Kentucky Law Journal

VOLUME 100 2011–2012 NUMBER 2

ARTICLES

The *Iqbal* Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation

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Introduction

For centuries, when dealing with the facts alleged by litigants in their pleadings, courts have struggled with the question of how much is enough. At what point does a pleading contain facts in sufficient detail to allow a case to proceed? For too long, common law pleading rules were rife with tricks and traps. Courts could dismiss cases for one pleading misstep or poorly turned phrase. Two major changes to pleading rules occurred over the last two hundred years. First, the adoption of the Field Code in New York in the middle of the nineteenth century led many states to either enact their own version of the Code or undertake procedural reform.[2] Second, the adoption of the Federal Rules of Civil Procedure,

1 Visiting Clinical Associate Professor of Law, Yale Law School; Assistant Professor of Law, Albany Law School; J.D., Yale Law School (1992); B.A., Fordham University (1989). Many friends and colleagues provided wonderful feedback on previous drafts of this piece, including Ian Ayres, Dennis E. Curtis, William Eskridge, James Follain, Jonah Gelbach, Patricia Hatamyar Moore, Alex Reinert, Elizabeth Renuart, Judith Resnik, and Michael Wishnie. I am grateful to the participants in the Albany Law School Scholarship Workshop Series for their helpful comments as I was conceptualizing this piece, including James Gathii, Thomas Guernsey, Robert Heverly, Mary Lynch, Debra Mann, Nancy Maurer, David Pratt, Rosemary Queenan, and Donna Young. After oral presentations of this work, Muneer Ahmad, James Forman, Jr., Heather Gerken, Doni Gewirtzman and Deidre Hill offered valuable feedback that I attempted to incorporate into this draft. My research assistants on this project, Tabitha Edgens, Mark Kittel, Kathryn Lang, and Meghan McDonough, as well as my legal assistant, Fredd Brewer, also provided invaluable assistance with this piece. All errors or omissions are, of course, mine. Another biographical matter that I should disclose, as more fully set forth below, is the fact that I had some involvement in the litigation that culminated in the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009): the legal services office at which I was working at the time, the Urban Justice Center, was first retained by Mr. Iqbal and his co–plaintiff well before the commencement of the suit, and continued to represent him until I left the agency in the spring of 2007. My direct involvement in the action was limited, however. *See infra* notes 11–12.

2 The Field Code, named for David Dudley Field, the head of a law reform commission in New York, was adopted in 1848, with almost all states adopting some form of civil procedure reform by the end of the century. For a discussion of the Field Code, see Lawrence M.

in 1938, transformed federal practice through notice pleading and liberal discovery rules. In this century, it would seem that we have already had our moment of change, represented by a possible tectonic shift in the case law surrounding pleading requirements that is already having a profound impact on the courts and litigants across the country. This development in the law surrounding pleading standards—making them more restrictive, and thus limiting access to the courts—is consistent with other, parallel trends in civil litigation in U.S. courts.

In what is swiftly becoming a landmark ruling, the Supreme Court, in May 2009, issued its decision in *Ashcroft v. Iqbal*,[3] a case brought by an immigrant of Pakistani descent caught up in the worldwide investigation that followed the horrific attacks of September 11, 2001. The defendants in *Iqbal* challenged the sufficiency of the allegations in the complaint, and the Supreme Court found that many of those allegations were conclusory, and still others were not pled with sufficient detail to satisfy the requirements of the Federal Rules of Civil Procedure, specifically Rule 8(a).[4] In *Iqbal*, the Court built on a precedent from just two years earlier—*Bell Atlantic v. Twombly*—which had imposed a "plausibility" requirement on civil pleadings in federal court,there, in the context of an antitrust case.[5]

Since this decision, the "plausibility standard," first articulated in *Twombly* and elaborated on in *Iqbal*, is now the yardstick against which all civil filings in federal court must be measured.[6] Moreover, some state courts have adopted the plausibility standard in assessing pleadings before them, despite the fact that the federal rules obviously do not apply in those jurisdictions.[7]

Friedman, A History of American Law 391–98 (2d ed. 1985). *See infra* text accompanying notes 20–25.

3 *Iqbal*, 129 S. Ct. at 1937.

4 *Id.* at 1949–52.

5 *Id.* at 1947; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). In *Twombly*, the Court found that allegations of parallel conduct by several telecommunications companies as reflected in common price fluctuations in products and services sold by these companies, with nothing more, failed to meet the pleading requirement of the federal rules. *Id.* at 554–57. The Court found that the claims of illegal conduct in that case were implausible given another, more likely reason for the similar conduct of market actors: for example, that the market had caused similar price movements in the cost of telephone service, and not any illegal, conscious conduct of the defendants. *Id.* at 564–70.

6 As the *Iqbal* majority made clear: "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." *Iqbal*, 129 S. Ct. at 1953 (quoting Fed. R. Civ. P. 1).

