentators have identified confusion in the courts as to whether all the facts necessary to state a claim for relief must be alleged in a complaint.[110] Thus, it seems not all lower federal courts have interpreted *Conley* in the manner suggested herein.

A proper understanding of *Conley* is important because it demonstrates the dramatic drift in pleading jurisprudence from *Conley* to *Iqbal* and undermines the legitimacy of the decision reached by the Court in *Iqbal.* Later in this Article, after discussing the *Iqbal* case, I will argue that the allegation of discriminatory intent in *Iqbal* was the exact type of factual allegation that the *Conley* Court (and commentators such as Clark) believed need not be included in a complaint. Thus, according to the *Conley* Court, the plaintiff would not have needed to even include

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106. Judge Clark was also generally supportive of the decision reached by the Court in *Conley*, although he expressed some reservations about the term "notice pleading." *See* Clark, *supra* note 97, at 181 (speaking in a supportive manner of the *Conley* decision but describing some of the disadvantages of the term "notice pleading").

107. *See, e.g.*, MILLAR, *supra* note 24, at 190–94 (considering the issue and concluding that all of the factual elements of a cause of action need not be alleged in order to give notice to the defendant); *see also* WRIGHT & MILLER, *supra* note 30, § 1216, at 214–20 ("A reading of *Garcia*, *Conley*, *Swierkiewicz*, and a host of other cases . . . suggests that the complaint . . . need not state with precision all of the elements that are necessary to give rise to a legal basis for recovery as long as fair notice of the action is provided to the opposing party.").

108. *But see* WRIGHT & MILLER, *supra* note 30, § 1216, at 212 ("Neither is the Supreme Court's oft-quoted decision in *Conley v. Gibson* clear on whether all the elements of a prima facie case or cause of action must be stated [in a complaint].").

109. *See* Twombly v. Bell Atl. Corp., 550 U.S. 544, 563 (2007).

110. *See* WRIGHT & MILLER, *supra* note 30, § 1216, at 211 ("The confusion that existed in the years following the adoption of the federal rules as to whether a claim for relief must state a 'cause of action' is typified by *Garcia v. Hilton Hotels International, Inc*. . . . ."); *see also* 2 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 8.04[1a][a] (3d ed. 2011) ("[S]ome courts attempted to frame a pleading standard based on the elements of a claim rather than on the fair notice standard. These courts stated that a complaint had to contain either direct or inferential allegations with respect to all material elements necessary to sustain recovery under some viable cause of action.").

an allegation of the defendants' discriminatory intent, yet the *Iqbal* Court dismissed the plaintiff's complaint because it did not find this allegation to be plausible.[111] For a rule that has not been changed in the period between *Conley* and *Iqbal*, the shift from "you don't need to allege it" to "you *do* need to allege it *and* you need to show that it is plausible" is quite dramatic.[112]

II. RECOGNIZING *TWOMBLY* AS A FACTUAL SPECIFICITY CASE

If the history of pleading and the *Conley* opinion recognize two different manners of challenging the sufficiency of a complaint[113]—factual specificity and legal theory—the next step in understanding the *Twombly* and *Iqbal* cases is to recognize that *Twombly* was a case about the factual specificity of the plaintiffs' complaint. Upon reflection, this conclusion is somewhat obvious. Nevertheless, in the confusion created by the introduction of the plausibility analysis, this somewhat simple proposition has sometimes been lost in the shuffle.[114] For instance, even Professor Adam Steinman's brilliant article, *The Pleading Problem*, which I consider to be the most insightful article to date on *Twombly* and *Iqbal* and which will be discussed favorably below, does not pinpoint factual specificity (or the lack thereof) as the underlying problem in *Twombly*.[115] Recognizing *Twombly* as a case about the factual specificity of the complaint, however, is necessary to a proper understanding of both *Twombly* and *Iqbal*.

The *Twombly* litigation was instigated against major telecommunications providers as a class action on behalf of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present."[116] The class asserted causes of action under section 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in

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111. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).

112. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 557 (2010) (noting that Rule 8(a)(2) has been unchanged since the rules were adopted in 1938).

113. *See* Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 61 (2007) ("The present Federal Rules of Civil Procedure allow a plaintiff's case to be attacked either for its legal or factual insufficiency.").

114. Some commentators who have focused on this question have mistakenly identified *Twombly* as a case involving a legal theory challenge rather than a factual specificity challenge. *See* Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 530–31 (2009) (concluding that *Twombly* did not involve the "amount of detail required by Rule 8(a)(2)" but rather the "legal merit" of the complaint). *But see* Schwartz & Appel, *supra* note 19, at 1127 ("The determination of plausibility, of course, depends on the factual specificity of a complaint.").

115. *See generally* Steinman, *supra* note 5.

116. *Twombly*, 550 U.S. at 550 (quoting Consolidated Amended Class Action Complaint at ¶ 53, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220)).

restraint of trade or commerce"[117] The complaint alleged that the defendants had entered into an illegal conspiracy:

> Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[118]

In addition to this generic allegation of a conspiracy, however, the complaint recounted in great detail the parallel business conduct of the defendants.[119] Although independent parallel conduct is not itself illegal, previous cases had established that the existence of parallel conduct was probative as to whether an illegal conspiracy or agreement had actually taken place.[120]

At the trial court level, the defendants brought a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules on the theory that the plaintiffs had failed to state a claim as required under Rule 8.[121] The district court granted the motion to dismiss;[122] and the Supreme Court eventually upheld the decision of the district court.[123]

The best way to demonstrate that *Twombly* is, at heart, a case about factual specificity is to imagine how the *Twombly* litigation would have unfolded had the plaintiffs' complaint included the following allegations:

> 1. On February 6, 1996, all of the defendants named in this lawsuit met at the Marriot Hotel in Waco, Texas.
> 2. During this meeting, defendants entered into an agreement to engage in parallel business behavior.
> 3. The agreement was memorialized in a document that was drafted on the evening of February 16, although no formal contract was ever drafted.

Assuming that this factually specific hypothetical complaint would have survived past the *Twombly* defendants' motion to dismiss (and I believe this assumption is beyond assailment),[124] the precise issue raised by the *Twombly* litigation can be

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117. *Id.* (quoting Sherman Act § 1, 15 U.S.C. §§ 1–7 (2006)).

118. *Id.* at 551 (quoting ¶ 51 of the plaintiffs' complaint).

119. *See id.* at 550–51.

120. *See id.* at 556.

121. *See* Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003).

122. *See id.*

123. *See Twombly*, 550 U.S. at 570.

124. *See, e.g.*, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 611–12 (1914) (explaining that direct evidence is usually unavailable in a conspiracy case but also clearly implying that direct evidence is sufficient to establish a conspiracy); Skye M. McQueen, *The Summary Judgment Standard in Antitrust Conspiracy Cases and* In re Travel Agency Commission Antitrust Litigation, 62 J. AIR L. & COM. 1155, 1192 (1997) (concluding that direct evidence will usually be sufficient to create a reasonable inference of

pinpointed. The difference between this hypothetical complaint and the "bare assertion of conspiracy" in the actual *Twombly* complaint is, of course, the level of factual specificity with which the allegation of conspiracy or agreement is made. As the Court explained in the *Twombly* opinion, the "bare assertion of conspiracy"[125] in the actual *Twombly* complaint was bereft of any mention of the "specific time, place, or person involved in the alleged conspiracies."[126] The hypothetical complaint fills this void by providing factual specificity as to when, where, how, and by whom the agreement was perfected.

The problem with the *Twombly* opinion is that it is not as explicit as it could have been in recognizing factual specificity as the underlying problem with the plaintiffs' complaint. The opinion discusses factual specificity at various places in the opinion. The opinion cites the *Conley* notice test[127] for factual specificity and affirms that a complaint "does not need detailed factual allegations."[128] The majority admonishes the dissent for "suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether."[129] And the dissenting opinion by Justice Stevens notes that "this is a case in which there is no dispute about the substantive law."[130]

At no point in *Twombly*, however, does the Court clearly pronounce that it is revisiting the ancient question of the factual specificity necessary for a plaintiff's complaint. The closest the opinion comes in this regard is the following: "This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."[131] Even here, though, the Court fails to precisely identify that the "antecedent question"[132] regarding the plaintiff's complaint was the lack of factual specificity with which the alleged conspiracy or agreement was described. The opinions by both the district court and the Second Circuit in the *Twombly* litigation fall into this same pattern: both courts mention factual specificity and the standards for measuring factual specificity, but neither directly pinpoints factual specificity as the underlying problem with the plaintiffs' complaint.[133]

The Court's failure to clearly *identify* the factual specificity issue in *Twombly* is itself problematic, but this problem is made worse by the fact that the Court's *analysis* of the factual specificity of the *Twombly* complaint is hidden in the opinion. The Court's observation that the *Twombly* complaint "mentioned no specific time, place, or person involved in the alleged conspiracies" is buried in footnote ten of the opinion.[134] And, even here, the Court's discussion is somewhat muddled. The Court contrasts the "lack of notice" provided by the "bare

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a conspiracy).

125. *Twombly*, 550 U.S. at 556.

126. *Id.* at 565 n.10.

127. *See id.* at 561.

128. *Id.* at 555.

129. *Id.* at 555 n.3 (citing Stevens, J., dissenting).

130. *Id.* at 571 (Stevens, J., dissenting).

131. *Id.* at 554–55.

132. *Id.*

133. *See id.* at 544; *see generally* Twombly v. Bell Atl. Corp., 425 F.3d 99 (2d Cir. 2005); Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

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

allegations" in the *Twombly* complaint with that provided by Form 9 of the Federal Rules of Civil Procedure, the model form for pleading negligence.[135] But in the same footnote, the Court suggests that the *Twombly* complaint has met the notice standard required by Rule 8 by comparing the actual *Twombly* complaint to one which "had not explained that the claim of agreement rested on the parallel conduct described."[136]

Adding to the ambiguity in the *Twombly* opinion is the Court's extensive discussion, and ultimate retirement, of *Conley*'s "no set of facts" language.[137] As recounted above, this language was originally intended to guide a court in considering a legal theory challenge to a complaint.[138] Because the critical question in *Twombly* was the factual specificity with which the complaint had been drafted, *Conley*'s "no set of facts" language was not relevant to the analysis. Nevertheless, the Court devoted a considerable portion of the *Twombly* opinion to *Conley*'s "no set of facts" language, ultimately concluding that the language should be retired. Because this language had often been misinterpreted as going towards the factual specificity question, and because commentators who made this mistake then presumed that there was no standard for factual specificity under the rules, there was a valid reason for the Court to retire the "no set of facts" language in *Twombly*. The *Twombly* opinion, however, is ambiguous as to whether it is retiring *Conley*'s "no set of facts" language because the language has been misinterpreted (by mistakenly addressing factual specificity) or because the language has been interpreted correctly (as actually going towards factual specificity) but that the conclusion that follows from this interpretation is not sound.[139] In other words, it is not clear whether the Court retired *Conley*'s "no set of facts" language because it had been misunderstood by other courts and commentators or because the Court itself shared in this misunderstanding. At certain points in the opinion, the Court writes as if it is retiring the language because everybody else has misunderstood the language.[140] At other points in the opinion, however, the Court seems to share in the erroneous conclusion that the "no set of facts" language was intended to govern the question of factual specificity.[141] Regardless of the reason why *Conley*'s "no set

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135. *See id.*

136. *Id.*

137. *See id.* at 561–63.

138. *See supra* notes 80–84 and accompanying text.

139. *Compare* CHARLES ALAN WRIGHT & MARY KAY KANE, 20 FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK § 72 (2002) ("Justice Souter carefully noted that *Conley* itself was not being overturned; it was the lower courts that had taken the 'no set of facts' language out of context."), *with* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 445–46 (2008) ("The problem with [*Twombly*] . . . is that it significantly raises the pleading bar beyond where *Conley* had placed it long ago."), *and* Robert E. Shapiro, *Requiescat in Pace*, 34 LITIGATION, 67, 68 (2007) (arguing that *Twombly* "did not just overrule Conley, it seems to overrule notice pleading itself").

140. *See Twombly*, 550 U.S. at 562 ("[T]here is no need to pile up further citations to show that Conley's 'no set of facts' language has been questioned, criticized, and explained away long enough.").

141. For instance, the Court states that under "a focused and literal reading of *Conley*'s 'no set of facts' [language], a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later

of facts" test was retired, the manner in which the *Twombly* Court discussed the issue further obscured the basic point that the underlying problem with the *Twombly* complaint was the lack of factual specificity in describing the alleged agreement amongst the defendants.

Considering all of the static in the *Twombly* opinion, it is not surprising that it has largely gone unnoticed that *Twombly* was primarily a case about the factual specificity in the complaint. This conclusion is clear, however, assuming that the hypothetical complaint discussed above (in which an agreement is described as having taken place in Waco, Texas on February 16, 1996, at the Marriot Hotel) would not have been dismissed in *Twombly*. This Article will proceed upon that assumption.

