The Indeterminacy of *Iqbal*

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How significant an effect will the Supreme Court's decision in Ashcroft v. Iqbal *have on the ability of plaintiffs to vindicate substantive rights in federal court? To date, most commentators have argued* Iqbal*'s effect will be substantial, echoing Justice Ginsburg's view that the Court "messed up the Federal Rules" governing civil litigation.*[1]

This Article questions that understanding. Although it is clear that Iqbal *requires courts to perform a new fact-screening function at a motion to dismiss, the Court's decision did not address several features of that function, including (1) the threshold of plausibility a complaint must possess to survive a motion to dismiss; (2) the sources of information a court may rely on to substantiate its "judicial experience and common sense";*[2] *(3) whether discovery is allowed at the beginning of a case before a motion to dismiss is decided; and (4) whether the complaint in* Swierkiewicz v. Sorema *remains a viable model in employment discrimination cases. Moreover, there are reasonable arguments that these and other issues concerning* Iqbal*'s application should be resolved in a manner amenable to the vindication of substantive rights.*

Iqbal*'s effect on federal practice is not as certain as critics to date have assumed. To understand the* Iqbal *screening model and its effect on federal litigation, courts and commentators will need to grapple with the many interpretative questions the Court's decision left open.*

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1. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Remarks for Second Circuit Judicial Conference (June 12, 2009) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-12-09.html).

2. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

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To read the initial academic commentary, one might think that the Supreme Court in *Ashcroft v. Iqbal*[3] repealed the federal pleading provisions and replaced them with something the Justices discovered in *Bleak House*.[4] Rule 8(a) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief,"[5] and Rule 12 provides that a court may dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted."[6] *Iqbal* held that a complaint satisfies these rules if its factual allegations show a "plausible" entitlement to relief, and that "conclusory" allegations do not count in the calculus.[7] Under this standard, the Court dismissed a complaint that alleged "on information and belief"[8]—that is, without actual knowledge—that the former Attorney General and Director of the Federal Bureau of Investigation purposefully discriminated against Muslim men on the basis of their religion, race, and national origin in designing post-9/11 detention policy.[9] But the Court remanded to the Second Circuit to determine whether the plaintiff, who had been engaged in discovery during the three years his case was on appeal, should be allowed to amend his complaint.[10] Then, the case settled.[11]

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3. 129 S. Ct. 1937.

4. The proceedings described in *Bleak House* are perhaps the epitome of judge-made procedural law gone wrong. At the beginning of the novel, Dickens warns would-be litigants to "'[s]uffer any wrong that can be done you, rather than come'" to court seeking relief. CHARLES DICKENS, BLEAK HOUSE 3 (MacMillan and Co. 1895) (1853).

5. FED. R. CIV. P. 8(a). Unless otherwise noted, references to the "Rules" are to the Federal Rules of Civil Procedure.

6. FED. R. CIV. P. 12(b)(6).

7. *Iqbal*, 129 S. Ct. at 1949–50.

8. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 551 (2007) (internal quotation marks omitted).

9. *Id.* at 1944.

10. *Id.* at 1954; *see also* Tony Mauro, *Groups Unite to Keep Cases on Docket*, NAT'L L.J., Sept. 21, 2009, at 1 (noting that after the Court released its decision, Iqbal's counsel planned to amend the complaint to include facts obtained during discovery; counsel maintained, "'We think we can meet the new standard' . . . . 'We absolutely still could win.'").

11. *See* Proposed Order of Dismissal with Prejudice, *Elmahgraby v. Ashcroft*, No. 1:04-cv-01809-JG-SMG (E.D.N.Y. Nov. 9, 2009) (submitted by Iqbal after entering into Stipulation of Settlement with defendants).

Commentators have been sharply critical.[12] A few of their critiques have focused on features of the Court's decision that by their nature are unlikely to recur, such as the Court's unexpected revision of the substantive law of *Bivens* and its willingness to find implausible allegations of high-level wrongdoing in the wake of the 9/11 attacks.[13] Most commentators, however, have taken aim at

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12. *See, e.g.*, *Access to Justice Denied: Hearing on* Ashcroft v. *Iqbal*: *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 8–30 (2009) [hereinafter *Hearing*] (statement of Professor Arthur M. Miller, New York University School of Law), *available at* http://judiciary.house.gov/hearings/pdf/Miller091027.pdf (criticizing *Iqbal* on wide-ranging grounds); *id.* at 61 (statement of John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation), *available at* http://judiciary.house.gov/hearings/pdf/Vail091027.pdf (arguing that *Iqbal* confers unwarranted discretion on judges, imposes impossible pleading burdens on legitimate claims, and rests on questionable empirical assumptions concerning costs of discovery); *id.* at 79 (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund), *available at* http://judiciary.house.gov/hearings/pdf/Adegbile091027.pdf (arguing that *Iqbal* unjustifiably disadvantages civil rights plaintiffs and creates "substantial uncertainty" about access to justice); Robert M. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 852 (2010) (criticizing *Iqbal* for unjustifiably recognizing "thick" model for screening complaints); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that *Iqbal* destabilizes the federal procedural system by subjecting motions to dismiss to a "foggy" legal standard); Michael C. Dorf, Iqbal *and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 218 (2010) (questioning *Iqbal*'s willingness to presume high-level government officers acted lawfully in wake of 9/11); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 185 (2010) (arguing *Iqbal* undermines consistency and "endors[es] pleading standards that will make it increasingly difficult for members of societal out-groups to challenge the unlawful practices of dominant interests"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010) (arguing that federal pleading standards are "in crisis"); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly (Illinois Public Law Research Paper No. 09-16) (arguing that following *Iqbal*, the legal standard governing motions to dismiss is equivalent to that governing motions for summary judgment), *available at* http://ssrn.com/abstract=1494683; Comment, Ashcroft v. Iqbal, 123 HARV. L. REV. 252, 261–62 (2009) (arguing that *Iqbal* imposes impossible pleading burdens and confers unwarranted discretion on judges); Rakesh N. Kilaru, Note, *The New Rule 12(b)(6):* Twombly*,* Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927–28 (2010) (similar); Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, LITIG., Spring 2009, at 1, 2 (arguing *Iqbal* imposes impossible pleading burdens on legitimate claims).

Much criticism of the Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies to *Iqbal mutatis mutandis*. Notable examples include: Stephen B. Burbank, *Pleading and the Dilemma of "General Rules,"* 2009 WISC. L. REV. 535, 556–57 & n.97 (2009) (arguing, *inter alia*, that the *Iqbal* complaint stated a plausible claim for relief); 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) (arguing that *Twombly*'s reasoning should only extend to claims based on and refuted by publicly available evidence); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 867 (2008) (arguing that the plausibility standard undermines uniformity and encourages forum shopping); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) [hereinafter Spencer, *Plausibility Pleading*] (arguing that *Twombly* represents an unjustified break from past practice).

I am aware of a single scholarly publication that unqualifiedly defends *Iqbal. See* Douglas G. Smith, *The Evolution of a New Pleading Standard:* Ashcroft v. Iqbal, 88 OREGON L. REV. (forthcoming 2010) (manuscript at 15–17, 26–27, available at http://ssrn.com/abstract=1463844) (characterizing *Iqbal* as a necessary response to the expense of modern federal litigation).

13. *See* Burbank, *supra* note 12, at 558 (noting tension between *Iqbal*'s plausibility analysis and public disclosures of high-level illegality); Dorf, *supra* note 12, at 224–28 (same).

the "systemic design choice[s]"[14] reflected in *Iqbal*, particularly the Court's restatement of what Rules 8 and 12 require for a case to proceed past the pleadings to discovery.

There are three principal lines of attack. First, it has been suggested that when the defendant controls critical private information, *Iqbal* creates an apparent Catch-22 for plaintiffs, requiring them to plead information they do not know but denying them a means of discovering that information.[15] As Rakesh Kilaru describes the phenomenon, plaintiffs "cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim."[16]

Second, commentators maintain that *Iqbal*'s admonition to analyze the plausibility of the plaintiff's claim in light of "judicial experience and common sense"[17] confers unwarranted discretion on judges—particularly district judges—to determine which cases proceed to discovery and, ultimately, decision on the merits. By instructing courts to apply an already imprecise standard of "plausibility" in view of these open-ended concepts, *Iqbal* "effectively stated that federal courts should dismiss a complaint if the allegations do not 'ring true.'"[18]

Third, commentators contend, in an argument advanced most powerfully by Professors Clermont and Yeazell, that the *Iqbal* Court's decision to apply the "plausibility standard" announced in *Bell Atlantic v. Twombly*[19] to all civil cases created "enormous confusion and transaction costs."[20] These critics charge that

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14. Clermont & Yeazell, *supra* note 12, at 847.

15. Bone, *supra* note 12, at 878–79; *see also Hearing*, *supra* note 12, at 84–85 (statement of Depo P. Adebile) ("[B]ecause plaintiffs typically can obtain discovery only if they survive a motion to dismiss, many will be denied the very tools needed to support meritorious claims, and thus wrongdoers will escape accountability."); *Hearing*, *supra* note 12, at 18 (statement of Professor Arthur M. Miller) ("[H]ow can plaintiffs with potentially meritorious claims plead with factual sufficiency without discovery, especially when they are limited in terms of time, lack resources for pre-institution investigations, and critical information is held by the defendants?"); Comment, *supra* note 12, at 262 ("Plaintiffs will have to plead facts showing why alternative explanations for conduct are not as likely as are their claims [which will present] a particularly large obstacle in contexts—such as employment discrimination—in which it is improbable that a plaintiff has concrete evidence of a defendant's wrongdoing and motivation before discovery.").

16. Kilaru, *supra* note 12, at 927.

17. Ashcroft v. Iqbal, 129 S. Ct. 1397, 1950 (2009).

18. Comment, *supra* note 12, at 262 (quoting Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 20, 2009, at A10); *see also Hearing*, *supra* note 12, at 18 (statement of Professor Arthur M. Miller) ("Where is the plausibility line and what must be pled to survive a motion to dismiss? How will each judge's personal experience and common sense affect his or her determination of plausibility?"); McMahon, *supra* note 12, at 867 ("[D]ifferent courts will inevitably exhibit different levels of tolerance for complaints that do not include a plethora of detailed factual allegations."); Rothman, *supra* note 12, at 2 ("*Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success."). Professor Burbank asserts that *Iqbal* "'obviously licenses highly subjective judgments' . . . . 'This is a blank check for federal judges to get rid of cases they disfavor.'" Liptak, *supra*.

19. 550 U.S. 544 (2007).