7 Since *Twombly* and *Iqbal*, the highest courts in Massachusetts and Nebraska, and a lower court in Delaware, have adopted the plausibility standard under their own pleading requirements. *See, e.g.*, Estate of Williams v. Corr. Med. Serv., Inc., No. 09C–12–126 WCC, 2010 WL 2991589, at *3 n.14 (Del. Super. Ct. July 23, 2010); Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008); Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 278 (Neb. 2010). At the same time, courts in several states have explicitly rejected a plausibil-

Despite this shift in pleading requirements, the Supreme Court has offered little guidance to the lower federal courts on the contours of the plausibility standard. This standard has also not proven durable or popular in substance with the lower trial courts. Indeed, as the oral argument in the *Iqbal* matter appears to reveal, even the Justices themselves seem somewhat unsure of the exact nature of the plausibility standard, or how to apply it. Furthermore, the Court placed its faith in federal judges' subjective views on pleadings, urging them to use their "experience and common sense" to determine whether a complaint pleads plausible facts.[8]

In the two years since the Court reached its decision in *Iqbal*, that opinion has been cited roughly 25,000 times. After *Twombly*, and again after *Iqbal*, many expressed fears that the new plausibility standard would grant judges wide ranging discretion to dismiss cases the claims of which did not comport with their experience and common sense. There was a particular fear about this discretion impacting civil rights cases adversely: that members of the federal bench hostile to such claims would wield these precedents to dismiss cases that met with their disfavor.

Initial research into the impact that these pleading requirements have had on civil cases in general and civil rights cases in particular would appear to reveal a modest impact, at best, on civil litigation generally, and civil rights cases in particular. Mostly this research has measured the dismissal rates on motions to dismiss filed before and after these precedents.[9] And these studies have yielded mixed results, with some showing a rise in dismissals in all civil filings after the decision in *Twombly*, especially in civil rights cases, while internal research conducted by the courts does not appear to support such findings across the board.[10] Apart from the mixed

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ity standard. *See, e.g.*, McKelvin v. Smith, No. 2090779, 2010 WL 5030130, at *4–5 (Ala. Civ. App. Dec. 10, 2010) ; Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 430 (Tenn. 2011) ; McCurry v. Chevy Chase Bank, 233 P.3d 861, 863 (Wash. 2010). Interestingly, at least one Ohio court has found not only that the *Conley* "no set of facts" standard still applies, but also that the plaintiff must still allege facts that are plausible. *See* Williams v. Ohio Edison, No. 92840, 2009 Ohio App. LEXIS 4786, at *7–8 (Ohio Ct. App. Oct. 29, 2009). For a discussion of the application of the plausibility standard in state court proceedings, see Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 Yale L.J. Online 109 (2010).

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

9 *See*, *e.g.*, Joe S. Cecil et al., Motions to Dismiss for Failure to State a Claim after *Iqbal*: Report to the Judicial Conference Advisory Committee on Civil Rules 1, 10 (Fed. Judicial Ctr., 2011) [hereinafter Cecil Report], *available at* http://ssrn.com/abstract=1878646; Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 554–56 (2010).

10 *See*, *e.g.*, Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study of the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811, 1838 (2008) (showing that, in the four months following the Court's decision in *Twombly*, there was a 39.6% greater chance that a civil rights case would be dismissed when compared to all other cases analyzed). A recent study compiled for the federal Judicial Conference Advisory Committee

results, this prior research may have had some shortcomings, and this study attempts to fill the gaps left by this previous body of work.

The goal of this study is to assess whether *Twombly*'s plausibility standard has begun to impose a higher bar on certain civil rights plaintiffs. The fear is that the plausibility standard leaves judges with too much discretion—discretion that may harm those plaintiffs who may have difficulty alleging facts to overcome a particular judge's subjective skepticism of civil rights claims. This fear was expressed by many observers (including myself),[11] in amicus briefs filed in *Iqbal*,[12] and through scholarly treatments of the plausibility standard.[13] Given the nature of the standard, a fear is that with such a blunt instrument, judges will have broad discretion to apply the standard to weed out otherwise meritorious cases, simply because such cases do not seem to mesh with a particular judge's experience and his or her common sense.

An initial issue that arises, that raises questions about these previous studies, is that this body of research has typically involved analysis of outcomes in cases that go beyond the key question in *Twombly* and *Iqbal*: that is, whether pleadings provide sufficient detail to raise a plausible claim for relief. Furthermore, a second, related question goes to the fact that little has been done to assess the *quality* of decisions through a review of the

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on Civil Rules found there to have been little change in dismissal rates without leave to amend when comparing results in two samples of decisions, one sample taken from before the Supreme Court's decision in *Twombly* and another after its decision in *Iqbal*. Cecil Report, *supra* note 9, at 21. See *infra* text accompanying notes 93–102 for further discussion of this study. In one area, however, described as dealing with "financial instruments," the dismissal rates were markedly higher after *Iqbal*. *See* Cecil Report, *supra* note 9, at 21.