The most common alternative to the view that *Twombly* was, at heart, about factual specificity is that the Court's plausibility analysis is a completely new metric by which to judge the sufficiency of a complaint under Rule 8 and that this analysis is completely independent from the traditional inquiries of factual specificity and legal theory.[142] I find this alternative too bizarre to be plausible. The notion that the Supreme Court would introduce a completely new requirement—plausibility—decades after the promulgation of Rule 8 contradicts the tone of the *Twombly* opinion itself. Granted, *Twombly* does retire the misunderstood language from *Conley*, and in certain portions of the *Twombly* opinion, the Court writes about the plausibility analysis as if it is a completely new requirement under Rule 8.[143] Nevertheless, broadly speaking, the *Twombly* opinion is not written as a revolt against established precedent and pleading principles. Instead, the Court's existing case law on pleading is regularly cited in the opinion, as if everything the Court is saying in *Twombly* is consistent with what it has said before.[144] The tone of the opinion is reverent, not revolutionary.

The better explanation, recounted above, is that *Twombly* was, at heart, about factual specificity. Nevertheless, the plausibility analysis used by the Court in *Twombly* cannot be ignored. If *Twombly* was ultimately about the factual

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establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 561. This is similar to the claims made by some academics that "[l]iteral compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment." Hazard, *supra* note 89, at 1685. In fact, the Court even cites to some of the academics who have asserted this conclusion based on the mistaken assumption that *Conley*'s "no set of facts" language governs the factual specificity question. *See Twombly*, 550 U.S. at 562 (citing, among others, Professor Hazard).

142. *See, e.*g., Shannon, *supra* note 87, at 475 & n.91 (noting that "[t]he final way [in addition to factual specificity and legal theory] in which an action may be dismissed for failure to state a claim is *insufficiency of proof*," but later qualifying this statement by acknowledging that insufficiency of proof is not "actually . . . per se" a separate grounds for dismissal (emphasis in original)).

143. *See, e.g.*, *Twombly*, 550 U.S. at 557 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'" (alteration in original) (quoting Rule 8)).

144. *See id.* at 555 (citing *Conley*, 355 U.S. 41, 47); *id.* at 555–56 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002), and Neitzke v. Williams, 490 U.S. 319, 327 (1989)); *id.* at 557 (citing Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005)).

specificity with which the plaintiff's complaint had been drafted, it is necessary to establish a link between factual specificity and plausibility.

III. LINKING FACTUAL SPECIFICITY TO THE PLAUSIBILITY ANALYSIS: WHEN IS THE PLAUSIBILITY ANALYSIS REQUIRED UNDER *TWOMBLY*?

If factual specificity was the core of the problem with the complaint in *Twombly*, it is then necessary to determine how the issue of factual specificity relates to the infamous plausibility analysis that was introduced and employed by the Court in *Twombly*. In short, what does plausibility have to do with factual specificity? The answer to this question is of utmost importance. Once the relationship between factual specificity and plausibility is understood, it is possible to determine whether the plausibility analysis is required in all civil cases or whether it is required less frequently. Knowing when to apply the plausibility analysis is impossible unless the relationship between plausibility and factual specificity is understood.

There are two possible ways to think about the relationship between factual specificity and plausibility. The first is that the plausibility analysis serves as a proxy for answering the question of factual specificity.[145] Under this theory, the question of whether a complaint has been drafted with the requisite factual specificity is answered by considering whether enough factual detail has been provided such that the plaintiff's story is plausible. Thus, the plausibility analysis is a tool by which the factual specificity of a complaint is measured.

The second way in which the relationship between factual specificity and plausibility can be explained is dramatically different. Pursuant to this understanding, the plausibility analysis is only triggered when the complaint has failed the test for factual specificity.[146] The plausibility analysis is not a measure for whether the complaint has been drafted with sufficient factual specificity; it is instead an analysis that is performed only *after* the separate specificity analysis has been conducted. Plausibility is a by-product of the factual specificity question, but it does not answer the factual specificity question.

The two different theories as to the relationship between factual specificity and plausibility each require a different conclusion as to *when* the plausibility analysis is necessary. Under the first theory, in which plausibility is a measure of the complaint's factual specificity, the plausibility test is required for every civil complaint filed in federal court.[147] Most commentators have adopted this understanding as to when plausibility is required. Under the second theory, however, the plausibility analysis is much less prevalent: because the plausibility analysis is triggered only by an independent defect in the complaint, in many (indeed, probably most) cases the plausibility analysis will be unnecessary. This perspective has gained traction recently, spurred by Professor Steinman's recent article in the *Stanford Law Review*.

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145. *See infra* Part III.A.

146. *See infra* Part III.B.

147. *See, e.g.*, Anderson & Huffman, *supra* note 3, at 4 ("Because the plausibility standard controls access to litigation in every civil action in federal court, piercing the murk of the *Twombly*/*Iqbal* plausibility standard is crucial.").

Unfortunately, similar to the failure of the *Twombly* opinion to identify factual specificity as the underlying problem in the complaint, the *Twombly* opinion is somewhat ambiguous as to the relationship between plausibility and factual specificity. The *Twombly* opinion never specifically addresses how the newly introduced plausibility analysis relates to the question of factual specificity. Nevertheless, upon close inspection, it becomes clear that the *Twombly* Court viewed plausibility as something triggered by a lack of factual specificity in the complaint. This section will explain how this conclusion is possible from a close reading of the *Twombly* opinion.

A. Plausibility as a Measure for Factual Specificity

The first theory as to the relationship between factual specificity and plausibility is that plausibility serves as a measure for whether the complaint has been drafted with sufficient specificity. That is, a complaint contains sufficient factual specificity when it is plausible; a pleading must be factually specific enough that it strikes the district court judge as a plausible story. Pursuant to this understanding, plausibility is a way to measure whether a complaint is sufficiently factually specific. Stated slightly differently, plausibility is a function or goal to be achieved by the requirement of factual specificity, and therefore, must be considered in answering the question whether the complaint has been drafted with sufficient factual specificity.

This understanding of the relationship between factual specificity and plausibility is somewhat intuitive. Consider the detective who is investigating a murder and is interviewing a suspect as to his whereabouts on the date of the murder. The detective is going to want the suspect to tell the story of his whereabouts on the date of the murder with as much specificity as possible. We have all likely witnessed this familiar scenario dozens of times on television or in the movies:

> Detective: Where were you on the night of the murder?
> Suspect: At home watching television.
> Detective: What were you watching?
> Suspect: Sports.
> Detective: Who was playing? Who won? What was the score?

The detective pushes the suspect for factual specificity because of an intuition that if the story is true, the suspect will be able to tell it with greater specificity. The first theory as to how plausibility relates to specificity is based on a premise somewhat similar to what is occurring in the detective hypothetical. A complaint drafted with factual precision and detail tends to signal that the pleader is telling an accurate story.[148] In the detective example, if the suspect cannot describe with

148. Professor Hartnett has suggested that there is no necessary correlation between specificity and plausibility. *See* Hartnett, *supra* note 4, at 496 ("It is not simply that specific allegations can make an inference less plausible, but that specificity has no necessary connection to plausibility of inference."). To support his claim, Professor Hartnett discusses a hypothetical in which the defendant's "negligence" is being considered. Whether a

factual particularity his actions on the night of the murder, it is presumably because he is lying. In the context of complaints in federal court, a dearth of factual precision in the complaint does not usually suggest untruthfulness by the drafter but rather that the drafter is without firsthand knowledge of the events alleged. This was the case in *Twombly*. If the plaintiffs had had firsthand knowledge of an agreement amongst the defendants, they would have included that specific information in the complaint. The lack of factual specificity did not suggest that the plaintiffs were lying when they alleged that an agreement had been made but rather that the plaintiffs were uncertain that this allegation was accurate. On a deeper level, the detective example and the first theory of the relationship between factual specificity and plausibility are the same in that there is a relationship between factual specificity and truth. The more factual specificity, the more plausible is the truth of what is stated.

This understanding of the plausibility analysis can be stated using algebraic terms, which will be helpful later in the Article. A complaint describing an event generically, rather than specifically, can be expressed by the term "X." A complaint in which an event is described with more factual specificity can be expressed as "X_1, X_2, X_3" with each of the separate units representing some specific description or factual detail of the event "X." Thus, X would represent the *Twombly* complaint's generic description of the alleged conspiracy between the defendants. The hypothetical complaint discussed earlier in this Article, in which the same alleged event is described in more detail (the meeting took place in Waco, Texas, on February 16, 1996, at the Marriot Hotel) would be represented by X_1, X_2, X_3. Under the first theory of the relationship between factual specificity and plausibility, the factual specificity of the complaint is measured by whether the event X is described with sufficient particularity ("1, 2, 3") such that it is plausible that event X actually occurred. In other words: Does X_1, X_2, X_3 imply the existence of X? We can use an arrow to represent the inferential analysis, thus: X_1, X_2, $X_3 \rightarrow X$?

Under this interpretation of the relationship between factual specificity and plausibility, the plausibility analysis is required for *every* complaint filed in federal court. As detailed in Part I of this Article, a complaint which does not contain sufficient factual specificity can be challenged as failing to "state a claim" under Rule 8. All civil complaints in federal court must, therefore, meet the standard for factual specificity. If factual specificity is measured under the plausibility analysis, the plausibility analysis is required in every case. Rule 8 requires factual specificity, factual specificity is measured by plausibility, and Rule 8 thus requires a determination under the plausibility analysis for every case.

B. Plausibility Only When Factual Specificity Standards Are Not Met

The second theory as to the relationship between plausibility and factual specificity is based on the assumption that plausibility is not related to the question of whether the complaint has been drafted with sufficient factual specificity. Under

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defendant was negligent, however, is a legal question, not a factual question. As will be explained below, the plausibility analysis in *Twombly* and *Iqbal* was focused on the question of whether certain *facts* were plausible.

this theory, the complaint's factual specificity is measured first, without regard to a plausibility analysis. If the complaint is drafted with sufficient factual specificity, the plausibility analysis is never reached. If, however, the complaint fails the test for factual specificity, the plausibility analysis is triggered. Once triggered, the plausibility analysis requires the court to consider whether *other* factual allegations in the complaint permit the plaintiff to proceed even though the complaint contains factual allegations that fail the test for factual specificity.

This view of the relationship between factual specificity and plausibility anticipates a slightly different role for the plausibility analysis, once triggered. Under both theories, the plausibility analysis requires an inferential inquiry. Under the first theory, the inferences are drawn from the factual specificity (or lack thereof) contained in the complaint. Under the second theory, however, the inferential inquiry is not based on the specifics (or lack thereof) regarding the event in question, but rather the other allegations in the complaint that are probative as to whether the generically described event actually occurred.

Here, again, the use of algebraic terms is helpful. Under the second theory of the relationship between factual specificity and plausibility, the starting point is the failure of an allegation to comply with Rule 8's standard for factual specificity. Thus, we can assume a generic allegation X. The conclusion that the complaint is not sufficiently factual specific is made without regard to a plausibility analysis. The plausibility analysis then considers whether other allegations in the complaint, which will be labeled Y and Z, permit the plaintiff to proceed despite the generic allegation of event X. Thus: Y, Z→ X?

Notice that under both theories of the relationship between plausibility and factual specificity, the truthfulness or accuracy of the allegation of event X is at issue. And, under both theories, the plausibility analysis seeks to gauge whether the actual occurrence of event X can be inferred from certain information. The two theories differ, however, on the source from which event X is to be inferred. Under the first theory of the relationship between plausibility and factual specificity, the question is whether event X has been described with sufficient specificity to permit the inference that event X occurred. Under the second theory, however, the question is whether event X can be inferred from other allegations in the complaint.

The most important aspect of the second theory of the relationship between factual specificity and plausibility is that plausibility is not required for every complaint filed in federal court. Indeed, in most cases, the plausibility analysis will not need to be conducted. A complaint that meets the factual specificity standard—and plausibility plays no part in this determination—will not be evaluated under a plausibility analysis. The plausibility analysis is triggered only when the test for factual specificity has failed.

The second theory as to the relationship between factual specificity and plausibility has a similar analytical structure to the groundbreaking views expressed by Professor Steinman in his article *The Pleading Problem*. As part of his call for a plain pleading understanding of Rule 8, Professor Steinman advocates for an understanding of the plausibility analysis in which "plausibility is a secondary inquiry that need not be undertaken at all."[149] Ultimately, I believe that Professor

149. Steinman, *supra* note 5, at 1314.

Steinman errs in conceptualizing plausibility as being triggered by "conclusory allegations,"[150] and I believe that this error can be traced to his failure to realize that *Twombly* was, at heart, a case about factual specificity. This issue will be explored at length in the next Part.[151] Regardless, the importance of Professor Steinman's idea that plausibility might be triggered by other defects in a complaint cannot be overstated. Before his work, the common presumption was that the plausibility analysis was required for every civil complaint filed in federal court.[152] His article was the first to provide an account of the plausibility analysis in which plausibility is triggered by other defects in a complaint and thus might often be unnecessary in adjudging the legal sufficiency of a complaint.