20. Burbank, *supra* note 12, at 560 (describing *Twombly*'s consequences).

because of such costs, reinterpreting Rule 8 was an ill-considered and illegitimate way to change so established a feature of the federal procedural system, regardless of the merits of the new standard.[21] Perhaps spurred by this outpouring of criticism (or perhaps by midterm electoral politics), bills to undo *Iqbal* and *Twombly* have been introduced in the House and Senate.[22]

In a departure from much of this commentary, this Article does not attempt to consider the wisdom of *Iqbal vel non*. Instead, I propose to identify a few of the most prominent doctrinal and methodological issues *Iqbal* left open, and consider how they will affect plaintiffs' ability to vindicate substantive rights in the federal courts. My central thesis is that *Iqbal* did not, and inevitably could not, answer a number of questions about how a court should adjudicate a motion to dismiss. This feature of *Iqbal* has two important consequences for federal practice and academic analysis of the Court's handiwork.

First, because *Iqbal* leaves a number of interpretative questions unresolved, lower courts err insofar as they consider the decision a "[l]icense to [d]ismiss."[23] This Article thus builds on the important work of Edward Hartnett by suggesting that the *Iqbal* decision may be less of a departure from established pleading doctrine than an initial, uncritical reading might suggest.[24]

Second, I hope to show that despite the zeal with which they have been advanced, the strongest criticisms of *Iqbal* rely on interpretations of the decision that are far from inevitable. Although critics are correct to observe that *Iqbal* restated the pleading standard for all civil cases, many features of the screening model it ordained are poorly defined. Recognition of that fact calls into question the validity of the standard critiques of *Iqbal*, at least for the time being. The Catch-22 argument, for example, assumes that discovery is categorically unavailable in the early stages of a suit. Similarly, the judicial discretion argument assumes that the standards announced in *Iqbal* trump traditional limitations on

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21. *See* Clermont & Yeazell, *supra* note 12, at 847 ("The Court, interpreting Rule 8 in [*Twombly* and *Iqbal*], substantially altered a systemic design choice. . . . The complicated issues were not sufficiently developed by lower-court percolation, by academic or empirical studies, or even by parties' position-taking."); McMahon, *supra* note 12, at 869–70 ("[G]iven the volume and variety of litigation, the pleading standard should not be complicated or cumbersome to apply."); Steinman, *supra* note 12, at 1295 ("[F]ederal pleading standards are in crisis . . . .").

22. The Notice Pleading Restoration Act, S. 1504, 111th Cong. § 2 (2009), provides that a federal court may not dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) or (e) except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). The Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009), provides in part that "[a] court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief."

23. Rothman, *supra* note 12.

24. Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 474–75 (2010) (noting several ways in which the impact of *Twombly* could be limited); *see also* Edward A. Hartnett, *Responding to* Twombly *and* Iqbal*: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24, 33–34 (2010), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Harnett.pdf (suggesting *Twombly*'s impact could be limited by amending Rule 12 to address the "core issue" of whether "a plaintiff [should] be able to obtain discovery in an effort to uncover evidence without which he or she cannot prevail").

the sources of information a court may consider on a motion to dismiss and that the Court's reference to "judicial experience and common sense" opens up a broad new area of unreviewable lower-court discretion. As I suggest below, these premises can be questioned, and there are reasonable arguments that *Iqbal* did not enact as radical a change in federal practice as critics have assumed. It follows that the negative critiques are at best premature and at worst directed at a target that is at least in part illusory.[25]

The Article proceeds as follows. In Part I, I place the discussion in context by outlining what *Iqbal* held. I argue that *Iqbal* requires a court to perform a new fact-screening function in response to a motion to dismiss, and that an important part of this function involves policing the reasonableness of inferences plaintiffs draw from their personal knowledge, a function traditionally associated with Rule 11 rather than Rule 8. Nevertheless, because of *how* the Court implemented this new function, only its most elementary features have been defined. In Part II, I elaborate on this point by identifying some of the most significant interpretative questions *Iqbal* left open. Although I offer preliminary suggestions as to how these issues might be resolved, my goal in this Part is not to offer a canonical interpretation of the case but rather is to highlight the indeterminacy of *Iqbal* as a guide to motion to dismiss practice. The picture that emerges from careful consideration of *Iqbal*, I maintain, is one where key details of how to adjudicate a motion to dismiss are undefined. I briefly conclude in Part III by demonstrating how these interpretative disputes cast doubt on the strongest normative critiques of *Iqbal*.

At the outset, a qualification is in order. Although I am skeptical that *Iqbal* will have the effects many critics predict, I do not think the Court's decision is immune from criticism. In my view, the Court could have done less violence to the Federal Rules, while honoring the important policies underlying official immunity, by adopting something like the approach Justice Breyer advocated in dissent, perhaps holding that a district court necessarily abuses its discretion if it orders discovery against high-level executive officials absent a substantial showing of wrongdoing. How *Iqbal* might have been decided, however, is not critical to the project undertaken in this Article. What I hope to show is simply

25. I do not go so far as to assert that *Iqbal* preserves the core of the pre-*Twombly* pleading regime intact. *See* Steinman, *supra* note 12, at 1325. In reaching this conclusion, Professor Steinman relies on the fact that *Twombly* and *Iqbal* were both "exceptional" cases (*Twombly* because of the case's scope, and *Iqbal* because of lurking separation-of-powers concerns) and notes that neither decision disturbed various established pleading doctrines, such as the notice-pleading principle that a complaint need not contain *detailed* factual allegations to comply with Rule 8. *Id.* at 1326. Professor Steinman, however, elides the fact that *Twombly* and *Iqbal* call on courts to perform a *function* they hitherto were not required to perform. Perhaps this simply reflects a different reading of *Iqbal*, in which case I have no quarrel with Professor Steinman's thesis. But if *Iqbal* in fact adopted a generally applicable fact-screening model, analysis of the similarities between the *legal standards* applied in pre- and post-*Iqbal* regimes will not give an accurate picture of *Iqbal*'s significance. If courts are doing something different after *Iqbal*, we need to assess the effects of that function *even if* courts continue to rely on certain legal principles from the pre-*Iqbal* era.

that the decision does not mean nearly so much as has been attributed to it so far.

I. WHAT *IQBAL* HELD: THE MOTION TO DISMISS FOR FAILURE TO JUSTIFY DISCOVERY

To understand what *Iqbal* held, it is useful to begin by considering the purpose that pleadings serve in a modern procedural system. Scholars have identified two general functions: providing notice of a plaintiff's claim, and allowing a court to screen cases for merit.[26] Both of these functions may be broken down into two further subcategories, depending on whether the notice-giving or screening is directed at the factual or legal basis for a case. Accordingly, we can identify four general functions pleadings perform in a modern judicial system: (1) providing notice of the factual basis of the case; (2) providing notice of the legal theory (or theories) upon which the plaintiff seeks to recover; (3) allowing the court to screen the plaintiff's legal theory for coherence; and (4) allowing the court to screen the case based on the likelihood of success on the merits suggested by the factual allegations in the plaintiff's pleadings.

The first three functions are uncontroversial, and the Federal Rules have long recognized that a complaint is deficient if it fails to provide notice of the basic factual background for the suit or the plaintiff's substantive legal theory, or if the plaintiff pleads a patently unmeritorious legal theory.[27] The fourth function, however, is a relatively recent development in the history of the Federal Rules, and it raises analytical issues that the traditional notice-giving and legal screening functions do not.

The Supreme Court began to consider this function seriously in the late 2000s. A securities case, *Dura Pharmaceuticals, Inc. v. Broudo*, held that to plead the element of "loss causation" under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, a complaint must provide "some indication" of the economic loss the plaintiff suffered and its causal

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26. Particularly useful discussions may be found in Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 FED. RULES DECISIONS 604, 607–14 (2007) (identifying three requirements for pleading: "transactional sufficiency," "procedural sufficiency," and "substantive sufficiency"), and Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 451, 454 (1986) (differentiating between notice-giving and dispute resolution functions of pleadings, and arguing that in appropriate cases, pleadings form an appropriate basis for "genuine and reliable merits decisions").

27. As for the first two functions, Rule 8 requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The rule thus contemplates that the complaint "[m]ust be premised on a factual transaction and not simply on an abstract invocation of the law," and it "[m]ust describe the factual transaction with sufficient clarity to give the opposing party 'fair notice' of the underlying event and of the nature of the claim arising out of that event . . . ." Ides, *supra* note 26, at 607. As for the third function, it is hornbook law that a complaint may be dismissed if it pleads the details of a transaction and then demands relief on a legal non sequitur, *e.g.*, Hughes v. Rowe, 449 U.S. 5, 10 (1980), or inadvertently pleads a bar to liability, such as a statute of limitations, *e.g.*, Jones v. Bock, 549 U.S. 199, 215 (2007).

connection to the false statement or omission underlying the plaintiff's claim.[28] Another securities case, *Tellabs, Inc. v. Makor Issues & Rights*, held that to plead a "strong inference" of scienter under the Private Securities Litigation Reform Act of 1995, the allegations of a complaint must give rise to "an inference of scienter" that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent."[29]

Then came *Twombly*. Confronted with a complaint which alleged "on information and belief" that the regional Bell operating companies had conspired to divide territory and drive out competitors, the Court rejected a literal reading of *Conley v. Gibson*'s "no set of facts" gloss on Rule 8(a),[30] holding instead that a complaint must contain "enough facts to state a claim to relief that is plausible on its face."[31] The *Twombly* complaint failed to do this. Setting aside a conclusory allegation of conspiracy, the complaint merely alleged that the defendant telephone companies engaged in parallel conduct in their respective service areas and failed to pursue business opportunities in contiguous markets.[32] The Court concluded, relying on precedents interpreting section 1 of the Sherman Act, that these allegations did not "nudge" the plaintiff's claims "across the line from conceivable to plausible."[33]

As *Twombly* illustrates, a court screening for factual sufficiency must consider a tricky decision-theoretic question in cases where the plaintiff lacks present knowledge about one or more elements of a legal theory she hopes to win on. In such cases, it is possible that a claim that lacks the necessary threshold of factual support when the case is filed will have sufficient factual support following an opportunity to review the defendant's files, depose witnesses, et cetera. In ruling on a motion to dismiss, a court therefore must make a judgment, explicit or implicit, about whether proceeding past the pleadings is justified.[34] In cost–benefit terms, the question posed by such a case is whether the benefits of allowing the case past the pleadings outweigh the costs of doing so. Which benefits and costs properly figure into the calculus is contested, but

28. 544 U.S. 336, 347 (2005).

29. 551 U.S. 308, 314 (2007).

30. 355 U.S. 41, 45–46 (1957) ("In appraising the sufficiency of the complaint we 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.").

31. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 551, 562−63, 570 (2007).

32. *Id.* at 550–51.

33. *Id.* at 570.

34. As Professor Epstein observed in his analysis of *Twombly*:

> [T]he procedural system [should] make some critical assessment of the costs and benefits of stopping litigation at the pleading stage, and for any reason, relative to those of going forward with discovery. On this matter, standard expected utility calculations suggest that litigation should be allowed to go forward only when the likelihood of a positive case is high enough to justify . . . the enormous costs of discovery in class action antitrust suits.