11 In the interest of full disclosure, this author participated in the litigation that ultimately came to be known as *Ashcroft v. Iqbal* since before the matter was even filed in federal court. Prior to joining the faculty at Albany Law School, I was a supervising attorney at the Urban Justice Center (UJC) in New York City, the non–profit legal services office that was Mr. Iqbal's initial counsel in the case. I then supervised the staff who handled the matter from its inception, including Megan Lewis, Andrew Kashyap, and Haeyoung Yoon, who all handled different aspects of the case while UJC was co–counsel on the matter. I do not wish to overstate my role, however. My staff followed the direction of lead counsel in the case, the firm of Koob & Magoolaghan, and, later, pro bono co–counsel from the firm of Weil Gotshal & Manges. As a result of these co–counsel arrangements, my personal involvement was limited. After leaving the UJC, I then teamed up with John E. Higgins, Esq., of Nixon Peabody, LLP, and Umair Khan and Robert Magee, law students at Albany Law School at the time, in drafting an amicus brief filed with the Supreme Court in support of Mr. Iqbal.

12 Brief of Amici Curiae Japanese Am. Citizens League et al. in Support of Respondent, *Iqbal*, 129 S. Ct. 1937 (No. 07–1015), 2008 U.S. S. Ct. Briefs LEXIS 893 (co–authored by this author). A large number of civil rights and other groups and individuals filed amicus briefs on behalf of the respondents. *See*, *e.g.*, Brief of Professors of Civil Procedure & Fed. Practice as Amici Curiae in Support of Respondents, *Iqbal*, 129 S. Ct. 1937 (No. 07–1015), 2008 U.S. S. Ct. Briefs LEXIS 884; Brief of Nat'l Civil Rights Orgs. as Amici Curiae in Support of Respondents, *Iqbal*, 129 S. Ct. 1937 (No. 07–1015), 2008 U.S. S. Ct. Briefs LEXIS 896.

13 For an overview of some of the critiques of these opinions, see *infra* notes 100–04 and accompanying text.

manner in which the so–called plausibility standard is being applied, if at all, by the district courts when dismissing claims. Finally, this research goes beyond mere dismissal rates to look at the volume of decisions dismissing cases, and the number of motions litigants are facing on these grounds. Because previous studies looked broadly at dismissal rates only, it would appear that they have overlooked what may be the most significant impact of *Iqbal*. Indeed, what my research reveals is that the number of dismissals on the grounds that the pleadings were not sufficiently specific has risen dramatically after that decision, a fact that is missed by looking solely at dismissal rates, and not the volume of dismissals.

This Article attempts to step into these apparent gaps in the empirical research, first by ensuring that the analysis reviews only cases in which the specificity of the pleadings were tested. Prior studies have reviewed outcomes in all motions to dismiss, including those filed on grounds not related to the specificity of the pleadings: for example, where a statute of limitations defense was raised or the defendant alleged the plaintiff had not exhausted his or her administrative remedies. Since such defenses were viable before *Twombly* and *Iqbal*, and are not related to the plausibility or specificity of the allegations in the pleadings *per se*, the *Twombly* and *Iqbal* precedents bear no relation to the merits of such motions and should have no impact on their outcome. In order to narrow the focus of any *Twombly*/*Iqbal* inquiry, this study focuses only on the outcomes in cases where defendants challenged the specificity of the pleadings through a motion to dismiss or motion for judgment on the pleadings.

Other innovations of this study include the following: it focuses explicitly and strictly on civil rights actions involving allegations of employment and/or housing discrimination; it looks at the *quality* of the decisions by assessing how lower courts are deploying the plausibility standard; it reviews the extent to which judges appear to be applying their experience and common sense to solve pleading challenges before them, as urged by the Court; finally, it has more of a body of post–*Iqbal* cases to review than previous studies.

In summary, this analysis yielded a few key findings from the cases studied, some of which are inconsistent with the initial fears about the impact of *Twombly* and *Iqbal*, and some of which bear those fears out. First, it seems that the Supreme Court's decision in *Twombly* itself had little impact on motions challenging the sufficiency of the pleadings in the employment and housing discrimination cases analyzed for this study. The study shows that the dismissal rate of the cases reviewed during a set time period immediately prior to that decision was actually higher than the dismissal rate of decisions reviewed in the time period between issuance of the *Twombly* and *Iqbal* decisions. Then the dismissal rates in the cases reviewed actually increased considerably after *Iqbal*. Indeed, the dismissal rates for the pre–*Twombly* cases in the database used in this study

was sixty–one percent; for those issued between *Twombly* and *Iqbal* and analyzed here, it was fifty–six percent; but then, for those issued after *Iqbal* and which became a part of this study, it was seventy–two percent. Second, dismissal rates "with prejudice" do not seem to rise much at all, after either *Twombly* or *Iqbal*. Another, counter–intuitive finding is that one can explain the drop in the dismissal rate between *Twombly* and *Iqbal* by pointing to the success of litigants pursuing disparate impact cases, particularly those pursuing challenges to reverse redlining practices of mortgage lenders during the height of the subprime mortgage crisis. Since some might fear *Twombly* and *Iqbal* would impact more novel or creative civil rights theories more dramatically, it would appear that, at least with respect to this class of cases during the time period analyzed, those fears were unfounded.