C. Twombly *and the Relationship Between Factual Specificity and Plausibility*

It takes some effort to determine from *Twombly* which of the two theories as to the relationship between factual specificity and plausibility is correct. The *Twombly* opinion never specifically addresses the issue. This is not necessarily surprising, of course, considering that the *Twombly* opinion never even directly pinpoints factual specificity as the fundamental problem with the plaintiffs' complaint. Moreover, because of the nature of the *Twombly* litigation, either theory could have been applied to the facts of the case. Thus, for instance, the idea that plausibility is a measure of factual specificity can be used to explain *Twombly*, on the theory that the lack of factual specificity in the complaint regarding the conspiracy between the defendants made that allegation implausible. On the other hand, *Twombly* can be

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150. *See id.* at 1324–25 (discussing his theory).

151. *See infra* text accompanying notes 224–40.

152. *See, e.g.*, Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2045 (2010) (arguing that the plausibility standard "applies to all types of civil actions"); Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 179 (2010) (explaining that the plausibility standard "applies to all civil matters"). The conclusion of many commentators that plausibility is required in "all civil matters" is likely based on the Court's pronouncement in *Iqbal* that its "decision in *Twombly* should [not] be limited to pleadings made in the context of an antitrust dispute." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009). The "antitrust-only" argument which was rejected in *Iqbal*, however, is different than the question that Steinman addresses, which is whether plausibility will be required for every complaint filed in federal court. *See* Steinman, *supra* note 5, at 1298–99 (discussing his thesis that the plausibility inquiry is not required in every dispute). The *Iqbal* opinion makes clear that the plausibility requirement is transubstantive and, as such, is consistent with the general thrust of the Federal Rules. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 536 (explaining that the Federal Rules are "uniformly applicable in all types of cases"); *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375 (2010) (arguing that only legislatures should engage in substance-specific rulemaking). That the plausibility analysis is transubstantive, and thus cannot be limited to a particular substantive context such as antitrust, does not mean, however, that the analysis is required for every civil complaint. Professor Steinman was the first to recognize that plausibility, despite being a transubstantive requirement, might nevertheless be inapplicable to a large number of complaints filed in federal court.

interpreted under the second theory of the relationship between factual specificity and plausibility. Pursuant to this understanding, the Court determined that the description of the agreement between the defendants was insufficiently fact specific; the Court then used plausibility to determine whether the alleged parallel conduct by the defendants justified allowing the plaintiffs to proceed despite this deficiency in the complaint.

To support his conclusion that plausibility is a "secondary inquiry"[153] which is only triggered by other defects in the complaint, Professor Steinman relies primarily on two points, both of which are persuasive. The first point considers the *Iqbal* Court's interpretation of the *Twombly* opinion. In particular, Steinman focuses on the *Iqbal* Court's introduction of a "two-step framework for evaluating the sufficiency of a complaint."[154] According to Professor Steinman, the *Iqbal* Court recognized that the plausibility analysis in *Twombly* was necessary only because of other defects in the complaint, and thus developed a two-part approach in which plausibility was the second, and possibly unnecessary, step.[155] Thus, by "taking *Iqbal*'s two steps seriously,"[156] the plausibility analysis from *Twombly* is revealed as a secondary consideration, which might be avoided in many cases. I think Steinman's observation is correct and important. As will be discussed more fully below, the *Iqbal* Court misinterpreted *Twombly* with regard to the sort of defects that should trigger the plausibility analysis. But the *Iqbal* Court *did* correctly recognize that plausibility was not the primary inquiry at the pleadings stage and might often be unnecessary. Thus, although the *Iqbal* Court erred in conceiving the first step of the inquiry, it was correct in recognizing that plausibility was the second (and possibly unnecessary) step in the analysis.

The second point on which Professor Steinman relies to support his conclusion that plausibility is a secondary consideration is that "the most significant pre-*Twombly* authorities remain good law."[157] Here again, I think Professor Steinman makes an important point. The Supreme Court had never before relied on a lack of plausibility to justify the dismissal of a complaint. And, in doing so in *Twombly*, it did not overturn any previous decisions.[158] The *Twombly* opinion cites previous Supreme Court decisions on pleading as if the *Twombly* plausibility analysis is perfectly consistent with those decisions.[159] In general, the *Twombly* opinion is written as if the case is simply an application of preexisting pleading principles. This approach is much more consistent with the notion that plausibility is a secondary consideration which is triggered only by another defect in the complaint.

Both of Professor Steinman's points supporting his conclusion that plausibility is a secondary consideration support the second theory as to the relationship

153. Steinman, *supra* note 5, at 1314.

154. *Id.*

155. *Id.* at 1314–18.

156. *Id.* at 1314.

157. *Id.* at 1320.

158. *Conley*'s "no set of facts" language was retired, but the case itself was not overturned. *See* WRIGHT & KANE, *supra* note 139, § 72 ("Justice Souter carefully noted that Conley itself was not being overturned . . . .").

159. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–55 (2007) (citing various Supreme Court cases interpreting Rule 8 of the Federal Rules of Civil Procedure).

between factual specificity and plausibility, in which plausibility is only triggered by a lack of factual specificity. There is, however, another, more obvious argument supporting the notion that plausibility is triggered only by a lack of factual specificity: the way in which the *Twombly* court used the plausibility analysis.

In describing the two different theories regarding the relationship between factual specificity and plausibility, this Article has made the observation that under either theory the question is whether a certain fact can be inferred. The difference in the two theories is the source from which this inference is based. Thus, for the first theory, in which plausibility is a tool by which the factual specificity of a complaint is measured, the question is whether an event can be inferred from the factual specificity with which the event is described. Stated algebraically: X_1, X_2, $X_3 \rightarrow X$? Under the second theory, the inference as to whether the event occurred is based on other allegations contained in the complaint. Thus: Y, $Z \rightarrow X$?

Viewed from this perspective, the *Twombly* opinion clearly falls under the second theory, in which plausibility is triggered only by a lack of factual specificity and in which the plausibility analysis is used to determine whether other allegations in the complaint infer the existence of the generically described event. In *Twombly*, the plausibility analysis was used to determine whether the allegations of parallel conduct plausibly suggested the existence of an illegal agreement amongst the defendants: "[T]he plaintiffs assert that the [defendants'] parallel conduct was 'strongly suggestive of conspiracy.' . . . But it was not suggestive of conspiracy, not if history teaches anything."[160] Using our algebraic symbols, the allegations of parallel conduct were Y and Z. According to the Court, Y and Z did not plausibly suggest the existence of X, the alleged illegal agreement.

When the Court addressed the lack of factual specificity in the *Twombly* complaint, it did not use the term "plausibility." The Court did not intimate that a trial court judge should infer whether an allegation is true based on the factual specificity with which that event is described. The entire discussion of the complaint's factual specificity is conducted without reference to plausibility.[161] The notice standard for measuring factual specificity from *Conley* is cited, but plausibility is not mentioned.

Thus, by closely reading the *Twombly* opinion, one recognizes that the plausibility analysis used by the Court was divorced from the question of the factual specificity of the complaint. The Court detailed the lack of factual specificity in the *Twombly* complaint without mentioning plausibility. And, when the Court engaged in a plausibility analysis, it did so without regard to the question of factual specificity. Assuming that a complaint drafted with more factual specificity would have survived a motion to dismiss (as this Article presumes), however, leads to the almost inescapable conclusion that the *Twombly* complaint's lack of factual specificity triggered the plausibility analysis by the Court. This explains why the Court in *Twombly* wrote as if the plausibility analysis it used was completely consistent with preexisting pleading principles: *Never* before had the Court affirmed the dismissal of a complaint *for lack of factual specificity*. *Twombly*, then, was a case of first impression. The plausibility analysis was not introduced as

160. *Id.* at 567.
161. *Id.* at 564–69.

a new gloss on accepted pleading standards. Instead, the plausibility analysis was the Court's response to an issue it had never before had to address: How should a district court proceed when a complaint has failed the test for factual specificity?

If plausibility is triggered by a lack of factual specificity, it is important to know what is required for factual specificity under Rule 8. Alas, we are back to the original question—factual specificity—which was part of the impetus for the Federal Rules. Recall that the Federal Rules were, in part, a reaction to the detailed factual specificity that some judges had required under the code pleading era. In *Conley v. Gibson*,[162] the Court affirmed that very little factual specificity would be required under the Federal Rules of Civil Procedure.[163] And then the issue mostly went away, at least as far as the Supreme Court was concerned.[164] That is, at least until *Twombly*. If the plausibility analysis introduced by the Court in *Twombly* is required only when the standard for factual specificity has not been met, the *Twombly* case is a living, breathing example of the application of Rule 8's standard for factual specificity to an actual complaint. All legal commentators recognize *Twombly* as an important case, but I would submit that the true import of the opinion has been obscured in the effort to figure out plausibility.[165] The *Twombly* opinion is the Court's first discussion of the factual specificity required under Rule 8 in decades. This is the most important aspect of the *Twombly* case. To play upon the old cliché, all the attention regarding *Twombly* has been directed toward the cart rather than the horse. And it just so happens that the horse in this case is an age-old question—the factual specificity required for a plaintiff's complaint—on which the Supreme Court has been mostly silent for decades.

Unfortunately, on the question of the factual specificity required under Rule 8, the *Twombly* opinion again obscures rather than enlightens. The *Twombly* opinion and holding support two competing versions as to how a court should measure whether a complaint has been drafted with sufficient factual specificity. Unfortunately, the *Iqbal* Court adopted the wrong version.

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162. 355 U.S. 41 (1957).

163. *Id.* at 47 ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."). For a full discussion, see the text accompanying notes 65–86.

164. The Supreme Court has periodically confirmed that the factual specificity standard in Rule 8 did not permit a heightened pleading standard for certain substantive areas. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) (rejecting the heightened pleading requirement employed by the court of appeals in an employment discrimination lawsuit); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 163 (1993) (holding that "[a] federal court may not apply a 'heightened pleading standard' . . . in civil rights cases alleging municipal liability").

165. *See* Catherine T. Struve, *Foreword: Procedure as Palimpsest*, 158 U. PA. L. REV. 421, 421 (2010) (describing the *Twombly* case as a "landmark pleading decision" but comparing it to the abstract painting of Cy Twombly).

IV. MEASURING THE FACTUAL SPECIFICITY OF A COMPLAINT: WHY *IQBAL* IS WRONG

Because plausibility becomes necessary only when the complaint is deficiently factually specific, *Twombly* is important for delineating what level of factual specificity is required under Rule 8. Unfortunately, here again, the *Twombly* opinion is ambiguous. There are two ways to interpret the *Twombly* opinion as to how the Court reached the conclusion that the plaintiffs' complaint had not been drafted with sufficient factual specificity. Under the first interpretation, the complaint was not sufficiently factually specific because it did not describe the event on which the defendants' liability was based with a sufficient degree of detail and particularity. This interpretation of *Twombly* will be labeled as the "transactional" understanding of the case. The other interpretation of the *Twombly* opinion is that the Court determined that the complaint in that case was not factually specific because it contained "conclusory" allegations; this will be labeled as the "conclusory" understanding of *Twombly*. The conclusory understanding of *Twombly* is the one adopted by the Court in *Iqbal*.

This Part will address the problems that arise from the *Iqbal* Court's interpretation of *Twombly*, in which the plausibility analysis is triggered by the mere presence of conclusory allegations. This Part will argue that these problems are insurmountable and that the *Iqbal* opinion will consequently be overturned.

A. The "Transactional" Interpretation of Twombly

The *Twombly* case can be read for the proposition that a complaint is sufficiently factually specific if it provides a basic description of the transaction or event on which the liability of the defendant is premised. The Court noted in its opinion that the plaintiffs' complaint "mentioned no specific time, place, or person involved in the alleged conspiracies."[166] The Court also contrasted the bare assertion of conspiracy in *Twombly* with the model form of pleading negligence accompanying the Federal Rules, which clearly identifies the defendant, the place where the accident occurred, and the time and date when the accident occurred.[167] In short, a transactional understanding of the factual specificity requirement in Rule 8 would require the plaintiff to identify the who, what, when, where, and how of the event or transaction on which the defendant's liability is premised. More specifically, it would require the plaintiff to identify *her* version of the particulars regarding the transaction or occurrence on which the defendant's liability is based. The *Twombly* complaint failed to meet this standard.