Epstein, *supra* note 12, at 81.

they conventionally are understood to include the expected costs of discovery, the possibility that the parties will settle the case for non-merits reasons, and the possibility that the plaintiff will uncover evidence allowing her to prevail on the merits and thereby vindicate policies reflected in substantive law.[35]

Iqbal manages to avoid addressing these issues directly but nonetheless requires courts to perform the fact-screening function that gives rise to them. As described by the Court, Mr. Iqbal's complaint alleged that he was arrested in November 2001 by federal agents investigating the 9/11 attacks.[36] Pending trial on immigration fraud charges, Iqbal was housed at the Metropolitan Detention Center in Brooklyn, New York, and designated a "person of 'high interest'" to the 9/11 investigation.[37] As a result of that designation, Iqbal was placed in a section of the MDC that incorporated the maximum security conditions allowed under federal Bureau of Prison Regulations.[38] There, his jailors "kicked him in the stomach, punched him in the face, and dragged him across his cell without justification; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others; and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'"[39]

As the Court approached the case, the question was not whether Iqbal was the victim of unconstitutional conduct—no one doubts he was—but rather how far up the chain of command he could target his claim, and particularly whether he could state a claim against John Ashcroft and Robert Mueller, the Attorney General and Director of the FBI at the time of the abuse described in the complaint.[40] As to these defendants, the complaint contained three principal allegations. It alleged that: (1) the FBI, under Mueller's direction, "arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the [9/11 attacks]"; (2) Ashcroft and Mueller approved a "policy of holding [post-9/11] detainees in highly restrictive conditions"; and (3) Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[41] The complaint said Ashcroft was the "principal archi-

35. *See Twombly*, 550 U.S. at 558 (noting risk that "a plaintiff with 'a largely groundless claim' [will] be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value'" (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005))); *id.* at 559 (noting the "enormous expense of discovery"); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) (noting the benefits of private antitrust enforcement); *see also* Paul Stancil, *Balancing the Pleading Equation* 61 BAYLOR L. REV. 90, 117–32 (2009) (outlining some economic costs of suit to plaintiffs and defendants).

36. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

37. *Id.*

38. *Id.*

39. *Id.* at 1944 (alteration in original) (citations omitted) (internal quotation marks omitted).

40. *See id.* (noting that "[t]he allegations against [defendants Ashcroft and Mueller] are the only ones relevant here" and that Ashcroft and Mueller argue that the complaint does not "show their own involvement in clearly established unconstitutional conduct").

41. *Id.* (final alteration in original) (internal quotation marks omitted).

tect" of this policy, and Mueller was "instrumental in [its] adoption, promulgation, and implementation."[42]

The Court organized its decision around two rulings, one substantive, the other procedural. Substantively, the Court held that to prevail on a claim under *Bivens*,[43] Iqbal was required to plead and prove that Ashcroft and Mueller purposefully discriminated against a group on the basis of a protected characteristic; mere acquiescence in others' wrongdoing was not enough.[44] Procedurally, the Court held that the allegations of Iqbal's complaint were insufficient to state a claim under *Twombly*.[45]

The four analytical moves necessary to this ruling can usefully be thought of as both the basic components of a system for screening cases for factual sufficiency, and the holdings of the Court.[46] First, the Court framed its inquiry by noting that the adequacy of a complaint is not judged against a predetermined quantum of specificity, but in the context of the substantive law.[47] If *Iqbal* is understood to mandate screening for factual sufficiency, this move is unsurprising. To determine whether a complaint is suggestive enough of liability to warrant discovery, a court must know which facts constitute a violation of the substantive law.[48]

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42. *Id.* (alteration in original) (internal quotation marks omitted).

43. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* holds that in certain circumstances, a federal court exercising federal question jurisdiction may recognize a damages cause of action for conduct that violates the Constitution. *See generally* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 804–25 (5th ed. 2003).

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

45. *Id.* at 1949–52.

46. *See, e.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER 55 (2009) ("[T]here is nothing very mysterious about the idea of a holding—it is the legal rule that, as applied to the facts of the particular case, generates the outcome."); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257 (2006) ("The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.").

47. *Iqbal*, 129 S. Ct. at 1949 ("In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities."); *see also id.* at 1946 ("[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.").

48. Some courts and commentators have continued, even after *Iqbal*, to describe the pleading problem in terms of whether the plaintiff has satisfied a "heightened" pleading standard. *See, e.g.*, Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("[P]leading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading . . . ."); *Hearing*, *supra* note 12, at 13 (statement of Professor Arthur M. Miller) ("The defense bar . . . asserts that a heightened pleading standard is necessary to keep litigation costs down, weed out abusive lawsuits, and protect American business interests at home and abroad."). This confuses the issue. As Professor Hovenkamp has observed, what the Court's recent decisions require "is not so much an increase in 'factual matter' as much as a closer correlation between the legal elements that must be proven and the allegations in a complaint." Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 57 (2010), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hovenkamp.pdf.

The Court next set aside Iqbal's allegations that Ashcroft and Mueller purposefully discriminated against Arab Muslim men in designing post-9/11 detention policy because of the allegations' "conclusory nature."[49] Although the Court justified this move on the ground that it was not bound to accept "a legal conclusion couched as a factual allegation,"[50] its actions, in my view, are more profitably understood as an attempt to police the policies underlying Rule 11 than a conclusion about the specificity of Iqbal's factual allegations.

Rule 11(b)(3) provides that, by submitting a filing such as a complaint, a litigant certifies she has a reasonable, good faith belief that the factual allegations in the filing "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[51] While there is a substantial body of law governing what a plaintiff may allege without evidentiary support, a fundamental policy reflected in the rule is that a litigant must "stop-and-think" before making a factual contention she does not know to be true.[52] Thus, "[w]hile Rule 11 does not 'bar the courthouse door to people who have support for a complaint but need discovery to prove their complaint, the need for discovery does not excuse the filing of a vacuous complaint.'"[53]

The Court's decision to set aside Iqbal's allegations of purposeful discrimination can, and should, be understood to reflect its conclusion that Iqbal lacked reasonable grounds to allege that Ashcroft and Mueller personally acted with a particular purpose.[54] While portions of Iqbal's complaint are quite prolix,[55] the portions addressing Ashcroft and Mueller are written in a spartan style reminiscent of a criminal indictment that effectively concedes Iqbal's lack of knowledge concerning the two men. Ashcroft and Mueller, the complaint tells us, "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological

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

50. *Id.* at 1950.

51. FED. R. CIV. P. 11(b)(3). *See generally* Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171 (1994) (assessing the 1993 revision to Rule 11 in light of the difficulties with implementation of the 1983 revision).

52. FED. R. CIV. P. 11 advisory committee's note (1993).

53. Scott v. City of Chicago, 195 F.3d 950, 953 (7th Cir. 1999) (quoting Samuels v. Wilder, 906 F.2d 272, 274 (7th Cir.1990)).

54. To be clear, I do not suggest that the Court read the entire body of Rule 11 case law into Rule 8 jot for jot, or that Iqbal's lawyers violated Rule 11. Some circuits have interpreted Rule 11 in a manner that makes it very difficult to sanction a litigant for making groundless factual statements, *see, e.g.*, Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 388 (2d Cir. 2003) ("With regard to factual contentions, 'sanctions may not be imposed unless a particular allegation is utterly lacking in support.'" (quoting O'Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996))), and there is no reason to think the Court took such a liberal view. I do contend, however, that the Court sought to prevent one of the basic problems Rule 11 is directed at—factual allegations "without any factual basis or justification." FED. R. CIV. P. 11 advisory committee's note (1993).

55. *See, e.g.*, Petition for a Writ of Certiorari app. D, at 186a–188a, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015), *available at* http://www.justice.gov/osg/briefs/2007/2pet/7pet/2007-1015.pet.aa.pdf.

interest.'"[56] Moreover, portions of the Court's opinion openly reject Iqbal's "conclusory" allegations on the ground that they are too far a leap from the concrete facts alleged. The Court, for example, rejected Iqbal's suggestion that the section of Rule 9 authorizing state of mind to be alleged "generally" saved his complaint because "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."[57]

Reading *Iqbal* as requiring courts to police the reasonableness of the inferences drawn from a plaintiff's actual knowledge does more than explain the considerations driving the Court's analysis; it also makes sense of a feature of the decision that has puzzled commentators. As many commentators have noted, the Rules' appendix of forms embraces conclusory allegations, most famously in the form negligence complaint's unexplained allegation that the defendant "negligently" drove a vehicle into the plaintiff.[58] If what doomed Iqbal's allegations was their resemblance to "legal conclusions," it is difficult to see how the forms state a claim,[59] yet Rule 84 makes clear that they do.[60]

Attention to the information likely to be within the plaintiff's personal knowledge goes some way toward explaining why the forms' "conclusory" allegations are unobjectionable. Because the forms generally discuss situations in which it is reasonable to infer an element as to which the plaintiff lacks present knowledge from the fact that an injury occurred, there is little need to police the reasonableness of the inferences the plaintiff draws from her personal knowledge. Consider the negligence complaint: especially in a jurisdiction that has adopted a comparative negligence regime, it is reasonable for a person struck by a vehicle while crossing the street to assume that the driver of the vehicle is guilty of *some* wrongdoing; vehicles do not ordinarily collide with pedestrians crossing the street, and common sense teaches that most of the time such an accident occurs, all parties likely are a little bit at fault.[61] What

56. *Iqbal*, 129 S. Ct. at 1951 (alteration in original).

57. *Id.* at 1954 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

58. *See, e.g.*, Bone, *supra* note 12, at 18–19; Spencer, *Plausibility Pleading*, *supra* note 12, at 472. The critical paragraph of the form complaint adopted with the 1938 Rules provides: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Bell Atl. v. Twombly, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting). The restyled 2007 version leaves out the fact that the plaintiff was crossing the highway when the defendant struck him. *See* FED. R. CIV. P. form 11 ("On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."). However, the amendments were "intended to be stylistic only." FED. R. CIV. P. 12 advisory committee's note (2007).

59. *Cf.* Elan Microelectronics Corp. v. Apple, Inc., No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) ("It is not easy to reconcile Form 18 [for patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a 'short and plain statement,' it offers little to 'show' that the pleader is entitled to relief.").

60. FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").

61. *See, e.g.*, Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 886 (2009) ("[D]rivers do not usually strike pedestrians when driving with reasonable care, so the probability of negligence conditional on a pedestrian being struck should be

distinguishes Iqbal's complaint is the reasonableness of the inference he drew from the fact that, following the 9/11 attacks, low-level officials brutally discriminated against Muslim men. It is not reasonable, the Court seems to say, to infer that *Ashcroft and Mueller* purposefully discriminated against Muslim men based on the simple fact that their inferiors did.