Apart from dismissal rates, plaintiffs in the employment and housing cases studied were far more likely after *Iqbal* than before *Twombly* to face a motion to dismiss challenging the specificity of the pleadings. Indeed, among the cases analyzed, decisions on such motions were generated only twelve times in the first quarter of 2004 (the first quarter analyzed), but then sixty times in the third quarter of 2010 (the last full quarter analyzed). This represents a five hundred percent increase. Similarly, when looking at the *number* of decisions dismissing complaints issued during the pre–*Twombly* and post–*Iqbal* periods, we see another dramatic increase, one of nearly 300% from the pre–*Twombly* period to the post–*Iqbal* period. At the same time, there was just a thirty–four percent increase from the pre–*Twombly* period to the period post–*Twombly* but before *Iqbal*.

When comparing *Twombly* and *Iqbal*, then, it would appear that it is the latter case that has had a much greater and adverse impact on these types of civil rights cases than the former, at least within the universe of cases analyzed in this study.

When it comes to the quality of these decisions, something else appears to be happening as well, something few might have predicted. Despite the increased dismissal rate following *Iqbal*, oddly, in a class of cases analyzed for this study,[14] courts rarely invoked the plausibility standard in the same manner it was utilized by the Supreme Court in *Twombly* and *Iqbal*; that is, courts rarely found that a case should be dismissed because a judge considered there to be a more plausible, and entirely legal, basis for the complained of conduct. Thus, the Court's approach to assessing plausibility, as utilized in both *Twombly* and *Iqbal*, is one that is rarely used by district courts when dismissing cases for pleading inadequacies. Finally,

14 When looking at the use of the plausibility standard, the study reviewed the largest class of cases identified in the database: i.e., non–disparate impact cases in which the motion was granted and all claims dismissed. This subset was made up of ninety–five cases—roughly fifteen percent of all cases analyzed in this study. In these decisions, the claims were dismissed in their entirety with prejudice. Given that, I operated under the assumption that it is in this class of cases that courts were likely to invoke the plausibility standard in a robust way.

and similarly, judges rarely, if ever, appear to invoke their own "experience and common sense," as urged by the Court, when ruling on motions to dismiss in these cases.

Perhaps these findings raise more questions than they answer. Do they suggest that courts are ignoring the substance of the heightened pleading standard, yet interpreting *Twombly* and *Iqbal* as license to dismiss cases more readily? Does the nature of the standard leave judges with broad discretion to dismiss cases that do not comport with their "experience and common sense?" In any event, two things are clear: motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, and far more cases are being dismissed after the release of that decision than before. At least in this regard, then, the initial fears about the impact of *Twombly* and *Iqbal* seem well founded, regardless of whether the dismissal rates have changed dramatically, the lone issue on which prior studies of the impacts of these decisions seemed to focus.

While this study did introduce some innovations to the methodology utilized here, it also has its limitations. First, the database utilized was made up of only decisions published in electronic form. It does not include all decisions in all district courts during the time period specified. Some argue that decisions on motions to dismiss in which the motion is granted are more likely to be reported than those in which the motion is denied. While this may be the case, this study uses published decisions in all three time periods studied.[15] There is nothing to indicate that if such a bias exists, it is more likely to exist in one time period than another. Admittedly, the outcomes in this study are a reflection of the data used. No broader claim is made about outcomes in all civil rights cases, or even all employment and housing discrimination cases.

Moreover, some sampling was done to identify a universe of cases to analyze, as more fully described below.[16] While certain qualifiers were used to narrow this universe, and the exact same search terms were not used in each search that was conducted to compile the database, the study utilized a large sample size of well over 600 cases. While there may have been some limitations to the methodology used, there is no claim here that the outcomes generated by this study are a reflection of all outcomes in all civil rights cases litigated in all federal courts from 2004 through 2010. Rather, my goals here are quite modest: to attempt to identify potential trends from a relatively narrow class of cases.

This article proceeds as follows. Part I provides a brief overview of the history of pleading requirements in federal and state courts, leading up to the adoption of the Federal Rules of Civil Procedure. This Part then

15 *See infra* Part II.B.

16 *See infra* Part II.C.

reviews the Supreme Court's decisions in *Conley v. Gibson*,[17] *Bell Atlantic v. Twombly*[18] and *Ashcroft v. Iqbal*,[19] placing a special emphasis on the development of the *Iqbal* case, from the trial court, through to the decisions of the Second Circuit Court of Appeals and, ultimately, the Supreme Court. Part II contains the results of the empirical analysis conducted for this study.