I am not the first to propose a transactional understanding of the factual specificity requirements of Rule 8.[168] The suitability of this approach to factual

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

167. *Id.*

168. *See, e.g.*, WRIGHT & MILLER, *supra* note 30, § 1215, at 194 ("Implicit [from Conley's notice pleading standard for factual specificity] is the notion that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented."); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1943) ("The notice in mind is rather that of the general nature of the case and the circumstances or

specificity has, however, perhaps not been completely realized. Although the Federal Rules contemplated that pleadings would proceed upon a more cursory description of the underlying factual context of the dispute between the parties than what had been allowed under code pleading, the rules accepted code pleading's primary premise that pleadings (and, to some extent, the law in general) should be primarily about stories rather than legal doctrine.[169] The Federal Rules, then, always contemplated that the plaintiff's complaint would tell a story about a real-world transaction or occurrence. In fact, the phrase "transaction or occurrence" appears in a host of federal rules. Plaintiffs can join together in one lawsuit only if their claims arise out of the "same transaction, occurrence, or series of transactions or occurrences."[170] Multiple defendants can be sued in the same lawsuit only if the claims against the defendants arise out of the "same transaction, occurrence, or series of transactions or occurrences."[171] A defendant is required to assert a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[172] Defendants (and plaintiffs) can bring crossclaims against other defendants (and plaintiffs) only if their crossclaim "arises out of the transaction or occurrence that is the subject matter of the original action."[173] A party can amend its pleading and have that pleading "relate back" to the date of the original pleading only if the amendment arises out of the same "conduct, transaction, or occurrence set out . . . in the original pleading."[174] Indeed, the legal realists behind the adoption of the Federal Rules have so successfully engrained the notion that pleadings (and, more generally, legal disputes) are, at heart, stories about transactions or occurrences that the approach has transcended the Federal Rules into other areas of procedure. Preclusion rules often hinge on an analysis that incorporates the "transaction or occurrence" inquiry.[175] And, in *United Mine Workers v. Gibbs*,[176] the Court interpreted the "case" or "controversy" language in Article III, Section 2[177] to require something very much akin to the "transaction or occurrence" language that litters the Federal Rules.[178]

Considering the ubiquity of the "transaction or occurrence" analysis throughout the rules, then, it should come as no surprise that Rule 8, which sets out the requirements for the initial pleading that begins a lawsuit, would also incorporate the concept. Indeed, unless a complaint describes in some detail as to the

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events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case."); Steinman, *supra* note 5, at 1334 ("A plaintiff's complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff's claim.").

169. *See supra* text accompanying notes 19–22.

170. FED. R. CIV. P. 20(a)(1)(A).

171. FED. R. CIV. P. 20(a)(2)(A).

172. FED. R. CIV. P. 13(a)(1)(A).

173. FED. R. CIV. P. 13(g).

174. FED. R. CIV. P. 15(c)(1)(B).

175. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

176. 383 U.S. 715 (1966).

177. U.S. CONST. art. III, § 2.

178. *See Gibbs*, 383 U.S. at 725 ("The state and federal claims must derive from a common nucleus of operative fact.").

transaction or event being sued upon, some of the other rules that depend on an identification of the relevant transaction or event might be difficult to apply. For example, a defendant considering whether he is required to assert a counterclaim against a plaintiff will need to know the transaction or occurrence that is the basis of the plaintiff's suit. The entire structure of the rules is organized according to "transactions or occurrences." If the plaintiff fails to identify with sufficient specificity the transaction or occurrence that is the basis of her suit, the rules do not work properly.

Of course, concluding that a transactional approach to the factual specificity question is proper is only a start in developing a comprehensive understanding of exactly how much specificity is required and *which* events must be factually described in the plaintiff's complaint. It advances the inquiry beyond *Conley*'s initial formulation of the test for factual specificity by providing an answer to the "Notice of what?" question. However, the ultimate proof, as they say, is in the pudding—in how the test is applied. The plaintiffs in *Twombly* were suing on an event or transaction—the alleged agreement between the defendants to engage in parallel business behavior—that they were unable to describe with *any* specificity. Under a transactional understanding of the notice test for factual specificity, *Twombly*'s complaint was obviously deficient.

B. The "Conclusory" Interpretation of Twombly

Although the transactional understanding of *Twombly* can be used to explain the resort to plausibility in that case, there is another "plausible" reading of how the Court reached that conclusion in *Twombly*. Pursuant to this understanding, the resort to plausibility was necessary in *Twombly* because the complaint included conclusory allegations. This is how the *Iqbal* Court read the *Twombly* opinion, and this was the critical error made by the *Iqbal* Court.

The *Iqbal* litigation was initiated by several individuals who had been arrested and detained by federal officials in the wake of the September 11, 2001 terrorist attacks.[179] The litigation involved numerous claims asserted by two plaintiffs against multiple defendants.[180] As the litigation proceeded to the Supreme Court, however, only the claims made by Iqbal against John Ashcroft and Robert Mueller were under consideration.[181] These claims centered on the policies adopted by the federal government regarding the confinement of an arrestee designated as a "person of high interest" to the post-September 11th investigation.[182] The complaint alleged that Ashcroft and Mueller had been involved in shaping this policy and that their involvement had been fueled by an unconstitutional discriminatory animus.[183]

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179. Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part, and remanded sub nom.* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

180. *Id.*

181. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

182. *Id.* at 1944.

183. *Id.*

Defendants Ashcroft and Mueller moved to dismiss the claims against them on the basis of qualified immunity.[184] The district court denied their motion.[185] Defendants Ashcroft and Mueller took an interlocutory appeal of this decision to the Second Circuit.[186] While the case was pending before the Second Circuit, however, the *Twombly* decision was rendered by the Supreme Court.[187] The Second Circuit considered the applicability of *Twombly* to the case,[188] but nevertheless affirmed the district court's denial of defendants' motion to dismiss.[189]

The Supreme Court reversed, concluding that Iqbal's "complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against [Ashcroft and Mueller]."[190] The Court's decision was based on the complaint's failure to comply with the plausibility rubric introduced in *Twombly*, which the Court described as consisting of a "two-pronged approach."[191] The *Iqbal* Court's description of the "two-pronged approach" involving plausibility is consistent with the understanding of *Twombly* advanced in Part II of this Article. The *Iqbal* Court understood that the resort to plausibility in *Twombly* was necessary only because the *Twombly* complaint was deficient in other regards. The *Iqbal* Court noted that had the "Court simply credited the allegation of a conspiracy [in *Twombly*], the plaintiffs would have stated a claim for relief and been entitled to proceed perforce."[192] In other words, the *Iqbal* Court recognized that the resort to plausibility in *Twombly* was necessary only because the plaintiffs' allegation of a conspiracy was somehow defective and thus was "not entitled to the assumption of truth."[193]

The critical question is why the allegation of conspiracy in *Twombly* was not entitled to the presumption of truth and thus subject to the plausibility analysis. According to the *Iqbal* Court, the defect in the *Twombly* complaint was that the allegation of conspiracy was a "legal conclusion"[194] or a "conclusory statement[]."[195] Because the complaint in *Iqbal* was also conclusory, and in this sense was similar to the *Twombly* complaint, the *Iqbal* Court proceeded to plausibility in *Iqbal* as it had done in *Twombly*.[196]

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184. *Elmaghraby*, 2005 WL 2375202, at *10.
185. *Iqbal*, 129 S. Ct. at 1944.
186. *Id.* On appeal, the United States settled plaintiff Elmaghraby's claims for $300,000. Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007).
187. *Iqbal*, 129 S. Ct. at 1944.
188. *Id.*
189. *Id.*
190. *Id.* at 1954.
191. *Id.* at 1950.
192. *Id.*
193. *See id.* at 1951.
194. *Id.* at 1950.
195. *Id.* at 1949.
196. *See id.* at 1949–51.

C. What Makes an Allegation Conclusory?

Before explaining the problems that arise from the *Iqbal* Court's "conclusory" reading of *Twombly*, it is imperative to have a working definition of what is meant by the term "conclusory." This Section will address that issue. This is not an easy task,[197] as the term "conclusory" is not generally recognized or used outside of legal circles.[198] Even within the legal community, the term is often associated with different concepts. Indeed, the *Iqbal* and *Twombly* opinions use a variety of different terms in describing the deficiency of the allegations in those cases: "legal conclusions,"[199] "conclusory statements,"[200] "conclusions,"[201] "bare assertions,"[202] conclusory allegations,[203] and "nonconclusory factual allegation."[204] This smorgasbord of terms, however, obfuscates two distinct principles operating within this pleading vocabulary: legal conclusions and conclusory factual allegations.[205]

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197. Brown, *supra* note 6, at 1286 ("Defining conclusory is a difficult task . . . .").

198. *See* Gertrude Block, *'Conclusory' v. 'Conclusionary,'* PA. LAW, Jan.–Feb. 1999, at 53 ("A search of both law and lay dictionaries revealed a surprising fact: Neither *conclusory* nor *conclusionary* is listed in *Ballentine's Law Dictionary* (Third Edition), *Black's Law Dictionary* (Fifth Edition), *Words and Phrases*, *The American Heritage Dictionary* (Second College Edition), or *Webster's New Third International Dictionary* (Unabridged)."); Eugene Volokh, *Conclusory*, THE VOLOKH CONSPIRACY (May 16, 2007, 1:41 PM), http://volokh.com/2007/05/16/conclusory/ (discussing how the term "conclusory" is only used in legal circles and how that term is used within the legal community). The Wyoming Supreme Court was so disturbed that the term "conclusory" is used only within legal language that it thought it necessary to confirm the suitability of the term: "After painstaking deliberation, we have decided that we like the word 'conclusory,' and we are distressed by its omission from the English language. We now proclaim that henceforth 'conclusory' is appropriately used in the opinions of this court."). Greenwood v. Wierdsma, 741 P.2d 1079, 1086 n.3 (Wyo. 1987).

199. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 564.

200. *Iqbal*, 129 S. Ct. at 1949.

201. *Id.* at 1950; *see Twombly*, 550 U.S. at 552.

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

203. *Id.* ("As such, the allegations are conclusory and not entitled to be assumed true.").

204. *Id.* at 1950.

205. The discussion of legal conclusions and conclusory factual allegations in this Article is not intended as a thorough account of the myriad issues related to the distinction made within our legal system between questions of fact and questions of law. For instance, decision-making authority at the trial court level is usually divided based on the distinction between questions of fact and questions of law. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 593 (6th ed. 1996) ("It is commonly said that questions of fact are for the jury and questions of law are for the judge. A more realistic analysis would be that questions the legal system assigns to the jury are *called* 'questions of fact,' and questions the legal system assigns to the judge are *called* 'questions of law.'" (emphasis in original)). The relationship between a district court's judgment and the ability of an appellate court to review that decision depends on whether the appellant is asking the appellate court to review a question of law or fact. *See* Ornelas v. United States, 517 U.S. 690, 695–700 (1996) (discussing the appropriate standard of review of a district court's legal and factual conclusions within the context of a probable cause determination). Even more mundane questions, such as the permissible scope of an expert's testimony at trial and the appropriate

1. Legal Conclusions

Legal conclusions are determinations about the legal effect of certain facts.[206] As such, they fall squarely within the province of a judge rather than the fact finder.[207] To demonstrate, consider a statute that restricts vehicles from parks, and assume that a plaintiff has brought suit and alleged that the defendant was riding a bicycle in a park. Whether the statute applies to the bicycle rider is a legal conclusion. That the defendant was riding a bicycle is a factual question, of course. But the legal effect of that bicycle riding (whether the statute applies to this conduct) is a legal question that must be answered by a judge. The answer to this legal question is a legal conclusion.

Because legal conclusions involve questions of law for a judge to decide, when a legal conclusion is stated in a pleading (such as a complaint), it is irrelevant except as to serve notice to the judge as to a particular legal argument being pressed by a party litigant.[208] The judge is obviously not bound by the legal conclusions or

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content of an interrogatory discovery request, can depend on the law-fact distinction. *See* O'Brien v. International Brotherhood. of Electrical Workers, 443 F. Supp. 1182, 1187–88 (N.D. Ga. 1977) (considering whether interrogatories were permissible by distinguishing whether the interrogatory called for a fact, a pure question of law, or a mixed question of law and fact). *See generally* Jill Wieber Lens, *The (Overlooked) Consequence of Easing the Prohibition of Expert Legal Testimony in Professional Negligence Claims*, 48 U. LOUISVILLE L. REV. 53, 55–60 (2009) (explaining the traditional prohibition against expert testimony regarding questions of law). Rather, the purpose of this Article is simply to consider this larger issue within the specific context of pleading.