The Court next determined that the remaining allegations in Iqbal's complaint were insufficiently suggestive of liability to defeat a motion to dismiss. Explaining what *Twombly* requires, the Court said: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."[62] The Court added that "[d]etermining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense,"[63] and that "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'"[64]

In the Court's view, Iqbal's complaint did not meet this standard. The Court credited Iqbal's allegation that the FBI arrested thousands of Arab Muslims pursuant to a policy designed by Ashcroft and Mueller.[65] But it opined that the policy's disparate impact on Arab Muslims was most likely explained by benign reasons, especially the policy's lawful objective of detaining persons suspected of involvement in the 9/11 attacks.[66]

Lastly, the Court rejected Iqbal's suggestion that the principles it applied, which were derived from *Twombly*, were limited to antitrust cases or complex litigation. *Twombly*, the Court said, "was based on our interpretation and

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quite high."); Randal Picker, Twombly*,* Leegin*, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 176 (2007) ("In the world of Form 9, the accident itself allegedly has taken place and perhaps that alone is enough, if we assume that most accidents arise from some sort of wrong.").

62. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

63. *Id.* at 1950 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).

64. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557).

65. *See id.* at 1951.

66. In the critical paragraph of its opinion, the Court explains:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Id. at 1951–52 (citation omitted).

application of Rule 8."[67] Accordingly, it "expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike."[68]

* * *

From this brief outline of what *Iqbal* held, the basic features of the new screening function a court must perform at a motion to dismiss may be discerned. At *Iqbal* step 1, the court sets a frame of reference for the screening analysis by identifying the applicable substantive law. At step 2, the court identifies the factual grist for its analysis by disregarding "conclusory" allegations—those, I suggest, that are not reasonable inferences from the plaintiff's personal knowledge. Lastly, at step 3, the court makes a judgment as to whether the case should move forward by asking whether the pleader has demonstrated a "plausible" entitlement to relief, some level of probability the Court has yet to define with any specificity. Together, *Iqbal* and *Twombly* reflect the Court's judgment that when the plaintiff fails to make this showing, discovery is not worth the effort, and the complaint should be dismissed, perhaps with leave to replead.

II. WHAT *IQBAL* DIDN'T HOLD: FOUR-AND-A-HALF UNRESOLVED QUESTIONS ABOUT THE NEW PLEADING REGIME

Iqbal requires federal courts to perform a new screening function at a motion to dismiss. Yet the Court's decision left many questions about how courts should discharge this function unanswered. In this Part, I identify five such issues—four of which are reasonably debatable—and offer provisional suggestions for how they might be resolved. My project is more by way of illustration than an attempt to offer a canonical catalog of the doctrinal and methodological issues that will arise in post-*Iqbal* litigation. I suggest that although *Iqbal* clearly requires courts to perform a new function when faced with a motion to dismiss, we only know the most basic contours of this function at present.

A. SOURCES OF INDETERMINACY

Before considering the doctrinal and methodological issues *Iqbal* left open, it might be worthwhile to consider *why* these issues persist. Why, in other words, is *Iqbal* the source of the "[p]ersistent confusion" and "substantial uncertainty" critics have identified?[69] The circumstances in which *Iqbal* was decided and structure of the Court's opinion suggest at least three general explanations.

The first has to do with the novelty of the enterprise *Iqbal* initiated. For most of the lifespan of the Federal Rules, it has been conventional wisdom that the factual sufficiency of a complaint is a non-issue. *Conley v. Gibson* ruled that a

67. *Id.* at 1953.

68. *Id.* (citation omitted) (internal quotation marks omitted).

69. Clermont & Yeazell, *supra* note 12, at 846; *Hearing*, *supra* note 12, at 89 (statement of Debo P. Adegbile).

complaint was adequate unless the plaintiff could prove no set of facts entitling her to relief,[70] and, as Professor Hazard observed, literal compliance with this rule could "consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."[71] Although that proposition may not capture the more nuanced reality of pleading practice prior to *Iqbal*,[72] it was not until *Iqbal* that the Court openly adopted a generally applicable model of screening complaints for factual sufficiency. As a result, there historically has been little serious consideration of how best to screen cases for factual sufficiency.[73] A federal court that considered whether a complaint alleged an adequate factual basis exposed itself to reversal for failing to comply with the command of *Conley*; indeed, this was the fate of Judge Gerard E. Lynch's dismissal of the *Twombly* complaint in the Second Circuit.[74]

The second reason for the persistence of substantial questions about the meaning of the *Iqbal* model arises from *how* the Court implemented the fact-screening function. By reinterpreting Rule 8 rather than working through the process created by the Rules Enabling Act,[75] the Court limited its ability to confront a number of analytical issues that an institutional designer who wanted to implement a threshold factual screen would likely address.[76] Rule 8's formulation—that a complaint must make a "showing that the pleader is *entitled* to relief"[77]—leaves a number of questions unanswered: What parts of a legal case is the pleader responsible for pleading? How convincing must the showing of "entitlement" to relief be to send a case to discovery? What sort of information may a pleader (and the court) rely on? Until these questions are presented in concrete cases, there is only so much a general statement of a general standard can resolve. The judicial process is such that a single decision—even a landmark decision—cannot begin to resolve all the problems of application that arise under a single, generally applicable standard.[78]

Then there is the structure of the *Iqbal* decision. As the prior Part explains,

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70. Conley v. Gibson, 355 U.S. 41, 45 (1957).

71. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

72. *See generally* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Marcus, *supra* note 26.

73. *See* Marcus, *supra* note 26, at 445 (noting that "[t]he last serious proposal" to amend the Federal Rules' pleading provisions was made in the 1950s).

74. Twombly v. Bell Atl. Corp., 425 F.3d 99, 119 (2d Cir. 2005), *rev'g* Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003). Judge Lynch was subsequently elevated to the Second Circuit. U.S. Court of Appeals for the Second Circuit, Circuit Judges' Biographical Information, http://www.ca2.uscourts.gov/Judgesbio.htm (last visited Apr. 22, 2010).

75. 28 U.S.C. § 2071 (2006).

76. *See* Bone, *supra* note 12, at 883–84 ("The Supreme Court is not the optimal institution to design a strict pleading rule . . . . The Court is not in a good position to gather and process [the relevant] information."); Clermont & Yeazell, *supra* note 12, at 850 ("[B]efore discarding the pleading system that has been in place for years, we ought to discuss its virtues and failures soberly and with the relevant information before us.").

77. FED. R. CIV. P. 8(a)(2) (emphasis added).

78. Perhaps the best example is *Miranda v. Arizona*, 384 U.S. 436 (1966), which, according to Westlaw, has been "examined" in eighty-two subsequent Supreme Court decisions.

only four analytical moves were necessary for the Court's judgment that Iqbal's complaint was deficient. Yet the Court's opinion includes an extensive restatement of *Twombly* with substantial glosses on the concept of "facial plausibility," the type of allegations a court may disregard in evaluating a complaint's factual sufficiency, and a new, two-step framework for evaluating complaints challenged with a motion to dismiss.[79] Whether or not this restatement was warranted as matter of judicial craftsmanship,[80] it was bound to leave significant questions unanswered.

Iqbal's open texture, then, may be understood as the product of a number of factors, some of which are inherent in the project of laying down general standards, and others of which are linked to how the Court reintroduced factual screening into federal practice. By remaking federal pleading standards via reinterpretation of Rule 8, in an opinion that defined pleading requirements for a broad range of cases, the Court all but guaranteed that substantial questions about the new pleading regime would persist. With this in mind, I turn to some of the particular issues the Court's decision left unresolved.

B. DOES THE PLAUSIBILITY STANDARD APPLY TO ALL CIVIL CASES?

In view of the Court's rejection of Iqbal's argument that *Twombly* should be limited to complex litigation or antitrust cases,[81] it might seem surprising to begin by asking whether the plausibility standard applies in *all* civil cases. Since *Iqbal* was decided, however, Judge Posner has twice suggested that the decision is limited to cases arising in particular areas of substantive law. In *Smith v. Duffey*, Posner observed:

> *Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery "provides especially cold comfort in *this* pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.[82]

Then in *Cooney v. Rossiter*, Posner suggested that "complexity," "immunity," and "paranoid" pro se claims of conspiracy might be unique circumstances in which "the plaintiff must meet a high standard of plausibility."[83]

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79. *See Iqbal*, 129 S. Ct. at 1949–50.

80. Given lower courts' institutional conservatism and expressed puzzlement about *Twombly*, *e.g.*, Iqbal v. Hasty, 490 F.3d 143, 155–57 (2d Cir. 2007), there is a reasonable argument that the restatement was necessary. In any event, it is a standard feature of the modern Supreme Court opinion.

81. *See Iqbal*, 129 S. Ct. at 1953.

82. 576 F.3d 336, 340 (7th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1954); *cf. Burbank*, *supra* note 12, at 558 (suggesting that the Court could require fact pleading as a matter of substantive law if it concludes that the purposes of the official immunity defense require greater protection than *Twombly* provides).

83. 583 F.3d 967, 971 (7th Cir. 2009).

Judge Posner's observations are not without any basis in the Court's decision. Indeed, as a theory of what motivated the Court's demanding application of the plausibility standard, the proposition that *Iqbal* was special because it challenged decisions made by high-level Justice Department officials is surely correct. Throughout its opinion, the Court was transparent about its desire to preserve these officials' discretion to respond energetically to future emergencies.[84]

But for reasons discussed above, the suggestion that the plausibility standard does not apply in all civil cases conflicts with what *Iqbal* held.[85] The context-sensitive nature of the plausibility inquiry, the Court's decision to set aside conclusory allegations, its application of the plausibility standard, and, critically, the *transsubstantive* nature of that standard each *explained* the Court's judgment dismissing the complaint.[86] Therefore, at least under a conventional understanding of the doctrine of precedent, those features of the Court's decision are holdings, which bind the Supreme Court and lower courts until they are modified, overruled, or repealed.[87]

For this reason, critics are correct to observe that *Iqbal* adds a generally applicable "requirement for claimants that goes above and beyond having to give notice."[88] In my view, however, that is perhaps the only way in which their expansive reading of *Iqbal* follows necessarily from what the Court held. In virtually every other respect, there is at least a reasonable argument that *Iqbal* does not mandate the obstacles to the vindication of substantive rights critics ascribe to it. In virtually every other respect, *Iqbal* is indeterminate.

C. DEFINING THE OPERATIONAL DETAILS OF THE PLAUSIBILITY STANDARD

To begin with, consider what we might refer to as the "operational details" of the plausibility standard. The Court held that "only a complaint that states a plausible claim for relief survives a motion to dismiss,"[89] and offered several glosses on this standard.[90] However, its decision does not address a number of

84. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1954.