I. Pleading Requirements, Then and Now

A. Pre–FRCP History, Rule 8(a) and Conley v. Gibson

With the adoption of the new Federal Rules of Civil Procedure in 1938, the drafters intended to eliminate the costly and burdensome "fact pleading" system then in place, choosing, instead, a "notice pleading" approach. Under fact pleading, popular after the adoption of the Field Code in New York,[20] litigants could dismiss their opponents' claims or defenses for improper reference to "mere evidence" or "conclusions," which were prohibited, as opposed to "ultimate facts," which were required.[21] Divining the difference between these categories of facts proved to be challenging at best.[22] Over 50 years ago, then–Professor Jack Weinstein, commenting on these requirements, argued as follows:

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

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

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

20 For a discussion of the popularity of the Field Code, see Jack J. Cound et al., Civil Procedure: Cases and Materials 372 (3d ed. 1980) (describing the Field code as the "prototype" for many states' rules and the "precursor" to the Federal Rules of Civil Procedure).

21 As pointed out by Richard Marcus, "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'" Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 439 (1986). In this 1986 work, Professor Marcus presciently wrote about his concern that the courts were returning to fact pleading, as opposed to notice pleading, *id.* at 435, a concern made only more grave after the decisions in *Twombly* and *Iqbal*.

22 One commentator described this tension as follows:

> [T]here is no logical distinction between statements which are grouped by the courts under the phrases "statements of fact" and "conclusions of law". [sic] It will also be found that many, although by no means all, pleadings held bad because they are said to plead "evidence" rather than "the facts constituting the cause of action" or defense really do nevertheless "state" the operative facts which the pleader will have to prove at the trial, but in a form different from that to which courts and lawyers are accustomed to recognize as a proper method of pleading.

Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 Colum. L. Rev. 416, 417 (1921); *see also* Riley v. Interstate Bus. Men's Accident Ass'n, 159 N.W. 203 (Iowa 1916). There the court held as follows:

> Our system of pleading is a fact system, and requires the parties to state truly and frankly the facts upon which they rely for their action or defense. It does not allow on the one hand the statement of legal conclusions, nor on the other hand the statement of evidence of facts; the pleading should state ultimate facts, and not the evidence of such facts. This makes the rule on what demurrer admits somewhat

> It is now generally conceded that it is virtually impossible logically to distinguish among "ultimate facts," "evidence," and "conclusions." Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described.[23]

The Federal Rules of Civil Procedure was supposed to have been an improvement to the Field Code, under which litigants were to draw these distinctions in their pleadings.[24] Interestingly, that Code itself had been instituted in the 19th Century to simplify the byzantine common law pleading requirements then in force.[25]

A significant innovation in pleading, Rule 8(a) of the Federal Rules of Civil Procedure requires nothing more than the following:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[26]

Roughly fifteen years after adoption of the Federal Rules, the Supreme Court interpreted the meaning of this Rule. In *Conley v. Gibson*, the Court-

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> difficult of application. The demurrer will not admit a pure conclusion, and the pleader may not plead his evidence. All that the demurrer can ever admit then is something which states ultimate facts as distinguished either from legal conclusions or a setting out of the evidence to prove them.

Id. at 205 (citations omitted).

23 Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 Colum. L. Rev. 518, 520–21 (1957).

24 For the history of the Field Code and the adoption of the Federal Rules of Civil Procedure to respond to the perceived shortcomings of it, see Matthew A. Josephson, Note, *Some Things Are Better Left Unsaid: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 Ga. L. Rev. 867, 874–77 (2008). For a bibliography of books and articles relating to the history of the adoption of the Federal Rules of Civil Procedure, see Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 Tex. Tech L. Rev. 909, 1032–40 (1999).

25 American pleading practice, though somewhat tailored to meet the needs of litigants in U.S. courts, was largely adopted from British common law pleading requirements. Friedman described those as follows:

> Pleading was an elaborate contest of lawyerly arts, and winning a case did not always depend on substantive merits. There were too many rules, and they were too tricky and inconsistent. The idea behind English pleading was not itself absurd. Pleading was supposed to distill, out of the amorphousness of fact and fancy, one precious, narrow issue on which trial could be joined. Principles of pleading were, in theory, principles of economy and order. Pleading demanded great technical skill. Those who had the skill—highly trained lawyers and judges—saw no reason to abandon the system.

Friedman, *supra* note 2, at 145.

26 Fed. R. Civ. P. 8(a)(1)–(3).

surveyed the pleadings in a civil rights action and found them adequate.[27] The standard the Court used in assessing the sufficiency of the pleadings was impressive in its generosity; it found that a complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) unless it was clear that a plaintiff could never establish any grounds for relief:

> 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.[28]

Justice Black, writing for the majority, went on to state as follows:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[29]

Until 2007, when the Court issued its decision in *Bell Atlantic v. Twombly*, the Court re–affirmed this liberal approach to civil pleadings in federal court, at one point calling it "axiomatic" that the "no set of facts" language represented the proper standard to apply when assessing the sufficiency of civil pleadings.[30] With *Twombly*, however, a majority of the Justices explicitly disavowed the "no set of facts" standard. This paper will now address the *Twombly* decision and its implications.