206. Legal conclusions also arise within the context of pure questions of law. A pure question of law is a legal issue whose resolution does not depend on the facts of a particular dispute between litigants. Kira A. Davis, Note, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191, 201 (2003) (defining a pure issue of law as a "legal issue[] unrelated to the facts of the case"). This Article will focus on the legal conclusions that depend upon the existence of particular facts, as these types of legal conclusions are more easily confused with the allegations of fact that were involved in *Twombly* and *Iqbal*. *See infra* text accompanying notes 216–20.

207. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9B FEDERAL PRACTICE AND PROCEDURE § 2521, at 219 (3d ed. 2011) ("[T]he general proposition remains true: rules of law are for the court to enforce."); Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1127–28 (2003) ("[C]ourts in both England and the United States have generally assumed that the jury's primary function is to decide questions of fact, while judges may permissibly decide questions of law."). Of course, there are exceptions to this principle. *See* 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5052, at 249 (2d ed. 2005) ("[T]he jury can decide many questions of law . . . .").

208. *See* Clark, *supra* note 97, at 192 ("You don't plead malicious prosecution, you don't plead false imprisonment, you just say what plaintiff and defendant did, what happened. Then it is for the court to put on any legal labels that are needed. If the parties do give such labels, that's just a way of being helpful. So if the pleader wants to tell us a little theory, that's all right, but it's not binding."). Some commentators have even suggested that a legal conclusion should not be included in a complaint. *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1355 (2010) ("[A] plaintiff should not even be alleging law."). Although I agree with the thrust of Clermont's point, I believe that legal conclusions in a complaint can alert the judge to a particular legal theory on which

arguments that are asserted in a complaint. Thus, in the example above, if the pleading had stated that "On January 15, 2009, defendant was riding a bicycle in Central Park and was thus operating a vehicle in the park," a judge evaluating the sufficiency of that complaint would not be required to defer to the legal conclusion that a bicycle constitutes a vehicle under the state. Of course, the judge would have to assume the truth of the specifically pleaded fact that the defendant was riding a bicycle in Central Park. But, as to the legal questions raised by the complaint, the legal argument made in the pleading is not entitled to deference.

The litigation culminating in the Supreme Court's decision in *Haddle v. Garrison* further demonstrates this basic proposition.[209] In *Haddle*, the plaintiff sued under the Civil Rights Act of 1871 after he was terminated from his employment.[210] The main legal question in the litigation was whether an at-will employment relationship qualified as "property" under the statute.[211] The district court had concluded that an at-will employee did not have a property interest under the statute in his employment relationship.[212] The district court reached this conclusion despite language in the plaintiff's complaint stating that the plaintiff "had been deprived of a property interest under the Civil Rights Act of 1871."[213] The Supreme Court ultimately reversed the district court's dismissal of the complaint, based on the Court's conclusion that the statute did include at-will employment relationships within the term "property."[214] The language in the complaint that the plaintiff had been deprived of property under the statute, however, was completely irrelevant to the legal analysis performed by the district court and the Supreme Court. That the plaintiff had been terminated and had been an at-will employee were not in dispute in *Haddle*; the issue in the litigation was as to the legal effect of those agreed-upon facts. The complaint's assertion that these facts entitled the plaintiff to relief under the statute was perhaps helpful to the district court in identifying the plaintiff's legal theory for relief; but, obviously, neither the district court nor the Supreme Court was in any way bound by the complaint's legal conclusion in performing the legal task of interpreting the statute.

Neither of the problematic allegations in *Twombly* and *Iqbal* were legal conclusions, despite the Court's occasional use of this term in both *Twombly* and *Iqbal*. As will be explained below, the drafters in both *Twombly* and *Iqbal* clearly intended to make factual assertions rather than legal conclusions, and the Court recognized this characteristic of the allegations in both cases.[215]

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the plaintiff is going to rely in the litigation. In this sense, then, a legal conclusion within a complaint can be helpful, and there is no real harm when a complaint contains a legal conclusion.

209. 525 U.S. 121 (1998).

210. *Id.* at 122–23.

211. *Id.* at 125.

212. *Id.* at 121.

213. *Id.* at 123.

214. *See id.* at 125–26.

215. *See infra* text accompanying notes 216–20.

2. Conclusory Factual Allegation

A conclusory factual allegation, as compared to a legal conclusion, is an assertion about something that occurred in the real world. A conclusory factual allegation operates within the larger category of factual allegations. What distinguishes a conclusory factual allegation is that it is an allegation of fact based on inferences from other facts but whose actual existence is nevertheless doubted by the audience considering the allegation. Broken down into separate elements, then, a conclusory factual allegation is (1) an allegation of fact (2) based on inferences from other facts (3) whose inferential value is doubted by the audience. Stated in algebraic terms, a conclusory factual allegation arises when Party A alleges Fact 1 because of the existence of Fact 2, but Party B doubts the inference of Fact 1 from Fact 2.

(1) "An Allegation of Fact"

A conclusory factual allegation differs from a legal conclusion included within a complaint in that it is intended as an assertion about an event that occurred in the real world rather than the legal effect of that occurrence.[216] In some instances, it can be difficult to distinguish between the two.[217] To demonstrate, consider the Supreme Court's decision in *Papasan v. Allain*,[218] which was quoted in both *Twombly*[219] and *Iqbal*.[220] In *Papasan*, the Court grappled with the plaintiffs' assertion that they "had been denied their right to a minimally adequate education."[221] This allegation could be viewed as either a legal conclusion or a

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216. Within the context of criminal procedure, the Supreme Court has sometimes referred to questions regarding the actual events in dispute as historical facts. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996) ("The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts . . . amount to reasonable suspicion or to probable cause."). Other commentators sometimes refer to "what happened?" factual questions as pure questions of fact. *See* Patricia J. Kaeding, *Clearly Erroneous Review of Mixed Questions of Law and Fact: The Likelihood of Confusion Determination in Trademark Law*, 59 U. CHI. L. REV. 1291, 1296–97 (1992) ("Where, however, a determination is neither a question of pure fact nor clearly a question of law, an appellate court must decide whether to treat it as law or fact for purposes of review.").

217. This was the "conclusion" of Charles Clark. *See* CLARK, *supra* note 24, at 231 (discussing the "illusory nature of the distinctions between facts, law, and evidence"); *id.* ("It should further be noted that the attempted distinction between facts, law, and evidence, viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound."); *see also* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 891 (2009) (describing as "hopeless" the distinctions made within the code pleading era between "allegations of ultimate fact, legal conclusions, and evidentiary facts").

218. 478 U.S. 265, 286 (1986) (concluding that, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

219. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

220. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

221. *Papasan*, 478 U.S. at 285.

factual allegation. If the lawyer who drafted the complaint intended to make a descriptive claim as to the education received by his clients, it was a factual allegation. If, however, the intent was to argue that the funding disparity amongst school districts in Mississippi, which had been described in the complaint, should be deemed a violation of the right to a "minimally adequate education,"[222] the complaint's allegation was simply a legal conclusion. The Supreme Court, considering the location of the allegation within the overall context of the complaint, determined that the drafter of the complaint intended to assert only a legal conclusion rather than a factual assertion.[223]

Because it can sometimes be difficult to ascertain whether a pleader has intended to make a factual statement or a legal conclusion,[224] some commentators have resolved that there is no difference between the two.[225] This is an analytical mistake.[226] Simply because it might sometimes be difficult to distinguish between the two does not mean that there is not a clear difference between them.[227] The

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222. *Id.*

223. *Id.* at 285–86. The Court made the same interpretive judgment about the plaintiff's complaint in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). In *Dura*, the plaintiffs' complaint, which asserted a securities fraud claim, was dismissed by the district court. *Id.* at 338–40. In order to win at trial on this claim, the plaintiff would have needed to prove the elements of "economic loss" and "loss causation." *Id.* at 341–42. The plaintiffs' complaint alleged that the defendant had made misrepresentations regarding the possible future approval of a new asthmatic spray device, and that when the company announced that the spray device would not be approved the "share price temporarily fell but almost fully recovered within one week." *Id.* at 339. The plaintiffs' complaint also included the following allegation: "'In reliance on the integrity of the market, the plaintiffs . . . paid artificially inflated prices for Dura securities' and the plaintiffs suffered 'damages' thereby." *Id.* at 340. The Court interpreted the allegation alleging "damages" as a legal conclusion:

> The statement implies that the plaintiffs' loss consisted of the 'artificially inflated' purchase 'prices.' The complaint's failure to claim that Dura's share price fell significantly after the truth became known suggests that the plaintiffs considered the allegation of purchase price inflation alone sufficient. The complaint contains nothing that suggests otherwise.

Id. at 347. Unfortunately for the plaintiffs, the Court disagreed with this legal conclusion: "[T]he 'artificially inflated purchase price' is not itself a relevant economic loss." *Id.*

224. *See, e.g.*, Marcus, *supra* note 46, at 466 ("The line between scrutiny of legal conclusions and scrutiny of factual conclusions is often obscure, however.").

225. *See supra* notes 210–14 and accompanying text.

226. As my Civil Procedure professor, Sam Issacharoff, used to say (paraphrasing): "That the ocean is aqua, and neither clearly blue nor green, does not mean that the grass is not green nor the sky blue."

227. It must be remembered that most of the conclusions by Clark and others who appear to reject the division between factual and legal assertions were formed as a reaction to code pleading. Code pleading dismissed complaints that were drafted with either too much, or too little, factual specificity. *See* YEAZELL, *supra* note 20, at 357 ("Courts [under Code pleading] held some complaints too detailed—and rejected them for pleading 'mere evidence'; others were rejected because, cast at a higher level of generality, they stated 'conclusions,' a flaw equally fatal under the Codes."). Thus, these opinions were specifically addressed at the distinction made during the Code pleading era between facts pleaded with the right amount of specificity and those pleaded too specifically or too generally, and the terms that courts

difficulty is in ascertaining the intent of the drafter. This inherent difficulty in surmising intent, however, should not blur the division between these two distinct concepts.

In any event, in most instances it is clear whether the drafter intended to make a factual assertion or legal conclusion. For instance, the problematic allegations in both *Twombly* and *Iqbal* were obviously factual assertions, despite language in both opinions describing the allegations as legal conclusions. In *Twombly*, the "bare assertion"[228] that a conspiracy or agreement had occurred was a factual assertion about an event which had occurred in the real world. The plaintiffs were not certain that this real-world event had actually transpired, and thus qualified their factual assertion by asserting it only "upon information and belief."[229] A competent lawyer would not assert a legal conclusion "upon information and belief." Furthermore, the notion that parallel behavior was alone sufficient for liability had already been firmly rejected in preexisting antitrust case law.[230] Thus, there was no reason for the plaintiffs' lawyers in *Twombly* to draft a complaint that drew the legal conclusion of liability under the Sherman Act merely from the existence of parallel behavior. In *Iqbal*, the allegation that the defendants had adopted a policy "solely on account of"[231] discriminatory reasons was also a factual assertion.[232] The drafters of the *Iqbal* complaint clearly intended to allege something that they believed had occurred in the real world: that the defendants had acted on the basis of a discriminatory purpose.

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had used to express these admittedly amorphous concepts. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957) (discussing how the courts during the Code pleading era used the terms "ultimate facts, evidence, and conclusions" when discussing the question of factual specificity). Apart from the question of the specificity with which factual allegations are drawn, however, is the more basic question of whether the allegation involves an assertion of fact or law. I believe this distinction is clearer, and that most of the comments by commentators such as Clark and others that appear to reject this distinction are actually directed to the separate, and less clear, question of the factual specificity of a factual allegation. And, in any event, the division of labor within our civil justice system requires that this distinction between assertions of law and fact be made. *Cf.* U.S. CONST. amend. VII ("[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *see* Hartnett, *supra* note 4, at 488–89 ("So long as there is a motion that accepts the truth of a pleader's factual allegations and tests for their legal sufficiency, courts must distinguish between factual and legal allegations. And so long as there is a motion designed to test the legal sufficiency of a plaintiff's claim, courts cannot be bound to treat a plaintiff's legal conclusions as true.").

228. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

229. *Id.* at 551 (quoting Consolidated Amended Class Action Complaint at ¶ 51, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220).

230. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (holding that parallel conduct is not sufficient for liability under the Sherman Act); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) (same).

231. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (quoting Complaint at ¶ 96, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015)).

232. *Cf.* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.").

(2) "Based on Inferences from Other Facts"

Another characteristic of a conclusory factual allegation is that it infers one fact from the existence of other facts. When a plaintiff makes a conclusory factual allegation, the plaintiff is conceding that he or she has no independent, firsthand knowledge of that factual allegation. Rather than describing the factual allegation directly, then, the plaintiff wishes to infer the fact from the existence of other facts on which the plaintiff does have firsthand knowledge.