85. *See supra* text accompanying notes 67–68.

86. A rule is transsubstantive if it applies equally to all cases regardless of the substantive law a case arises under. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. (forthcoming 2010) (manuscript at 76), *available at* http://ssrn.com/abstract=1428992.

87. *See supra* note 46.

88. Clermont & Yeazell, *supra* note 12, at 829 (citation omitted).

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

90. *See, e.g.*, *id.* at 1949 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *id.* ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (internal quotation marks omitted)); *id.* at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); *id.* ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." (internal quotation marks omitted)).

issues concerning how that standard is to be applied, including: (1) the threshold of plausibility a complaint must possess to survive a motion to dismiss; (2) whether plausibility is assessed as to an element the plaintiff lacks knowledge about or a claim as a whole; and (3) whether the plausibility inquiry takes account of bars to liability raised as affirmative defenses.[91] Although critics have argued that *Iqbal* requires each of these questions to be resolved in the manner most hostile to the vindication of substantive rights, the Court's decision does not definitively resolve any of these questions, and there are good arguments that they should be resolved in a more modest manner that minimizes the extent of *Iqbal*'s departure from prior law.

Consider first the threshold of plausibility necessary to state a claim: How confident must a court be of the plaintiff's "entitlement to relief" to deny a motion to dismiss?[92] *Iqbal* does not answer the question. Once the "conclusory" allegations were excised from the complaint and the Court rejected the crucial argument, discussed below, that discriminatory purpose could be inferred from the detention policy's disparate impact or the actions taken by Ashcroft and Mueller's inferiors,[93] no remaining allegations suggested that Ashcroft and Mueller personally engaged in purposeful discrimination.[94] The Court's decision therefore establishes the unsurprising proposition that a complaint containing *no* nonconclusory allegations suggestive of liability does not state a plausible entitlement to relief. It does not tell the threshold of plausibility that must be reached when nonconclusory allegations *are* suggestive of liability.

Moreover, the Court's statements in both *Iqbal* and *Twombly* hedge on the threshold of plausibility a complaint must cross to survive a motion to dismiss. In both cases, the Court explicitly states that it is not imposing a "probability requirement,"[95] but simply requiring allegations showing more than a "mere possibility" of misconduct.[96] The Court has not explained what a "probability requirement" is. But if we understand that concept as something akin to a movant's burden on a preliminary injunction[97] and a "mere possibility of misconduct" as actions "consistent with legal conduct,"[98] it would seem that the Court is asking for, at most, something like probable cause to believe the defendant breached a

91. *See, e.g.*, Cooney v. Rossiter, 583 F.3d 967, 970–71 (7th Cir. 2009) (discussing the relevance of the immunity defense); Bone, *supra* note 12, at 21–22 (discussing the threshold of plausibility and target of plausibility analysis).

92. This question can be thought of as the pleading analogue to the standard of proof on the merits. *See United States v. Fatico*, 458 F. Supp. 388, 403–06 (E.D.N.Y. 1978) (discussing various standards of proof in probabilistic terms).

93. *See infra* section II.D.

94. *Iqbal*, 129 S. Ct. at 1952.

95. *Id.* at 1949; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

96. *Iqbal*, 129 S. Ct. at 1950; *see also Twombly*, 550 U.S. at 557–58.

97. *E.g.*, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) (noting that a movant seeking preliminary injunction must establish, *inter alia*, "that he is likely to succeed on the merits").

98. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting).

legal duty owed to the plaintiff.[99] If that analogy is apt, *Iqbal* merely requires courts to make a practical decision whether, given all the circumstances set forth in the complaint, the plaintiff is likely entitled to relief.[100] To be sure, this is more demanding than *Conley v. Gibson*, according to which "a pleading is insufficient only if the pleader 'pleads himself out of court.'"[101] But it is also far from "expect[ing] the proof of the case to be made through the pleadings,"[102] as critics at times have suggested.[103]

Turning to whether plausibility is assessed element by element or as to a claim as a whole, the circuits had divided prior to *Iqbal*,[104] and *Iqbal* did not address the question directly. Nevertheless, the Court's descriptions of the plausibility standard make clear that plausibility is properly assessed as to a claim as a whole. The Court explained, for example, that a "*claim* has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged";[105] that "only a complaint that states a plausible *claim* for relief survives a motion to dismiss";[106] and that "[d]etermining whether a complaint states a plausible *claim* for relief" is a context-specific task.[107] It might be objected that what the Court said it was doing is inconsistent with what it *did*, namely, evaluating the likelihood of purposeful discrimination and conspiratorial agreement.[108] But the objection overlooks the central role purposeful discrimination and agreement play in discrimination claims under *Bivens* and Section 1 of the Sherman Act, respectively. In both cases, proof of particular elements—adverse decision-making "because of" a constitutionally protected characteristic under *Bivens*, and agreement under the Sherman Act—all but assures a violation of the law unless the

99. *Cf.* United States v. Grubbs, 547 U.S. 90, 95 (2006) (probable cause in the search warrant context is "anticipatory" and requires only a "'fair probability'" that evidence will be found in the place to be searched (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983))).

100. *See Gates*, 462 U.S. at 238 (probable cause in the search warrant context requires a judge to make a practical decision about whether there is a "fair probability" that evidence will be found in a particular place).

101. Hazard, *supra* note 71, at 1685 (quoting Early v. Bankers Life & Cas. Co, 959 F.2d 75, 79 (7th Cir. 1992)).

102. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

103. *See Hearing*, *supra* note 12, at 19 n.34 (statement of Professor Arthur M. Miller).

104. *Compare, e.g.*, Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008) ("*Twombly* focused on the plausibility of the complainant's claim for relief . . . ."), *with* Aktieselskabet AF 21. November 2001 v. Fame Jeans, 525 F.3d 8, 17 (D.C. Cir. 2008) ("*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim."), *and* Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) ("[T]he complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.").

105. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (emphasis added).

106. *Id.* at 1950 (emphasis added).

107. *Id.* (emphasis added).

108. *See Aktieselskabet AF*, 525 F.3d at 17.

defendant establishes an affirmative defense.[109]

Iqbal also did not hold that a plaintiff must plead facts sufficient to overcome any affirmative defenses, including the defense of qualified immunity. Once again, the circuits had divided prior to *Iqbal*. Some courts held that the requirement of pleading a "plausible entitlement to relief" did not disturb the traditional rule that a plaintiff has no burden to overcome affirmative defenses at the pleadings.[110] Affirmative defenses concede the allegations of the complaint but assert that relief is not warranted because of some additional consideration, and consequently, a defendant must raise any affirmative defenses in the answer to the complaint.[111] Courts that read *Twombly* to apply only to the plaintiff's prima facie case thus reasoned that the additional burdens *Twombly* imposed on plaintiffs do not include the duty to overcome affirmative defenses.

Other courts questioned this account.[112] Certain affirmative defenses—for example, the claim that the defendant's conduct was reasonable in view of clearly established law, which, if established, entitles the defendant to qualified immunity[113]—do not turn on information uniquely within the defendants' control and are practically certain to be raised in particular types of cases. These courts therefore held that, at least as to defenses like qualified immunity, the plaintiff was required to show a plausible entitlement that took into account the effect of affirmative defenses.

Some language in *Iqbal* might suggest that the Court adopted the latter position.[114] But for two reasons, this over-reads the Court's decision. First, the Supreme Court's prior decision in *Gomez v. Toledo* squarely addressed the burden of pleading qualified immunity—the very defense at issue in *Iqbal*—and ruled that because "qualified immunity is a defense, the burden of pleading it rests with the defendant."[115] There is no indication that the Court intended to or did overrule *Gomez*, and implied overrulings of the Court's decisions are not

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109. *See Iqbal*, 129 S. Ct. at 1948 ("Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose."); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954) ("The crucial question is whether respondents' conduct toward petitioner stemmed from . . . an agreement, tacit or express.").

110. *See, e.g.*, Iqbal v. Hasty, 490 F. 3d 143, 153–58 (2d Cir. 2007).

111. *See* Gomez v. Toledo, 446 U.S. 635, 640–41 & n.8 (1980).

112. *See, e.g.*, Robbins v. Oklahoma, 519 F.3d 1242, 1249 (2008).

113. *See* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. REV. 911, 925–27 (2008) (describing qualified immunity doctrine).

114. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1942–43 (stating that the case "turns on" the question of whether "respondent, as the plaintiff in the District Court, [pled] factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights"); *id.* at 1948–49 ("[T]o state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."). The language regarding "clearly established rights" originates in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the leading case on qualified immunity. *See id.* at 818–19.

115. 446 U.S. 635, 640 (1980).

favored.[116] More importantly, the Court's rejection of Iqbal's complaint did not turn on aspects of the case that would have been raised as an affirmative defense. The elements the Court found lacking—purposeful discrimination and personal involvement—are both elements of a plaintiff's prima facie case for unconstitutional discrimination.[117]

The surprising result is that a decision that plainly was motivated by concerns originating in the law of official immunity left untouched traditional doctrine addressing how immunity is raised and evaluated. The Court neither overturned its prior precedent nor decided *Iqbal* in a manner that properly may be understood to mandate an additional burden on plaintiffs at the pleadings. Accordingly, it would be wrong to think that *Iqbal* requires a plaintiff to anticipate and overcome affirmative defenses in the complaint. The "claim" that *Iqbal* requires a plaintiff to plead plausibly is a prima facie claim.

D. HOW CAN A COURT SUBSTANTIATE ITS "JUDICIAL EXPERIENCE AND COMMON SENSE"?

In a statement that has alarmed commentators, *Iqbal* noted, citing Judge Jon O. Newman's opinion below, that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[118] The Court, however, did not explain what it meant by this. It did not address the kind (or sources) of information that inform a court's judicial experience and common sense. Nor did it address the relationship between this concept and doctrines that constrain the information a court may consider on a motion to dismiss.

These points may seem academic, but the apparent simplicity of the Court's diktat obscures important questions about the adjudication of motions to dismiss after *Iqbal*. First, courts are in the business of providing reasons. They do not simply announce decisions, but explain why they follow from accepted premises.[119] Second, various legal rules governing how a court is supposed to evaluate a motion to dismiss are designed to *limit* the information the court may consider. A court, for example, must convert a motion to dismiss into a motion for summary judgment if the motion presents matters outside the pleadings.[120]

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116. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

117. *See Iqbal*, 129 S. Ct. at 1948–49, 1952.

118. *Id.* at 1950 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).

119. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) ("In law . . . giving reasons is seen as a necessary condition of rationality.").