B. Bell Atlantic v. Twombly

The plaintiffs in *Twombly* alleged that the defendants' "parallel conduct"—such as having similar pricing schemes—gave rise to antitrust claims.[31] The plaintiffs' position was basically *res ipsa loquitor*: the facts describing such parallel conduct meant that the defendants had to have

27 Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

28 *Id.* at 45–46.

29 *Id.* at 47 (citing Fed. R. Civ. P. 8(a)(2)).

30 *See, e.g.*, McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980) ("It is axiomatic that a complaint should not be dismissed 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.'" (quoting *Conley*, 335 U.S. at 45–46)). *McLain* was an 8–0 ruling, with Justice Marshall taking no part in the decision. *Id.* at 247; *see also* Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976) (quoting *Conley*'s "no set of facts" language with approval). *Hospital Building* was a unanimous decision. *Id.* at 739. Interestingly, both were antitrust cases.

31 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–50 (2007).

conspired to act in concert.[32] Since they must have done so, at least according to the plaintiffs, they were guilty of antitrust violations.[33]

The Court found that such allegations were insufficient to satisfy Federal Rule of Civil Procedure 8(a)'s requirement that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[34] The Supreme Court found that where, as in the facts before it, there were equally likely causes for the complained of conduct, it was no more plausible that illegal conduct brought about the factual situation than it was plausible that completely innocent conduct may have also been the source of those facts.[35] The Court went on to conclude as follows:

> The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." . . . An allegation of parallel conduct is thus much like a naked assertion of conspiracy in [an antitrust] complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief."[36]

Beyond just finding a new "plausibility standard" within Rule 8(a),[37] the Court went even further, disavowing *Conley v. Gibson*'s "no set of facts" standard and finding that "famous observation ha[d] earned its retirement."[38] Elaborating, the Court observed that the *Conley* standard was "best forgotten as an incomplete, negative gloss on an accepted pleading

32 *See id.* at 550–51.

33 *Id.* at 551, 553.

34 *Id.* at 555, 570.

35 *Id.* at 568–69.

36 *Id.* at 557 (alteration in original).

37 The appellate court below had found that the plaintiffs' claims were plausible, but did not use this language to articulate a pleading standard. *Id.* at 553. The Court then cited a district court opinion of Court of Appeals Judge Richard Posner, sitting by designation, in which Posner found that the allegations in a complaint in an antitrust case had to be plausible to allow the litigation to enter costly discovery. *Id.* at 558; Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003). Even in light of these two lower court precedents, the plausibility standard had not entered into prior opinions of the Supreme Court on the sufficiency of the pleadings. Rather, the Supreme Court did use the term plausibility in determining the sufficiency of allegations, but in the context of reviewing a decision on a motion for summary judgment, which, of course, involves a very different standard. *See* Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 596 (1986) ("[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e).").

38 *Twombly*, 550 U.S. at 563.

standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[39]

Applying the plausibility standard, the Court ultimately found that because the plaintiffs failed to "nudge[] their claims across the line from conceivable to plausible," the complaint had to be dismissed.[40]

The Court's decision left lower courts and litigants scrambling to discern its meaning and apply its terms. Indeed, courts across the country varied in their interpretation of *Twombly*,[41] with some considering its holding limited to pleading requirements in anti–trust cases, and others applying it to all civil matters regardless of the subject matter.[42]

Enter the plaintiff in *Iqbal*, who would offer the Court an opportunity to answer some of the questions left unanswered by the *Twombly* opinion.

C. Ashcroft v. Iqbal

1. *Complaint and District Court.*—As part of the global law enforcement effort that followed the events of September 11, U.S. law enforcement and immigration officials detained thousands of men of Arab descent found within the United States.[43] In November 2001, Javaid Iqbal, a man born in Pakistan but residing in the United States lawfully, was arrested by immigration and FBI officials. He was charged with conspiracy to defraud the United States and for possessing fraudulent identification. Iqbal was detained at the Metropolitan Detention Center (MDC) in Brooklyn, NY, and held in the maximum security "Special Housing Unit" within the MDC (known by its acronym, the "ADMAX SHU").[44] Iqbal alleged that prison guards verbally and physically abused him and denied him medical

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39 *Id.*

40 *Id.* at 570.