Outside the context of pleading, the process of inferring facts from the existence of other facts is usually associated with the term "circumstantial evidence."[233] Thus, consider a case in which the plaintiff wishes to establish that the defendant was talking on a cell phone at the time of an automobile accident between the plaintiff and the defendant. If the plaintiff directly saw the defendant talking on the phone (or has another witness to this behavior), the plaintiff (or witness) can testify as to that fact. If, however, the plaintiff did not directly see the defendant talking on the phone, she might wish to prove this fact by circumstantial evidence. If the defendant's cell phone log showed that the defendant had placed or received a call immediately before the accident, this record could be used as circumstantial evidence to show that the defendant had been talking on the phone at the time of the accident.

Put in algebraic terms, then, a conclusory factual allegation will follow an established pattern, wherein Fact A is presumed from the existence of Facts B and C. The problematic allegations in both *Twombly* and *Iqbal* fall into this pattern. In *Twombly*, the plaintiffs alleged that a conspiracy or agreement had occurred, not because they had directly perceived this agreement, but because of the existence of the parallel business behavior of the defendants. In *Iqbal*, the plaintiffs believed that the defendants had acted with a discriminatory purpose because of the existence of large numbers of Arab-Muslim men who had been arrested as part of the investigation of the terrorists' attacks of 9/11 and because of their belief that no penological reason could explain the defendants' policies.

(3) "Whose Inferential Value Is Doubted by the Audience"

For an allegation of fact to be "conclusory," it is also necessary that the "audience" doubt the inferential link that the speaker (the pleader) believes exists.[234] The term "conclusory," then, represents an opinion as to whether the

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233. *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 25 (2d ed. 1923) (distinguishing between testimonial evidence and circumstantial evidence and defining the latter as "all offered evidentiary facts not being assertions from which the truth of the matters asserted is desired to be inferred").

234. *See* Block, *supra* note 198, at 53 ("Both *conclusory* and *conclusionary*, in current legal usage, describe a conclusion reached without adequate proof or evidence."); *Conclusory Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/conclusory (defining conclusory as "consisting of or relating to a conclusion or assertion for which no supporting evidence is offered").

alleged fact follows from the supporting facts. It is a pejorative term. A person drafting a complaint does not believe the inferences made in the complaint are "conclusory." Rather, the pleader believes that the existence of Facts B and C "conclusively" establish the existence of Fact A. To somebody who disagrees with the factual inferences, however, the factual allegations are "conclusory." The audience doubts the inferential link between Facts B and C to Fact A, and thus labels their relationship as "conclusory." The term conclusory will only arise in the context of pleadings, then, when the person reading the pleading disagrees with the factual inferences that the pleader believes are warranted. One person's "warranted conclusion" is another's "conclusory allegation." Because the determination of whether certain facts follow from other facts is based on real-world experience and observation, it should come as no surprise that people will frequently disagree as to whether an inference is warranted or "conclusory."[235]

D. The Error of Iqbal*'s "Conclusory" Interpretation of* Twombly

Using the working definitions established in the previous section, the problems stemming from *Iqbal*'s interpretation of *Twombly*, in which plausibility is triggered by the existence of "conclusory allegations," become evident. There are three. First, the existence of conclusory allegations cannot rationally serve as a trigger for the plausibility analysis because the determinations as to whether an allegation is "conclusory" or "plausible" are analytically one in the same. Second, determining whether an allegation is sufficiently factually specific by asking whether that allegation is conclusory is fundamentally flawed because the two are not necessarily related. A conclusory allegation might be drafted with insufficient factual specificity, as was the case in *Twombly*. However, an allegation might be conclusory yet also be drafted with all possible factual specificity; this was true of the allegation of discriminatory intent in *Iqbal*. Asking whether an allegation is conclusory is thus a poor proxy for whether that allegation is factually specific. Third (and this is related to the second point), if plausibility is triggered merely by the existence of conclusory allegations, as *Iqbal* holds, this principle cannot be reconciled with Supreme Court precedent. The Court had never before suggested that the presence of conclusory allegations require an analysis of the plausibility of those allegations. In fact, in cases such as *Swierkiewicz v. Sorema N.A.*,[236] the Court had soundly affirmed that conclusory allegations are not problematic. The best interpretation of the *Iqbal* opinion is not that the Court intended to overrule cases such as *Swierkiewicz*, but rather that the Court was bewildered by the nebulous *Twombly* opinion**.** Once the chaos from the *Twombly* opinion is resolved (and

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235. *See* Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 243 (2006) (explaining that in evaluating the weight to be given circumstantial evidence "the jury must use its experience with people and events in weighing the probabilities"). Professor Heller makes the interesting empirical point that both testimonial and circumstantial evidence require the jury to rely on their own experiences in determining how much weight should be given to that evidence, but that jurors consistently undervalue circumstantial evidence and overvalue testimonial evidence. *See id*. at 244. The *Twombly* and *Iqbal* opinions seem to share the bias discussed by Professor Heller.

236. 534 U.S. 506 (2002).

hopefully this Article contributes to that effort), the Court will turn its back on the *Iqbal* decision.

1. Plausibility and Conclusory: A Circular Problem

The first problem with using the existence of conclusory allegations as a trigger for the plausibility analysis is that, within the context of pleadings, the determination that an allegation is conclusory is the same as the determination that the allegation is not plausible. In other words, to say that an allegation is conclusory is not analytically different than saying that the allegation is not plausible, at least in the manner the term "plausibility" was used in both *Twombly* and *Iqbal*. Both terms reflect the same concept, which is that the reader doubts the actual occurrence of an event that the pleader has inferred from other facts.[237] To use one as a trigger for the other is redundant or circular.

To demonstrate, consider the *Twombly* facts. According to the *Iqbal* Court, the allegation of conspiracy in the *Twombly* complaint was conclusory.[238] Using the definitional framework outlined above, the Court thus interpreted the allegation of a conspiracy to be a factual statement that the plaintiffs had inferred from the existence of other, directly observable facts. To attach the pejorative "conclusory" label to this allegation, however, it was necessary for the Court to make a judgment as to whether it believed the factual allegation of conspiracy followed from the directly perceived instances of parallel conduct. The Court did not. As detailed above, the allegation of a conspiracy in *Twombly* would not have been "conclusory" if the Court believed that conspiracy followed from parallel behavior.

The plausibility analysis, however, retraces this same pattern of thinking. Earlier in this Article, I closely examined the Court's plausibility analysis in *Twombly*.[239] It was determined that, in conducting the plausibility analysis in *Twombly*, the Court was considering whether the allegations of parallel conduct implied a conspiracy.[240]

The *Iqbal* decision falls into the same pattern. In *Iqbal*, the Court determined that the plaintiffs' allegations of discriminatory intent were "conclusory."[241] The Court did not explicitly explain why these allegations were conclusory.[242]

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237. According to this author's perception of how the two terms are commonly used, they might be slightly different (on a quantitative level) in the *level* of doubt that they serve to indicate. For instance, a reader might believe an allegation is "conclusory" yet also "plausible." It is not that there is any qualitative difference in the analysis required to reach those separate conclusions; rather, it is that the term "conclusory" is used to indicate general doubt about the inference being considered while the term "implausible" is reserved only for those inferences which are highly unlikely. Thus, if a reader believed that an inference contained in an allegation was forty percent likely, he might label it "conclusory" yet also "plausible." However, if the reader believed the inferential allegation only five percent likely, it might be both "conclusory" and "implausible." Even if there is a slight quantitative difference between the terms, however, they still represent the same kind of analytical process and it is illogical for one to serve as the "trigger" for the other.

238. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).

239. *See supra* text accompanying notes 145–65.

240. *See supra* text accompanying notes 147–48.

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

242. *Id.*

However, the clear inference which can be drawn from the opinion is that the *Iqbal* Court found the allegations of discriminatory intent to be conclusory because the plaintiff had not directly observed this fact, and the Court doubted that the fact could be inferred by the directly perceivable facts contained in the *Iqbal* complaint. Simply stated, the Court doubted that the defendants' discriminatory intent could be inferred from the fact that a high proportion of Arabs and Muslims had been involved in the investigative roundup after the 9/11 tragedy. But, the plausibility analysis involved the same analytical inquiry of determining whether certain facts could be inferred from others.

To state that a conclusory allegation triggers the plausibility analysis, then, is akin to saying that the defendant's negligent behavior triggers an analysis of whether the defendant acted reasonably. The reasoning is circular.

There is a response to this problem. Although I think the definition given to the word "conclusory" in this Article is consistent with how that term is generally used within legal jargon, it is possible that the Court intended something slightly different when it used the term in *Twombly* and *Iqbal*. In equating the allegations of discriminatory intent in *Iqbal* to the allegations of a conspiracy in *Twombly*, the Court most likely intended to stress that each allegation was based not on the events that had been directly perceived but rather on inferences from events that had been directly perceived. Thus, in *Twombly*, the plaintiffs had not directly perceived the conspiracy event on which the defendants' liability was premised, but they had inferred that such an event had actually occurred because of inferences the plaintiffs had drawn from the directly perceived parallel conduct. Similarly, in *Iqbal*, the plaintiffs sought to infer the defendants' discriminatory intent from the directly perceived real-world event involving the post-9/11 investigation and the proportion of Arabs and Muslims who had been detained in this process. In both *Twombly* and *Iqbal*, then, the critical allegation followed a certain pattern, which was that the alleged conduct of the defendant had not been directly perceived but instead had been inferred by the plaintiffs because of other facts.[243] Using the three-step definition of a "conclusory factual allegation" described above, the allegations in both *Twombly* and *Iqbal* were (1) factual assertions that were (2) based on inferences from other facts. Excluding the third part of the definition of "conclusory" explained above—that the reader doubts the inference asserted by the pleader—solves the circular problem that arises when conclusory allegations trigger the plausibility analysis. Under this massaged definition of "conclusory," then, the plausibility analysis is triggered by the existence of factual assertions that are based on inferences rather than on directly perceived events. The Court then evaluated the inferences made by the complaint; those that the Court finds convincing are labeled "plausible" while those that are unconvincing are labeled "conclusory."

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243. Commentator Stephen Brown, in his insightful article, *Reconstructing Pleading:* Twombly, Iqbal*, and the Limited Role of the Plausibility Inquiry*, advocates for a definition of conclusory that is very similar to the massaged version discussed in the text. *See* Brown, *supra* note 6, at 1288–92 (determining that conclusory allegations are allegations about an event that is only indirectly perceptible or an event that is directly perceptible but pleaded indirectly).

2. The Disconnect Between Conclusory Allegations and Factually Specific Allegations

Although the "circular" problem discussed above can be resolved by massaging the term "conclusory" in a way that departs from its commonly used meaning, problems that are more fundamental exist if the plausibility analysis is triggered merely by the presence of conclusory allegations. The first of these problems is that there is no necessary correlation between an allegation that is conclusory and an allegation that is factually specific. To use one as a measure (or proxy) for the other, then, is an analytically flawed approach. As the adage goes: "To get a correct answer you have to ask the right question." The *Iqbal* approach, in which the factual specificity question is answered by asking whether an allegation is conclusory, is destined to sometimes give the wrong answer because it asks the wrong question.

The *Twombly* and *Iqbal* cases demonstrate that there is no necessary link between the factual specificity with which an allegation is made and whether that allegation is "conclusory." In *Twombly*, the complaint alleged that an agreement or conspiracy had occurred based on the circumstantial evidence of parallel business behavior.[244] Because the allegation of conspiracy in *Twombly* was asserted based on the existence of other facts (the parallel business behavior), it fits under the massaged definition of a conclusory factual allegation discussed in the previous Section. In addition to being conclusory, the allegation of conspiracy in *Twombly* was not as factually specific as it could have been. It was possible to describe the agreement or conspiracy with more factual detail, and a hypothetical complaint with this degree of factual specificity was discussed earlier in this Article. Thus, the allegation in *Twombly* was both conclusory and lacking in factual specificity.

The allegation of discriminatory intent in *Iqbal* was conclusory in the same manner that the allegation of conspiracy in *Twombly* was conclusory. Like the conspiracy allegation in *Twombly*, the allegation of discriminatory intent involved in *Iqbal* was asserted by the plaintiffs based on the existence of other facts that the plaintiffs believed implied a discriminatory motive by the defendants, namely, the disproportionate number of Arabs and Muslims who had been involved with the federal government's post-September 11th investigation.[245] Although the problematic allegations in both *Twombly* and *Iqbal* qualify as conclusory factual allegations, they are different with regard to whether they were drafted with the requisite degree of factual specificity. Although the allegation of conspiracy in *Twombly* could have been drafted with more factual specificity, the allegation of

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244. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007) ("The nub of the complaint, then, is the [defendants'] parallel behavior . . . and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.").