120. FED. R. CIV. P. 12(d) ("If . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). In general, a court may only consider the complaint, attachments to it, briefs and oral arguments, extrinsic material

For both these reasons, the sources of information a court relies on to substantiate its "judicial experience and common sense" are important. If "judicial experience and common sense" constitutes a license to rely on broad new categories of extrinsic information at a motion to dismiss, the critics' fears that motion to dismiss practice will be unduly influenced by individual judges' differing views of life, the universe, and everything may be warranted.[121] If, on the other hand, "judicial experience and common sense" introduces only a few new premises into courts' analysis, the critics' fears may be overstated.

Some insight into what the Court meant by "judicial experience and common sense" can be gained by examining how it explained propositions it viewed as obvious in *Iqbal*. The key to the Court's plausibility analysis was its rejection of two inferences: (1) that the disparate impact of post-9/11 detention policy revealed discriminatory purpose on the part of the policy's designers,[122] and (2) that, as characterized by the Second Circuit, "it is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."[123]

The Court rejected the latter inference on the ground that it was incompatible with the substantive law of *Bivens*. It ruled that purpose, not knowledge, is necessary to establish a superior officer's liability for an inferior officer's unconstitutional conduct.[124] This substantive legal principle, not the Justices' ad hoc common sense, blocked the inference that Ashcroft and Mueller condoned their inferiors' actions.[125]

As for the first inference, the Court conceivably might have relied on the doctrine that a policy's disparate impact on a protected group does not necessarily demonstrate unconstitutional discriminatory purpose.[126] But instead, it held that high-level officers' conduct was presumptively lawful, even in the aftermath of "a national and international security emergency unprecedented in the

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"integral" to the plaintiff's claim, and matters of which a court may take judicial notice in resolving a motion to dismiss. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366, at 183–86 (3d ed. 2004).

121. *See supra* note 18.

122. *Iqbal*, 129 S. Ct. at 1951–52.

123. Iqbal v. Hasty, 490 F.3d 143, 166 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009); *see* Dorf, *supra* note 12, at 227 (noting that the *Iqbal* Court characterized as "not plausible" the inferences that the designers of the detention policy "relied on race, national origin, or religion in deciding whom to treat as high-value suspects" and that "prison authorities . . . were acting on orders").

124. *See supra* notes 43–44 and accompanying text.

125. *Iqbal*, 129 S. Ct. at 1952 ("But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, *that inference alone* would not entitle respondent to relief." (emphasis added)).

126. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976). *See generally* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (describing and critiquing the discriminatory intent standard the Court has adopted).

history of the American Republic."[127] While not articulated by the Court, that presumption has a long pedigree in the common law, though the importance courts have attached to it has waxed and waned over the years. Innumerable judicial decisions addressing allegations of official unlawfulness contain statements to the effect that courts will presume officials have lawfully discharged their duties.[128]

Notably, the Court in *Twombly* relied on similar sources in explaining why the mere fact of parallel conduct would not support an inference of conspiracy at the pleadings. The Court explained that "we have the benefit of the prior rulings and considered views of leading commentators . . . that lawful parallel conduct fails to bespeak unlawful agreement."[129]

In view of the Court's reliance on these essentially legal sources, it seems that *Iqbal*, at most, should be read to authorize courts to rely on what scholars of administrative law have referred to as "judgmental facts" in adjudicating a motion to dismiss.[130] Such "facts"—in reality, value-loaded judgments about how the world operates—inhabit a grey area between the substantive law and propositions so obvious or widely accepted they may be judicially noticed.[131] Although judgmental facts purport to describe how the world operates, they are "mixed with judgment, policy ideas, opinion, discretion or philosophical preference."[132] They also are a *product* of the substantive law. The lawfulness of official conduct, for example, is not an immutable feature of the universe.[133] Courts nevertheless presume officials follow the law, for a variety of reasons ranging

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127. *Iqbal*, 129 S. Ct. at 1945 (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)). Professor Dorf describes the Court's reasoning in the follows terms:

> Arab and Muslim men are disproportionately sent to a maximum security prison unit, where they are subjected to harsh treatment by prison authorities who repeatedly state that, as Muslims and terrorists, they deserve no better, but it is simply not plausible to think that the pervasive and discriminatory abuse resulted from instructions by the Attorney General or the FBI Director.

Dorf, *supra* note 12, at 14.

128. *See, e.g.*, Bracy v. Gramley, 520 U.S. 899, 909 (1997) ("Ordinarily, we presume that public officials have properly discharged their official duties." (internal quotation marks omitted)); Bishop v. Wood, 426 U.S. 341, 350 (1976) ("[W]e must presume that official action was regular and, if erroneous, can best be corrected in other ways [than a direct action under the Constitution]."); Dombrowski v. Pfister, 380 U.S. 479, 484 (1965) ("It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court . . . ."); Delassus v. United States, 34 U.S. (9 Pet.) 117, 134 (1835) (Marshall, C.J.) ("He who alleges that an officer entrusted with an important duty has violated his instructions, must show it.").

129. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–56 (2007) (citing, *inter alia*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), and 6 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1433a, at 236 (2d ed. 2003)).

130. KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 15.10, at 178 (2d ed. 1980).

131. *See* FED. R. EVID. 201 (limiting judicial notice to facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

132. DAVIS, *supra* note 130, § 15.10, at 178.

133. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 713 (1974) (finding official conduct was illegal); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952) (same); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803) (same); JACK GOLDSMITH, THE TERROR PRESIDENCY *passim* (2007).

from separation of powers concerns to the necessity of maintaining reasonable limits on judicial dockets.[134]

If courts follow this reading, *Iqbal*'s likely impact on motion to dismiss practice will be somewhat different than that predicted by its initial critics. On one hand, increased reliance on judgmental facts will, as the younger Professor Marcus has observed, encourage the growth of "substance-specific" procedure—procedural doctrines adapted to the needs and pathologies of particular areas of substantive law.[135] More broadly, increased use of judgmental facts increases the power of judges vis-à-vis Congress, the Executive Branch, and the agencies to determine the kind of cases that receive a hearing in federal court. As *Iqbal* pointedly illustrates, a court's reliance on judgmental facts can directly affect whether particular forms of primary conduct support a federal suit designed to test the legality of that conduct. To the extent judges define and shape judgmental facts, they exercise a power which is not easily distinguished from the legislative power to define norms of substantive law. On the other hand, there is little reason to suspect that increased reliance on judgmental facts will result in arbitrary decisionmaking or threaten the traditional role of the judge as neutral arbiter of the facts and the law. A judgmental fact must be expressed to have persuasive and explanatory value, and, as a statement of substantive law, is subject to de novo appellate review.[136] At least under this understanding, the proposition that "judicial experience and common sense" threatens traditional norms of judicial decisionmaking is dubious. One might disagree with a particular principle of substantive law, but reliance on such a principle does not, as one critic maintains, "permit judges to use *their own opinions* . . . to decide motions to dismiss."[137]

Of course, courts might read more into the Court's reference to "judicial experience and common sense" than a careful reading of *Iqbal* and *Twombly* warrants, in which case *Iqbal* will have a more substantial, and troubling, impact on motion to dismiss practice. There are good reasons, however, to doubt that misreadings will occur on a broad enough scale to affect evaluation of *Iqbal* as a systemic design choice. For one thing, it would be strange if courts read the Court's reference to judicial experience and common sense in a vacuum, without regard to the role it played in *Iqbal* and *Twombly*. In addition, the more courts read into "judicial experience and common sense," the more that concept will be in tension with traditional pleading doctrines designed to limit the

134. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607–08 (1985) (describing the government's broad prosecutorial discretion as "rest[ing] largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review").

135. *See* Marcus, *supra* note 86 (manuscript at 68) (predicting that "[a] nominally trans-substantive standard will metamorphose in application into a number of substance-specific procedural rules that differ from doctrinal category to doctrinal category").

136. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1988) (noting the general principle that questions of law are reviewable de novo).

137. Thomas, *supra* note 12, at 31 (emphasis added).

information a court may consider at the pleadings. Because courts must make sense of the *corpus juris*, there is at least some reason to think they will be circumspect in applying "judicial experience and common sense" in circumstances where doing so would contravene traditional limitations on the sources of information that may be considered at a motion to dismiss.

E. MAY A DISTRICT COURT ALLOW DISCOVERY WHILE A MOTION TO DISMISS IS PENDING?

In both *Iqbal* and *Twombly*, the Court assumed that the filing of a motion to dismiss stays discovery. Whether that assumption is a binding feature of the Court's decisions will have a significant effect on their impact in the lower courts. If a court retains discretion to order discovery while a motion to dismiss is pending, the Catch-22 posited by commentators is less likely to materialize, at least where courts are inclined to entertain requests to engage in discovery in the early stages of a case. Conversely, if discovery is categorically unavailable, the Catch-22 effect is more likely to prevent plaintiffs from stating a claim with enough particularity to survive a motion to dismiss.[138]

As Professor Hartnett has demonstrated, there is little textual support in the Federal Rules for the Court's unexplained assumption that the filing of a motion to dismiss automatically stays discovery. To briefly summarize, the only rule to explicitly consider the timing of discovery—Rule 26(d)(1)—provides that discovery may be taken any time after the completion of an initial discovery planning conference, which occurs at the beginning of a case.[139] Furthermore, Rule 12(i) provides that upon order, a court may defer resolving a motion to dismiss until trial. Consistent with these provisions, a substantial body of pre-*Twombly* authority holds that "[d]iscovery need not cease during the pendency of a motion to dismiss."[140] Professor Hartnett concludes, based in part on the idea that "a decent respect for the Supreme Court counsels against reading its opinions to

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138. For general discussion, see Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. (forthcoming 2010); Hartnett, *Taming* Twombly, *supra* note 24, at 503–15; Suzette M. Malveaux, *Front-Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010). Although no court of appeals has addressed the circumstances in which a district court may authorize discovery in the early stages of a case following *Iqbal*, a number of district courts that have considered the question have approached it with considerable nuance. *See, e.g.*, Wagner v. Mastiffs, No. 2:08-cv-431, 2009 WL 5195862, at *2 (S.D. Ohio Dec. 22, 2009) (applying balancing test to determine availability of pre-motion-to-dismiss discovery); S.D. v. St. Johns Cnty. Sch. Dist., No. 3:09-cv-250-J-20TEM, 2009 WL 4349878, at *6 (M.D. Fla. Nov. 24, 2009) (denying motion to stay discovery where defendants entitled to assert immunity defense would be subject to discovery as fact witnesses); Kregler v. City of New York, 646 F. Supp. 2d 570, 581 (S.D.N.Y. 2009) (limiting pre-motion-to-dismiss discovery to threshold issues considered at hearing pursuant to Rule 12(i)); Comm'n for Immigrant Rights v. County of Sonoma, 644 F. Supp. 2d 1177, 1210 (N.D. Cal. 2009) (same); Coss v. Playtex Prods., LLC, No. 08 C 50222, 2009 WL 1455358, at *3 (N.D. Ill. May 21, 2009) (similar).