41 *See, e.g.*, United States v. Harchar, No. 1:06–cv–2927, 2007 U.S. Dist. LEXIS 47028, at *4 (N.D. Ohio June 28, 2007) ("*Twombly* merely held that a complaint that alleged only parallel conduct did not state a claim for an antitrust conspiracy."). For a discussion of interpretations of the substantive reach of *Twombly*'s holding pre–*Iqbal*, see Gregory L. Grattan, Note, *The Gatekeepers Keep Changing the Locks:* Swanson v. Citibank *and the Key to Stating a Plausible Claim in the Seventh Circuit Following* Twombly *and* Iqbal, 6 Seventh Circuit Rev. 1, 11–12 (2010).

42 Janice R. Ballard, Comment, Bell Atlantic v. Twombly: *Has the Court Re–Set the Bar with a Heightened Pleading Standard?*, 32 Am. J. Trial Advoc. 183, 198–201 (2008) ("[T]he mammoth weight of the case law suggests that Bell Atlantic [sic] has unquestionably outstripped its initial contextual boundaries.").

43 Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005), *aff'd in part*, *rev'd in part sub nom.*, Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). Mr. Elmaghraby was dropped from the suit when he settled his claims for $300,000. *See* Nina Bernstein, *U.S. is Settling Detainee's Suit in 9/11 Sweep*, N.Y. Times, Feb. 28, 2006, at A1.

44 First Amended Complaint & Jury Demand at 15, Elmaghraby v. Ashcroft, No. 1:04–cv–01809–JG–SMG (E.D.N.Y. Sept. 27, 2005).), 2004 WL 3756442.

care.[45] After pleading guilty to the charges filed against him, though none had anything to do with terrorism, he was ultimately deported to Pakistan in January of 2003.[46]

In September 2004, Iqbal and another individual exposed to the same treatment, Ehab El Maghraby, filed suit in federal district court for the Eastern District of New York, alleging a range of constitutional and statutory violations of their rights.[47] The defendants in the action included, among others, various prison guards, the warden at MDC, Attorney General Ashcroft, and FBI Director Mueller.[48] The complaint alleged that anyone among those detainees swept up in the September 11th investigation would be classified as "of interest" to that investigation, even if they faced no terrorism–related charges.[49] The complaint further alleged that Ashcroft and Mueller approved "[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI."[50] Ashcroft, it was further alleged, was the "principal architect" of this policy[51] and Mueller was "instrumental in [its] adoption, promulgation, and implementation."[52]

With respect to the harsh conditions of confinement, it was alleged that these two defendants "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin . . . ."[53]

After Ashcroft and Mueller filed motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure for the alleged failure to state a claim, the trial court ruled against these defendants, deploying the "no set of facts" language from *Conley v. Gibson*.[54]

2. *Court of Appeals*.—After Judge Gleeson denied most of the bases for the *Iqbal* defendants' motions to dismiss, the matter was appealed to the Second Circuit. The Supreme Court had already granted certiorari in *Bell Atlantic v. Twombly*, but the decision was not issued in that case until after oral argument before the Second Circuit. Ultimately, the Second Circuit reversed in part Judge Gleeson's prior decision, but affirmed those aspects

45 *Id.*

46 *Iqbal*, 490 F.3d at 149.

47 *Elmaghraby*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *2.

48 First Amended Complaint & Jury Demand, *supra* note 44, at 4–10.

49 *Id.* at 11.

50 *Id.* at 13–14.

51 *Id.* at 4.

52 *Id.* at 4–5.

53 *Id.* at 17–18; *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009) (recounting allegations in the complaint).

54 *See* Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *29 (E.D.N.Y. Sept. 27, 2005).

of it related to the sufficiency of the allegations related to Ashcroft and Mueller's involvement in setting the challenged policies.[55]

Applying *Twombly's* plausibility standard to the allegations of the complaint, the Second Circuit turned first to the plaintiff's procedural due process claim. Considering the language in the complaint, i.e., that Ashcroft and Mueller had "condoned" the challenged policy, the court looked to the context of the suit to assess the plausibility of the allegations. Because of the high priority given the law enforcement effort in the wake of the attacks of September 11, the court found it plausible that both Ashcroft and Mueller did indeed condone the challenged policy.[56] Despite the finding that these allegations were plausible given the context, the court ultimately found that, because the right purportedly violated was not a clearly established right at the time of such violation, the procedural due process claim could not survive the defendants' qualified immunity defense and warranted dismissal.[57]

Turning to the claims of discrimination, Ashcroft and Mueller challenged the specificity and the plausibility of Iqbal's claims that they had knowledge of and condoned the allegedly discriminatory treatment of the plaintiff. Looking once again to the post–September 11 context in which the claim arose, the Second Circuit found it plausible that the Attorney General and Director of the FBI were aware of and condoned the discriminatory practices to which Iqbal alleged he was subject.[58]

Ultimately, the Second Circuit found that these allegations were sufficient to satisfy even the strictures of the new plausibility standard articulated in *Twombly*.[59]

3. *Supreme Court.*—Ashcroft and Mueller then sought review of the appellate decision by writ of certiorari to the Supreme Court. Review was granted by the high Court,[60] which heard oral argument on the matter in early December, 2008.

a. Oral Argument: The Elusiveness of the Plausibility Standard

Solicitor General Gregory Garre, arguing for the petitioners, stated that the first error of the appellate court was that it "conclud[ed] that the

55 Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007). As the Second Circuit opinion pointed out, plaintiff Iqbal was of Pakistani, and thus, not Arab, descent. *Id.* at 148 n.2. Regardless, according to the appellate court, Iqbal alleged that he was singled out for treatment based on his ethnicity, if not his perceived race. *Id.*

56 *Id.* at 166.