245. *See Iqbal*, 129 S. Ct. at 1951 ("The complaint alleges 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.' It further claims that 'the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.'" (capitalization in original)).

discriminatory intent in *Iqbal* could not have been drafted with any more precision. A person's state of mind (including a discriminatory intent) is definitely a factual question,[246] but it is not an "event or transaction" and cannot be described any more specifically (absent a ridiculous discussion of brain neurons, synapses, and endorphins) other than to say that the state of mind does, or does not, exist. It is a reason or explanation for a real-world phenomenon, and in this sense is a species of causation inquiry,[247] but it is not something susceptible to precise description.[248] The allegation of agreement or conspiracy in *Twombly* was also about a particular state of mind, but because humans cannot communicate other than by external, physical acts,[249] the agreement or conspiracy amongst the defendants required real-world events or transactions.

Thus, *Iqbal*'s focus on the existence of conclusory allegations is analytically flawed because this inquiry does not address the fundamental question of whether the complaint has been drafted with sufficient factual specificity. This analytical flaw, however, is not just a theoretical problem—it creates serious tension with Supreme Court precedent. In fact, the Court's treatment of the conclusory allegations in *Iqbal* simply cannot be reconciled with Court precedent previously considering conclusory allegations of discriminatory intent.

3. Conclusory Allegations and Supreme Court Precedent

Although *Iqbal*'s "conclusory" interpretation of *Twombly* would suggest that the mere presence of conclusory allegations triggers the plausibility analysis, the Court has never before indicated that a complaint's inclusion of conclusory allegations is problematic. In fact, in *Swierkiewicz v. Sorema N.A.* (decided only seven years prior to *Iqbal*), the Court specifically addressed a challenge to a conclusory allegation of discriminatory intent, indistinguishable from the one asserted in *Iqbal*, and concluded that the allegation was sufficient regardless of whether the district court believed the allegation was likely to be "plausible" or true.[250]

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246. *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.").

247. *See* Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 190–92 (1999) ("Intentional human conduct . . . unlike other phenomena, can be explained by . . . reasons for action. Although physical causes explain the movements of galaxies and planets, molecules, infrahuman species, and all the other moving parts of the physical universe, only human action can also be explained by reasons. It makes no sense to ask a bull that gores a matador, 'Why did you do that?,' but this question makes sense and is vitally important when it is addressed to a person who sticks a knife into the chest of another human being. It makes a great difference to us if the knife-wielder is a surgeon who is cutting with the patient's consent or a person who is enraged at the victim and intends to kill him.").

248. The drafters of the Federal Rules of Civil Procedure seemed to understand that a person's state of mind is not susceptible to a more particular description when they excluded "conditions of a person's mind" from the heightened particularity requirements of Rule 9. *See* FED. R. CIV. P. 9(b).

249. *See* Daryl J. Bem & Charles Honorton, *Does Psi Exist? Replicable Evidence for an Anomalous Process of Information Transfer*, 115 PSYCHOL. BULL., no. 1, 1994 at 4–18 (describing general scientific doubt regarding "ESP").

250. *See Swierkiewicz*, 534 U.S. 506 (2002).

In *Swierkiewicz*, a plaintiff sued his employer under Title VII of the Civil Rights Act of 1964 alleging that he had been fired on account of his national origin.[251] The district court dismissed the complaint on the grounds that the plaintiff "had not adequately alleged circumstances that support an inference of discrimination."[252] This decision was affirmed by the Second Circuit under circuit precedent holding that, in order to survive a motion to dismiss, a plaintiff must allege the facts that he will ultimately have to provide evidence of after the discovery stage in order to avoid summary judgment.[253] The Supreme Court reversed the "Court of Appeals' heightened pleading standard" in a unanimous opinion.[254] The Court confirmed the notice test for the factual specificity requirement announced in *Conley* and explained that the complaint had met that requirement by detailing "the events leading to his termination."[255] Most importantly, the Court rejected the argument that the "conclusory allegation of discrimination" permitted the Court to affirm a dismissal based on the implausibility of the plaintiff's allegation: "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."[256]

There is no way to reconcile, as a matter of pleading standards, the Court's approach to the "conclusory allegations of discrimination" in *Swierkiewicz* and *Iqbal*. Both involved conclusory allegations of discriminatory intent; in *Iqbal*, the Court dismissed these allegations as implausible while in *Swierkiewicz* the Court admonished the trial court for engaging in this same type of analysis. Many lower courts and commentators have determined that *Iqbal* overruled the *Swierkiewicz* case.[257] This is a fair conclusion; the cases cannot be reconciled.

The problem with this understanding of *Iqbal*, however, is that the Court never even mentioned *Swierkiewicz* in the *Iqbal* opinion. The *Swierkiewicz* decision (along with *Twombly*) was the most relevant precedent to the *Iqbal* litigation. *Swierkiewicz* was cited and discussed in the briefs submitted to the Court;[258] yet, it is not even mentioned once in the *Iqbal* opinion.[259] This is a curious way to overrule a case, if this is what the Court intended. And, although the Court has

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251. *Id.* at 508–09.

252. *Id.* at 509.

253. *Id.*

254. *Id.* at 514–15.

255. *Id.* at 514.

256. *Id.* at 515 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

257. *See* Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009) (concluding that *Swierkiewicz* was overruled by *Iqbal*); Seiner, *supra* note 152, at 193 (concluding that there is "serious concern following *Iqbal* as to the validity of the *Swierkiewicz* decision," and citing numerous authors who have reached the same conclusion); Thomas, *supra* note 3, at 18 (explaining that "*Swierkiewicz v. Sorema N.A.* effectively may be dead"). *But see* Swanson v. Citibank, N.A., 614 F.3d 400, 404–06 (7th Cir. 2010) (concluding that the *Swierkiewicz* decision is still valid after *Iqbal*).

258. *See* Brief for Respondent Javaid Iqbal at v, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015) (citing to *Swierkiewicz* in "passim"); Brief for the Petitioners at VI, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015) (citing to *Swierkiewicz* four times in the brief).

259. *See Swanson*, 614 F.3d at 410 (noting that *Swierkiewicz* was not cited in the *Iqbal* opinion).

sometimes overruled previous cases in this passive manner, the usual course for the Court is to directly confront precedent that is in conflict with the approach of the Court in the case at bar.[260]

There is a better descriptive account of what happened in *Iqbal*: The *Iqbal* Court did not mean to overrule *Swierkiewicz*, either directly or implicitly. Rather, the Court was simply puzzled as to how to reconcile the *Twombly* decision with the *Swierkiewicz* decision. The *Twombly* opinion, as discussed above, is written as if it is consistent with every pleading case that had previously been decided by the Court.[261] And the *Twombly* opinion (unlike the *Iqbal* opinion) cites the *Swierkiewicz* decision as if both are compatible;[262] it even explicitly dismisses the plaintiffs' attempt to argue that the result in *Twombly* was inconsistent with *Swierkiewicz*.[263] But the *Iqbal* Court could not sort out how to reconcile these two cases.

Indeed, the results in *Twombly* and *Swierkiewicz cannot* be reconciled if the complaints in those cases are considered only from the perspective of whether they included "conclusory allegations." Using the massaged definition of conclusory discussed above, the allegations in both *Twombly* and *Swierkiewicz* were conclusory in the sense that they inferred one fact from the existence of other facts. But *Twombly*'s allegation of an illegal antitrust conspiracy was determined to be implausible, while *Swierkiewicz*'s allegation of discriminatory intent was allowed to proceed to discovery. The Supreme Court even admonished the lower court in *Swierkiewicz* for suggesting that a complaint should be dismissed on the grounds that "recovery is very remote and unlikely."[264]

Thus, by adopting the "conclusory" reading of *Twombly*, the *Iqbal* Court painted itself into a corner. The allegation of discriminatory intent in *Iqbal* was "conclusory," as that term has been massaged in this Article. The allegation of discriminatory intent in *Swierkiewicz* was also conclusory, as was the allegation of an illegal antitrust conspiracy in *Twombly*. But the Court treated the conclusory allegations in *Swierkiewicz* and *Twombly* dissimilarly. The *Iqbal* Court dealt with this quandary by ignoring *Swierkiewicz*, discussing *Twombly*, and then proceeding to the plausibility analysis.

If *Twombly* would have been interpreted according to the "transactional" approach discussed above, however, the *Iqbal* Court would not have been in the position of having to ignore either *Twombly* or *Swierkiewicz*. Under this reading of *Twombly*, the *Twombly* and *Swierkiewicz* decisions *can* be reconciled; the resort to plausibility in *Twombly* was necessary because the complaint failed to provide a minimal amount of factual detail as to the transaction or event on which the

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260. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1875 (2008) (explaining that when the Court overrules prior precedent the "norm is to conduct such doctrinal analysis explicitly" rather than overruling the opinions "sub silentio").

261. *See supra* text accompanying notes 142–44.

262. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 563 (2007) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)).

263. *Id.* 569–70.

264. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

liability of the defendant was premised. The complaint in *Swierkiewicz*, however, is materially different than the *Twombly* complaint under this metric. As the Court noted in *Swierkiewicz*, the complaint in that case provided the basic details of the event that formed the basis of the plaintiff's complaint.[265]

Had the Court adopted the transactional reading of *Twombly*, then, it would not have even reached the plausibility analysis in *Iqbal*. Because the allegation of discriminatory intent in *Iqbal*, like the allegation of discriminatory intent in *Swierkiewicz*, was made with all possible factual specificity, the Court would have permitted the *Iqbal* plaintiffs to proceed to discovery like the plaintiffs in *Swierkiewicz*. The "transactional" reading of *Twombly*, then, not only reconciles *Swierkiewicz* with *Twombly* but also would have prevented the plausibility analysis in *Iqbal*, thus avoiding the inconsistent results in *Iqbal* and *Swierkiewicz*.

Of course, this is not what occurred in *Iqbal*. The *Iqbal* Court clearly considered *Twombly*'s "conclusory" allegations to be the impetus for the plausibility analysis in that case.[266] And because the *Iqbal* case also involved conclusory allegations, the Court proceeded to plausibility in *Iqbal*[267] despite the inconsistency of this result with *Swierkiewicz*.

Going forward, the challenge is to sort out how this jumbled mess will, and should, be resolved. The best, and easiest, fix to this problem is for the *Iqbal* case to be overruled and for *Twombly* to be read according to the "transactional" method discussed above.

First, reading *Twombly* according to the transactional theory discussed above is both historically and analytically sound. As recounted earlier in this Article, civil complaints in the United States have long been subject to a standard of factual specificity.[268] Reading *Twombly* as a case about factual specificity incorporates that case into this history. Adopting the transactional understanding of *Twombly* introduces a method for measuring factual specificity which is consistent with the overall thrust of the Federal Rules of Civil Procedure (which lean heavily on the notion of a "transaction" or "occurrence"[269]) and which is analytically sound in the sense that it accurately measures the factor under consideration.

Furthermore, from the perspective of Supreme Court precedent, it is a much easier task to overrule the *Iqbal* decision than it would be to overrule the *Swierkiewicz* decision. The *Swierkiewicz* decision cannot be easily isolated. If the plausibility analysis is required every time there is a "conclusory" factual allegation (under the assumed definition given to that term in order to avoid the circular problem discussed above), the plausibility analysis would be necessary in every case in which the defendant's liability depends upon the subjective intent of the defendant. As discussed above, a defendant's state of mind is a fact that can only be

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265. *Id.* at 514 ("Applying the relevant standard, petitioner's complaint easily satisfied the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. . . . His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.").

266. *See supra* text accompanying notes 184–96.

267. *Id.*

268. *See supra* text accompanying notes 35–57.

269. *See supra* text accompanying notes 168–78.

alleged by inference to other directly perceivable facts. Thousands, probably millions, of complaints have been filed in federal court which rest on this premise. Surely the *Twombly* Court did not mean to suggest that these complaints had been incorrectly analyzed for all these decades if the plausibility of those allegations of discriminatory intent were not considered by the district courts. This would be a dramatic shift in pleading jurisprudence, and I am reluctant to believe that the Court intended such a seismic shift.[270]

It is somewhat ironic that the Supreme Court's initial pronouncement on the pleading standards required for Rule 8, *Conley v. Gibson*, also involved an allegation of discriminatory intent.[271] Indeed, the factual specificity challenge made to the complaint in *Conley* centered on the allegations of discriminatory intent which were included in the complaint: "The [defendants] also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper."[272] The *Conley* Court rejected this argument, and there is no indication that this decision was based on an analysis of the plausibility of the discrimination allegations made in the complaint. The *Iqbal* decision is not only inconsistent with *Swierkiewicz*; it runs afoul of pleading cases that extend all the way back to *Conley v. Gibson*.