139. *See* FED. R. CIV. P. 26(d)(1), (f).

140. *See, e.g.*, Hartnett, *Taming* Twombly, *supra* note 24, at 507 (quoting SK Hand Tool Corp. v. Dresser Indus., 852 F.2d 936, 945 n.11 (7th Cir. 1988)).

have deleted an explicit provision of the Federal Rules without so much as mentioning it," that district courts retain their traditional discretion to allow discovery while a motion to dismiss is pending.[141]

This argument has some force. But while it is faithful to the Rules, it is less convincing as a reading of the Court's decisions. In both *Iqbal* and *Twombly*, the Court's assumption that discovery would be unavailable was so central to its analysis that it probably should be considered, if not part of the holding, then a significant feature of those decisions.[142] *Twombly* reasoned, "It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest."[143] And the *Iqbal* majority explicitly rejected the "careful case management" approach advocated by Justice Breyer in dissent.[144] Lower courts that care about following the law accordingly face the unappealing prospect of ruling that pre-motion-to-dismiss discovery is categorically unavailable despite the substantial authority in the Rules to the contrary, or ruling that such discovery may be taken despite the Supreme Court's contrary view.

In view of these conflicting mandates, there is no simple answer to whether a court may order discovery while a motion to dismiss is pending.[145] One

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141. *Id.* at 512.

142. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

143. *Twombly*, 550 U.S. at 546.

144. *Compare Iqbal*, 129 S. Ct. at 1953 ("[T]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."), *with id.* at 1961 (Breyer, J., dissenting) ("The law . . . provides trial courts with other legal weapons designed to prevent unwarranted interference. [W]here a Government defendant asserts a qualified immunity defense, a trial court . . . can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials.").

145. Professor Dodson has suggested, contrary to this position, that *Iqbal* and *Twombly* generally rule out discovery while a motion to dismiss is pending. Dodson, *supra* note 138, at 24. His basic contention is that district courts, confronted with *Iqbal*'s strong language, will be hesitant to order discovery before a motion to dismiss is decided. *Id.* at 26–27. Although I see no reason to question that assertion, Professor Dodson's argument also can be read to suggest that a court lacks *legal* authority to order discovery. To the extent Professor Dodson makes this claim, his argument seems to me to rest on doubtful premises.

Professor Dodson first notes that the Court's statements in *Iqbal* and *Twombly* reflect its belief that the filing of a motion to dismiss automatically stays discovery. *Id.* at 25–26. Yet whatever deference is ordinarily due to the Supreme Court's assumptions, those assumptions surely are entitled to less weight if they conflict with a Federal Rule having the force of law. If the Justices were to publish an opinion setting forth their view that service of process should be effected within thirty days, it would hardly follow that Rule 4(m)'s 120-day time limit no longer had legal effect. Moreover, *Iqbal* simply was not a case about the timing of discovery. The questions presented in the federal defendants' petition for certiorari, for example, nowhere mention discovery. *See* Pet. for Cert., *supra* note 55, at I. It cannot be that, merely because they spoke on the question, *Iqbal* and *Twombly* are the last word on the availability of discovery.

Professor Dodson next observes that the *Iqbal* Court "closed the doors on discovery" in the case before it, even though "pre-dismissal discovery historically has been considered" in cases involving claims of official immunity. Dodson, *supra* note 138, at 26. The assertion that the Court "closed the

approach, which seems to me to best reconcile the Court's decisions with the Rules, is to read *Iqbal* and *Twombly* to implicitly recalibrate the showing of good cause Rule 26(c) requires to stay discovery pending resolution of a motion to dismiss.[146] This reading avoids the absurdity Professor Hartnett perceives in *Iqbal* and *Twombly*. Yet it also acknowledges the Court's understanding of the litigation process. Given the role official immunity played in the Court's analysis, *Iqbal* is easily read to hold that good cause is presumptively (but perhaps rebuttably) established in cases where an express federal policy seeks to free defendants from the burdens of litigation.[147] And *Twombly*, at a minimum, counsels renewed attention to Rule 26(b)'s default policy of calibrating discovery to an action's demonstrated merit.[148]

Even understood this way, however, *Iqbal* is more forgiving than critics have assumed. A premise of the standard critiques is that a plaintiff who cannot meet the pleading standard is simply out of luck. But if *Iqbal* did not cut off all pre-motion-to-dismiss discovery, that view is mistaken. Plaintiffs may argue, and courts may agree, that limited discovery is appropriate at the onset of a case, before a motion to dismiss is decided.

F. WHITHER *SWIERKIEWICZ*?

A final question that will affect the extent of *Iqbal*'s impact on litigation in the federal courts involves the continued viability of *Swierkiewicz v. Sorema N.A.*, the leading case on pleading employment discrimination claims.[149] The *Swierkiewicz* complaint described a series of suspicious events culminating in the plaintiff's termination from a position at Sorema N.A., a New York reinsurer controlled by a French parent corporation.[150] The plaintiff, Akos Swierkiewicz,

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door" on discovery, however, is not entirely correct. As noted above, Iqbal engaged in substantial discovery while the appeal involving Ashcroft and Mueller was pending, and before the case settled, he proposed to amend his complaint to include facts discovered during discovery. *See supra* note 10.

Professor Dodson finally observes that defendants might stonewall discovery requests until a previously filed motion to dismiss is decided. Dodson, *supra* note 138, at 24 n.91. I see no reason why this would affect a court's legal authority to order discovery, and I do not understand Professor Dodson to suggest that it would.

146. *See* FED. R. CIV. P. 26(c)(1) (providing in part that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

147. *See Iqbal*, 129. S. Ct. at 1953 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question [the identity of a clearly established right] is resolved, discovery should not be allowed.").

148. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."); FED. R. CIV. P. 26(b)(2)(C)(iii) (requiring court to limit availability of discovery where its "burden or expense . . . outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

149. 534 U.S. 506 (2002).

150. *Id.* at 508.

was a 53-year-old native of Hungary who was hired as the company's senior vice president and chief underwriting officer (CUO).[151] After nearly six years in this role, the company's Chief Executive Officer, François Chavel, demoted Swierkiewicz and assigned most of his underwriting responsibilities to Nicholas Papadoulo, a 32 year old who, like Chavel, was French.[152] Chavel then appointed Papadoulo CUO about a year later, citing the need to "energize" the underwriting department. At the time, Papadoulo had a single year of underwriting experience.[153] Swierkiewicz complained to Chavel and demanded a severance package.[154] Chavel fired him.[155]

Swierkiewicz's complaint asserted claims for national-origin and age discrimination under Title VII and the Age Discrimination in Employment Act.[156] In an oral decision that was probably incorrect on its own terms, the district court dismissed the complaint because it failed to allege facts sufficient to show a prima facie case of discrimination under the evidentiary framework of *McDonnell Douglas Corp. v. Green*,[157] and the Second Circuit affirmed by unpublished summary order.[158]

The Supreme Court reversed.[159] It explained that the lower courts' reliance on *McDonnell Douglas* was illogical, because the framework announced in that case does not apply in every case and the showing necessary to prove a prima facie case varies from case to case.[160] The Court then held, after offering a lengthy exposition of the Federal Rules' "simplified notice pleading standard," that Swierkiewicz's complaint satisfied Rule 8.[161]

Because the Court framed its decision in terms of the notice Swierkiewicz's complaint provided, some courts and commentators have questioned whether *Swierkiewicz* remains good law after *Iqbal*.[162] If *Iqbal* does implicitly authorize

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151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 509.
155. *Id.*
156. *Id.*
157. Swierkiewicz v. Sorema, N.A., 86 Fair Empl. Prac. Cas. (BNA) 1324 (S.D.N.Y. 2000) (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). The court reasoned that Chavel's comment was "too vague to be considered age-related," and "even if the remark were considered to be an age-related remark, it is far too remote in time and unrelated to the job action at issue." *Id.* at *6. The court then explained that "allegations that other folks were promoted who were less qualified . . . are insufficient to raise an inference of discriminatory circumstances." *Id.* at *6–7.
158. Swierkiewicz v. Sorema, N.A., 5 F. App'x 63, 64–65 (2d Cir. 2001).
159. *Swierkiewicz*, 534 U.S. at 515.
160. *Id.* at 511–12.
161. *Id.* at 512–15.
162. *Compare* Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) ("[B]ecause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley.*"), *with* Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *4 (E.D. Mich. 2009) ("[R]ead together, *Swierkiewicz* and *Twombly* require employment discrimination plaintiffs to allege sufficient material facts to state a plausible claim for relief, but do not mandate doing so on every element of the *McDonnell Douglas* prima facie case."), *and* Jenkins v. N.Y. City Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) (positing a "dividing

something like the approach *Swierkiewicz* rejected, the critics' contention that *Iqbal* puts plaintiffs on the horns of a dilemma may prove to be a strong indictment. Swierkiewicz's complaint described a suspicious sequence of events leading up to his termination—unexpected demotion, replacement with a less qualified candidate, innuendo suggesting impermissible motive—but, like many employment discrimination plaintiffs, Swierkiewicz could not point to a smoking gun showing he was the victim of unlawful discrimination prior to discovery.

The better view, however, is that *Iqbal* left the essential holding of *Swierkiewicz*—that the complaint in that case was sufficient—intact. To begin with, the notion that *Iqbal* overruled *Swierkiewicz* ignores the maxim that lower courts are not to infer implied overrulings of directly applicable Supreme Court precedent, even if later decisions undercut an earlier case's reasoning.[163] *Swierkiewicz* is clearly applicable to the evaluation of an employment discrimination complaint. As a question of blackletter law, it controls. Perhaps more important, however, is that the *Swierkiewicz* complaint seems to withstand scrutiny under *Iqbal*. And if this is the case, the conflict between *Swierkiewicz* and *Iqbal* becomes at most one of emphasis.

Swierkiewicz specifically alleged that although he was well-qualified for the CUO position, he was replaced by a less qualified Frenchman twenty-one years his junior who only had a year of underwriting experience. He additionally cited a fact from personal knowledge from which an observer could reasonably infer that his employer impermissibly acted on the basis of his age. Although these allegations are somewhat sparse, it would not be unreasonable to conclude from them that Swierkiewicz was the victim of intentional discrimination. At minimum, that is a plausible *inference* to draw from the allegations.[164] Thus, there is at least a decent argument that Swierkiewicz's complaint suffices under *Iqbal*.

As a result, it would seem that *Iqbal*'s effect on employment discrimination claims will be more complicated than critics thus far have assumed.[165] On the

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line that distinguishes a discrimination claim which, although not required to set forth a prima facie case under *Swierkiewicz*, has alleged sufficient facts to make it plausible under *Iqbal* and *Twombly*"). *See also* Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. (forthcoming 2010) (manuscript at 17–18, *available at* http://papers.ssrn.com/5013/papers.cfm?abstract_id=1477519) (observing that "there may be serious concern following *Iqbal* as to the validity of the *Swierkiewicz* decision," but concluding *Swierkiewicz* survives).

163. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

164. *Cf.* DiPetto v. United States, No. 09-3203-cv, 2010 WL 2724463 (2d Cir. July 12, 2010) (finding *Iqbal* satisfied by a complaint alleging that plaintiff received comparatively less overtime and fewer work breaks because he was Caucasian); Bell v. Turner Recreation Comm'n, No. 09-2097-JWL, 2009 WL 2914057, at *3 (D. Kan. Sept. 8, 2009) (same; complaint alleging that plaintiff was assigned less favorable tasks than white employees, plaintiff's hours were reduced compared to white employees, and plaintiff was subjected to heightened scrutiny of her job performance).

165. *Cf., e.g.*, Spencer, *supra* note 12, at 200 (arguing that *Iqbal* "reflects . . . an attitude of hostility and skepticism toward supplicants with alleged grievances against the government"); Comment, *supra* note 12, at 262 (arguing that *Iqbal* "substantially strengthened [*Twombly*'s plausibility] standard by adding a probability requirement" and will be a "particularly large obstacle in contexts—such as

one hand, courts may properly recognize that *Iqbal* leaves the essential holding of *Swierkiewicz* undisturbed, in which case the claim that *Iqbal* frustrates the vindication of substantive rights guaranteed by federal civil rights statutes will lose much of its force. To survive dismissal in this scenario, a plaintiff would only need to plead a claim as strong as Swierkiewicz's.

Alternatively, courts might over-read *Iqbal* to require a statement of an employment discrimination claim substantially more suggestive of liability than that in *Swierkiewicz*. Although some early studies of *Iqbal* and *Twombly* suggest this is occurring,[166] others suggest the contrary.[167] Moreover, the studies that purport to show *Iqbal* has had a negative effect on employment discrimination claims suffer from a significant methodological limitation insofar as they only analyze published decisions appearing in commercial databases.[168] These studies accordingly fail to account for the relative rate at which motions to dismiss are filed, or the kinds of orders courts are likely to reduce to writing and make publicly available.[169] And, they inevitably fail to take account of subsequently decided appellate decisions that could substantially affect *Iqbal*'s application in the employment discrimination context.[170]

For these reasons, it seems to me that it is too soon to judge the overall effect *Iqbal* will have on adjudication of employment discrimination claims in federal court. Although it would be imprudent to discount the possibility that *Iqbal* will be over-read in a manner that prevents plaintiffs from vindicating the policies reflected in the federal civil rights statutes, it would be equally imprudent to

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employment discrimination—in which it is improbable that a plaintiff has concrete evidence of a defendant's wrongdoing and motivation before discovery").

166. Patricia Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 567–58 (2010); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1837 (2008); *see also* Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029–31 (2009) (relying primarily on review of individual cases, but also considering statistical data).

167. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12 (2010) (reporting on survey of plaintiffs' side employment discrimination attorneys, in which only 7.2% of respondents responded that any of their employment discrimination cases had been dismissed for failure to state a claim under the standard announced in *Twombly*/*Iqbal*).

168. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 869–70 (2007).

169. Two studies maintain that "the fact that any 'reported case bias' is equally present in both the pre- and post-*Twombly* case set allows for a meaningful comparison and analysis of any change." Seiner, *supra* note 166, at 1031 (quoting Hannon, *supra* note 166, at 1829). I am skeptical. Reported case bias results in part from failing to account for the frequency with which a particular type of motion is filed. *Twombly* and *Iqbal* make it easier for a defendant to win a motion to dismiss, thus we should expect that the rate at which motions to dismiss are filed will increase under those decisions. As a result, a simple comparison of the rate at which motions are *granted*, pre- and post-*Twombly*, does not compare apples to apples.

170. *Cf., e.g.*, Boykin v. KeyCorp, 521 F.3d 202, 214–15 (2d Cir. 2008) (concluding that pleading standards for employment discrimination remained substantially unchanged after *Twombly*).

conclude that such an effect follows inevitably from the Court's decision, or has in fact been demonstrated. Here, as elsewhere, the verdict is still out.

III. EVALUATING *IQBAL*

One could easily go on,[171] but the discussion thus far amply illustrates the essential point. Having considered several doctrinal and methodological issues that arise under *Iqbal*, it is clear that the answer to the question "What do we know about the *Iqbal* model?" is "Not much." *Iqbal* unquestionably requires courts to perform a new, fact-screening function at a motion to dismiss; and if my reading is correct, an important component of that function involves policing the reasonableness of inferences plaintiffs draw from information within their personal knowledge. But a number of aspects of this new function are not resolved by the Court's decision. Among other things, *Iqbal* does not tell the threshold of plausibility a complaint must possess to survive a motion to dismiss;[172] the sources of information a court may rely on to substantiate its "judicial experience and common sense";[173] whether discovery is allowed at the onset of a case before a motion to dismiss is decided;[174] and whether the complaint in *Swierkiewicz* remains a viable model in employment discrimination cases.[175] Moreover, there are reasonable arguments that these and other issues concerning *Iqbal*'s application should be resolved in a manner amenable to the vindication of substantive rights.

All this suggests that *Iqbal*'s effect on federal practice may be substantially different than what the decision's earliest critics have imagined. For the lockout effect posited by proponents of the Catch-22 argument to materialize, *Iqbal* must be interpreted to set a high threshold of plausibility; discovery must be categorically unavailable while a motion to dismiss is pending; and *Swierkiewicz* must be dead letter in employment discrimination cases. But *Iqbal* does not hold any of those things, and there are reasonable arguments that it should not be interpreted to do so. If the threshold of plausibility is reasonably low, discovery remains available, and *Swierkiewicz* is viable, it becomes more difficult to identify a category of cases in which a substantial number of meritorious claims will be excluded from the federal courts.

Similarly, for the critics' fears concerning judicial discretion to materialize, *Iqbal*'s unadorned reference to "judicial experience and common sense" must be read to authorize courts to rely on much more than general theoretical

171. For example, the circuits have already divided over whether the two-step analysis *Iqbal* said a court "can" apply, 129 S. Ct. at 1950, is mandatory. *Compare* Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("[D]istrict courts should conduct a two-part analysis."), *with* Brooks v. Ross, 578 F.3d 574 (7th Cir. 2009) (disregarding *Iqbal*'s suggested order of battle). In addition, the status of the Federal Rules' appendix of forms continues to puzzle courts. *See supra* notes 58–60.

172. *See supra* notes 91–99 and accompanying text.

173. *See supra* note 118 and accompanying text.

174. *See supra* section II.E.

175. *See supra* note 162 and accompanying text.

propositions derived from the substantive law that are subject to de novo appellate review. But again, this interpretation is far from inevitable. As demonstrated above, there is at least a reasonable argument that "judicial experience and common sense" is an unfortunate label for the somewhat different idea that courts may rely on judgmental facts in resolving a motion to dismiss.[176] Like all aspects of the new pleading regime, there are sensible arguments for and against allowing courts to rely on such facts, the merits of which are beyond the scope of this Article. But reliance on judgmental facts does not necessarily entail that courts' decisions will be arbitrary, ad hoc, or immune from appellate review, as critics have suggested.

To be sure, *Iqbal* places new emphasis on policing the reasonableness of inferences plaintiffs draw, and on any reading precludes cases where the plaintiff possesses *no* evidence of wrongdoing from proceeding to discovery. But on their own, these features of the decision do not support the conclusion that the Court has closed the courthouse door on plaintiffs pressing meritorious claims. The Federal Rules have *always* contemplated that courts will police the reasonableness of the interferences drawn by plaintiffs.[177] And *Iqbal*'s effect on cases in which the plaintiff lacks *any* evidence of wrongdoing has never been the critics' principal target, perhaps because quite different arguments are necessary to justify a rule that permits this kind of case to proceed to discovery.

Of course, these conclusions do not respond to the methodological criticism of *Iqbal*—that changing pleading standards by reinterpreting Rule 8 created high transaction costs and is inconsistent with the process created by the Rules Enabling Act.[178] However, there is considerably less urgency to answering this critique. That the critique applies equally to any significant interpretation of a procedural rule, from *Conley* on down, calls into question whether it is a criticism of *Iqbal* or of the Court's asserted power to make procedural law through interpretation of the Federal Rules.[179] Moreover, unless we assume that sound procedural policy must be the product of immaculate conception, the methodological criticism tells little about what surely are the most pressing questions now facing Congress and the lower courts: what does *Iqbal* mean, and should the regime it ushered in be retained? Complaints about *how* the Court implemented the new screening model do not answer the question *whether* that model is effective or desirable.

It might also be objected that this Article's focus on how *Iqbal* should be

176. *See supra* text accompanying notes 130–37.

177. *See, e.g.*, D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9–10 (1976) (discussing Rule 11's origins and noting that the rule incorporates the requirement, initially articulated by Justice Story, that there be "good ground for the suit in the manner[] in which it is framed").

178. *See supra* notes 20–21, 75 and accompanying text.

179. Here, it is useful to keep in mind Professor Hazard's claim that *Conley* "turned Rule 8 on its head." Hazard, *supra* note 71, at 1685. *See generally* Emily Sherwin, *The Story of* Conley*: Precedent by Accident*, *in* CIVIL PROCEDURE STORIES 281 (Kevin McDermott ed., 2004).

applied fails to "hear the music" in the Court's recent pleading decisions. The fact that the Supreme Court dismissed two complaints, including a complaint seven federal judges found sufficient, indicates a new willingness to decide cases on the pleadings, and the analysis here ignores the signaling effect of this exercise of judicial power by the Nation's highest court. The most responsible response to this objection is that empirical research is necessary to judge the effect of the Court's opinion, and that methodologically sound research likely will not be available for several years.[180] But at a more general level, I have tried to show that reactions to the "big message" of the Court's pleading decisions may not be particularly useful, and may even mislead. "Court closes door to victims of unconstitutional treatment" is good fodder for editorial writers,[181] but it is a sloppy guide for readers inclined to take the Court's decisions seriously as law.

In a different context, Matthew C. Stephenson and Adrian Vermeule recently observed that "[s]ometimes judges write watershed opinions whose deep logic only gradually becomes clear and whose language fails to capture that deep logic."[182] *Iqbal*, I suggest, will likely prove to be such an opinion. The case indubitably redistributed power among plaintiffs, defendants, and courts at the onset of a federal case. But on closer analysis, there are good reasons to question the extent of that change. To understand the new pleading regime, courts and commentators will have to grapple with the many interpretative questions *Iqbal* leaves open.

180. *See supra* text accompanying note 168.

181. *See, e.g.*, Editorial, *Throwing Out Mr. Iqbal's Case*, N.Y. TIMES, May 19, 2009, at A28.

182. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 598, 609 (2009).