Overruling *Iqbal* is thus the much easier route by which to achieve consistency within the Supreme Court's case law. Moreover, there is no convincing argument that the *Iqbal* Court's interpretation of Rule 8 is superior to that represented in previous Supreme Court case law. If the costs associated with litigation have changed in the decades since the adoption of the Federal Rules, thus requiring a reworking of the approach to pleading and discovery, the appropriate course for the Court to take is a formal amendment to the Rules.[273] The Rules Enabling Act gives the Supreme Court the power "to prescribe general rules of practice and procedure"[274] and establishes a formal process for doing so.[275] The Act does not,

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270. Professor Marcus has previously expressed similar views regarding lower federal court opinions which seem to anticipate the Supreme Court's *Iqbal* decision:

> The difficulties with scrutinizing factual conclusions become manifest in connection with the frequent demand that the plaintiff proffer sufficient supporting evidence to make conclusory [factual] allegations, particularly those relating to state of mind, credible. In these cases . . . the court is not affirmatively concluding that plaintiff's charges are false, but only that they are unsupported. Although the desire to insist on some underlying evidence is natural, that exercise is materially different from the substantive scrutiny described above. Requiring plaintiff to proffer supporting evidence at the pleadings stage cannot be justified for several reasons.

Marcus, *supra* note 46, at 467–68 (footnote omitted).

271. Conley v. Gibson, 355 U.S. 41, 43 (1957).

272. *Id.* at 47.

273. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered . . . .").

274. 28 U.S.C. § 2072(a) (2006).

however, give the Supreme Court the power to amend pleading practice "on the fly" through judicial interpretation.[276]

E. The Irony of Conley *(Properly Understood) and* Iqbal

In the previous Part, it was noted that there is some irony to the fact that both *Iqbal* and *Conley* involved allegations of discriminatory intent. I believe the irony extends beyond the inconsistent treatment those allegations received at the Supreme Court in those two cases. In *Conley*, the Court did not inquire whether the allegation of discriminatory intent was plausible; in fact, the best interpretation of the *Conley* opinion is that the Court thought the allegation of discriminatory intent in the complaint was *completely unnecessary*.

Recall the conclusion reached earlier in this Article that *Conley*'s "no set of facts" language anticipates that a complaint might be ambiguous regarding certain facts that a plaintiff might ultimately have to prove at trial in order to recover from the defendant, and that this ambiguity (or absence) is not fatal to the complaint.[277] The "no set of facts" language directs a judge that she is to "fill the gaps" in the story in a manner that is favorable to the plaintiff. If the notice standard for factual specificity requires a defendant to give the "who, what, when, and where" regarding the events or transactions on which the defendants' liability is premised, the *Conley* "no set of facts" language applies to facts that are not part of the "event or transaction" of the suit but must nevertheless be proven at trial for a recovery to occur. An allegation of a defendant's mental state (such as a defendant's discriminatory intent) fits this description. A defendant's mental state is a fact question which will often be necessary for recovery, but it is not an "event or transaction" falling under the transactional definition of "notice" developed in this article. It is something that is internal to the defendant. As such, *Conley* can be read for the proposition that an allegation of discriminatory intent (such as that involved in cases such as *Conley*, *Swierkiewicz*, and *Twombly*) need not even be included in a complaint to comply with the requirements of Rule 8.

I am not the only one who has reached this conclusion. In his notable book *Civil Procedure of the Trial Court in Historical Perspective* Professor Robert Millar engages in an enlightening discussion on whether the Federal Rules require a factual allegation on each element of a cause of action.[278] Professor Millar eventually concludes that the best interpretation of the Rules is that it is unnecessary to allege all of the elements of a cause of action so long as notice is adequately given.[279] In discussing the type of factual allegation which might be omitted from a complaint but nevertheless satisfies the notice standard of factual specificity, Professor Millar gives the example of a suit based on a dog-bite incident in which the underlying substantive law requires that the plaintiff prove

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275. 28 U.S.C. §§ 2073–77 (2006).

276. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 546–60 (discussing the importance of adhering to the rule-making process when considering alteration to the Federal Rules); Miller, *supra* note 5, at 84–90 (same).

277. *See supra* text accompanying notes 89–90.

278. MILLAR, *supra* note 24, at 190–94.

279. *Id.* at 193.

that the defendant had knowledge of the dog's propensity to bite.[280] Professor Millar concludes: "[I]f the third element, that of *scienter*, is omitted, is not the defendant, nevertheless, reasonably informed of the nature of the claim?"[281] Professor Millar might just as well have been referring to the *Iqbal* case.

When the Supreme Court pronounced the "no set of facts" language in *Conley*, I believe the Court was writing from a perspective similar to Professor Millar's. Of course, *Conley*'s "no set of facts" language was "retired" in *Twombly*.[282] My point here, though, is not to argue that a plaintiff be allowed to proceed without even alleging factual matters such as the defendants' illegal scienter, even if that is the best interpretation of the *Conley* opinion. Instead, my point here is to demonstrate what a dramatic shift the *Iqbal* approach would be if it were to be controlling in the future. Moving from a view that a plaintiff need not even allege discriminatory intent to a view that a plaintiff must allege discriminatory intent, allege the circumstantial evidence on which that conclusion is based, and convince a court that this inferential evidence is "plausible" is extraordinary considering that these interpretations are based on the exact same text of Rule 8.

F. Professor Steinman's Effort to Justify Iqbal*'s Interpretation of* Twombly

Professor Steinman, in his article *Plain Pleading*, seems to implicitly understand that there are problems with the *Iqbal* Court's reliance on the existence of conclusory allegations as the trigger for the plausibility analysis. Professor Steinman attempts to avoid these difficulties by defining "conclusory" consistent with the "transactional" theory of factual specificity advanced here.[283] I doubt that the term can be so stretched. This Article attempts to define "conclusory" as it is commonly understood and used within legal circles. The heart of the concept is that one fact is inferred from another. This analysis is, at base, different than whether an event or transaction has been described with sufficient factual detail, as explained above. The term "conclusory" simply has too much baggage for it to be employed in the manner that Professor Steinman suggests. Attempting to resolve the problem through word play will simply exacerbate the confusion that exists with regard to pleading.

Apart from this problem of nomenclature (and probably in part because of this problem), I believe that Professor Steinman also errs in explaining *Iqbal* as a case that fails the "transactional" trigger for plausibility. According to Professor Steinman: "The problem [in *Iqbal*] is not the cursory allegation of discriminatory animus. The problem is the murkiness surrounding what Ashcroft and Mueller actually did *vis-à-vis* Iqbal."[284] This reading of *Iqbal* is incorrect.

The complaint in *Iqbal* was specific about the transaction on which the defendants' liability was premised. As part of its post-9/11 investigation, the FBI arrested thousands of Arab Muslim men.[285] The plaintiff was one of them.[286] Many

280. *Id.* at 190.
281. *Id.* at 190–91 (emphasis in original).
282. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560–63 (2007).
283. Steinman, *supra* note 5, at 1334–39.
284. *Id.* at 1336 (emphasis in original).
285. First Amended Complaint and Jury Demand at ¶ 47, Elmaghraby v. Ashcroft, 2004

of these men (including the plaintiff) were designated as being of "high interest" to the government investigation.[287] Once these men were designated as being of "high interest," they were subject to a formal policy that required that they be held in highly restrictive conditions of confinement until they were "cleared."[288] This formal policy was cleared by defendants Ashcroft and Mueller "in discussions in the weeks after September 11, 2001."[289] The complaint alleged that the defendants had approved this policy because of a discriminatory purpose.[290]

Granted, parsing this story from the numerous factual allegations contained in the complaint requires some work, and maybe the complaint was not written as succinctly as it could have been in order to avoid "murkiness." The complaint, however, was a vehicle by which multiple claims were asserted against, and by, multiple parties.[291] There was more at stake in the litigation than simply the claims against Ashcroft and Mueller considered by the Supreme Court in the *Iqbal* opinion. Because of the complex nature of the litigation, it is perhaps not surprising that the narrative was not always chronological, a fact that seems to trouble Professor Steinman.[292]

In any event, the Supreme Court has never adopted the position that an inartfully drawn complaint should be dismissed for "murkiness."[293] The proper question is whether the facts have been told with sufficient specificity. On this issue, particularly if one assumes a transactional understanding of the factual specificity required in a complaint, the *Iqbal* complaint was adequate. The circumstances surrounding the plaintiff's arrest and imprisonment were told in great detail.[294] The policy in which persons designated as "high interest" were held in restrictive conditions of confinement was explained.[295] The only part of this transactional story arguably lacking in factual specificity was the factual allegation that Ashcroft and Mueller had agreed to the restrictive confinement policy "in discussions in the weeks after September 11, 2001."[296] But even here the complaint was much more specific about Ashcroft and Mueller's involvement in the restrictive confinement policy than were the allegations in *Twombly*. Ashcroft and Mueller were specifically identified; the manner in which this policy was adopted was identified ("discussions"); and a very narrow time period ("weeks after September 11, 2001")

WL 3756442 (E.D.N.Y. Sept. 30, 2004) (04 CV 1809 (JG)(JA)).

286. *Id.* at ¶ 48.

287. *Id.*

288. *Id.* at ¶¶ 53–64.

289. *Id.* at ¶ 69.

290. *Id.* at ¶¶ 10, 96, 198, 232, 235.

291. *See, e.g.*, *id.* at ¶ 266 (pleading twenty-first cause of action); *id.* at ¶¶ 8–45 (listing parties to the lawsuit).

292. *See* Steinman, *supra* note 5, at 1337 (noting that the description of events in the complaint was not always chronological).

293. A complaint that is "vague or ambiguous" is potentially subject to a motion for a more definite statement under Rule 12(e). *See* FED. R. CIV. P. 12(e). *But see* Steinman, *supra* note 5, at 1336 (concluding that the "murkiness" of the facts in the *Iqbal* complaint justify the Court's conclusion).

294. *See* First Amended Complaint, *supra* note 285, at ¶¶ 81–99, 111–26, 136–78, 187–93.

295. *Id.* at ¶¶ 48–64.

296. *Id.* at ¶ 69.

was identified. The *Iqbal* complaint was much more specific about Ashcroft and Mueller's involvement in the restrictive confinement policy than was *Twombly*'s allegation of conspiracy, which did not detail how the alleged agreement was reached, where it was done, by whom, and when.

Even more telling, however, was the focus of the plausibility analysis in *Iqbal*. In *Twombly*, the allegation of agreement was not told with specificity, and the Court proceeded to see if the circumstantial evidence "plausibly" suggested that an agreement had occurred. In *Iqbal*, however, the Court did not consider whether Ashcroft and Mueller had "plausibly" been involved with the adoption of the restrictive confinement policy. Rather, the plausibility analysis was focused specifically on whether Ashcroft and Mueller's alleged involvement with the restrictive confinement was based on discrimination:

> To prevail . . . the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin. . . . This the complaint fails to do. . . . [T]he complaint does not show, or even intimate, that petitioners purposefully housed detainees [in highly restrictive conditions] due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.[297]

If the Court had been concerned about the "murkiness surrounding what Ashcroft and Mueller actually did *vis-à-vis* Iqbal,"[298] as Professor Steinman suggests, the plausibility analysis would have been applied to this question. Instead, the plausibility analysis was applied to the question of the defendants' discriminatory intent. Reading *Iqbal* in such a way that the problem is "not the cursory allegation of discriminatory animus"[299] is a nice way to minimize the *Iqbal* decision and make it consistent with *Swierkiewicz*, but it is not faithful to the analysis and language of the *Iqbal* opinion.

CONCLUSION

The *Twombly* and *Iqbal* cases have mostly been treated as a cohesive pair by commentators and courts, but these two cases have divergent futures. *Twombly* will eventually be recognized as a valuable case. The *Twombly* case, properly understood, clarifies the factual specificity standard under Rule 8 and instructs lower courts how to proceed when this standard is not met. *Iqbal*, however, will go down as a hiccup. Perhaps it will be explained away on nonpleading grounds.[300] Or,

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297. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009).

298. Steinman, *supra* note 5, at 1336.

299. *Id.*

300. If the Court is inclined to limit the *Iqbal* decision to the specific facts of that case, there are compelling reasons to do so. *See id.* at 1326 (describing *Iqbal* as a "rather exceptional case[]" in the sense that it challenged the "efforts on behalf of the federal government in response to, as the Court put it, 'a national and international security

perhaps it will be directly overruled. Regardless of the exact method of its expiration, though, its shelf life is limited unless the Federal Rules are dramatically rewritten or cases interpreting the Rules are overruled. There is no indication, however, that the Supreme Court truly intended to signal this dramatic shift in *Iqbal*. The better interpretation of *Iqbal* is that the Court was simply confused as to what had occurred in *Twombly*. Once this confusion is sorted out, however, the Court will turn its back on the *Iqbal* decision.

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emergency unprecedented in the history of the American Republic'").