57 *Id.* at 167–68.

58 *Id.* at 175–76.

59 *Id.* at 177–78.

60 Ashcroft v. Iqbal, 554 U.S. 902 (2008).

complaint stated a violation of clearly established rights by the former Attorney General and Director of the FBI."[61] By framing the argument in this way, just as the petitioners had done in their briefs,[62] Garre had staked the position that in a case where a defendant may invoke a defense of qualified immunity, a plaintiff must plead certain specific facts in the complaint that would permit that plaintiff to overcome such a defense: including, that the defendant had violated clearly established rights. Several of the justices questioned whether a plaintiff must anticipate potential defenses that a defendant might not even raise, when such an issue is best left to the summary judgment phase of the proceeding, if at all.[63]

As to plausibility, Justice Souter, the author of the *Twombly* opinion, stated that in that prior case, there was no evidence that might suggest that illegal conduct was a more likely explanation for the allegations of parallel conduct in that antitrust case.[64] The bulk of the Justices' questioning surrounding the plausibility of plaintiff's claims was then left mostly to plaintiff's counsel.

Following Garre's argument, Alex Reinert took the podium on behalf of Iqbal. The discussions between Reinert and the Justices, and even, apparently, between the Justices themselves, reveal that the plausibility standard appears elusive, even to the Court. Reinert initially faced a series of questions from Justice Scalia regarding the plausibility of the allegations in the complaint.

Justice Scalia, relying on the Court's application of the plausibility standard in *Twombly*, asserted that in the instant situation it was "much less plausible" that higher level officials had knowledge of the conduct alleged than they had not.[65] After some back–and–forth between the Justices and Reinert, Justice Souter stepped in with what he admitted may have been a "softball question."[66] Building on earlier questioning from Justice Breyer, during which it was asked whether a complaint would seem plausible if a plaintiff alleged that the president of a beverage company was responsible if a consumer found a mouse in a bottle, Justice Souter stated that he was "starting with the assumption" that in Twombly "the context tells us how specific" a complaint has to be.[67] He then asked if the complaint in *Iqbal* was based on the assumption that "it is more plausible

61 Transcript of Oral Argument at 3, *Iqbal*, 129 S. Ct. 1937 (No 07–1015).

62 *See* Initial Brief of Appellant–Petitioners at 6, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07–1015), 2008 U.S. S. Ct. Briefs LEXIS 740 at *14–15; Reply Brief: Appellant–Petitioner at 1–3, *Iqbal*, 129 S. Ct. 1937 (No. 07–1015), 2008 U.S. S. Ct. Briefs LEXIS 1104 at *1–4.

63 *See, e.g.*, Transcript of Oral Argument, *supra* note 61, at 4 (Ginsburg, J.); *id.* at 9 (Souter, J.).

64 *Id.* at 10.

65 *Id.* at 33.

66 *Id.* at 40.

67 *Id.*

that the Attorney General of the United States and the Director of the FBI were in fact directly involved in devising a policy with the racial characteristics and the coercive characteristics that you claim, than that the President of Coca Cola was putting mouses (sic) in bottles?"[68]

Chief Justice Roberts, then followed up on Justice Souter's question, again, comparing the allegations against a president of a company as opposed to allegations made about the actions of the Attorney General, asking "how are we supposed to judge whether we think it's more unlikely that the president of Coca–Cola would take certain actions as opposed to the Attorney General of the United States?"[69]

After some exchanges between the Justices and Reinert, Justice Scalia asked whether the plaintiff's allegation that he had been held without any legitimate penological reason was sufficient to create a plausible claim for relief.[70] This led to this exchange, which is recounted at length:

> JUSTICE SCALIA: . . . [I]s that the only basis – after an attack on the country of the magnitude of 9/11, is that the only basis on which people can be held? Namely that these people are the – are the guilty culprits, and we are going to put them in jail?
>
> MR. REINERT: Well –
>
> JUSTICE SCALIA: Surely for at least a period, you can hold people just – just to investigate?
>
> MR. REINERT: Well, Justice Scalia, I don't think for a period it's constitutional to hold them solely based on their race, religion, and national origin. And if it is –
>
> JUSTICE SCALIA: Well, it wasn't solely on that.
>
> MR. REINERT: Well, that is the allegation. If it is, that's an issue to be dealt on the merits, exactly as this Court did in Johnson v. California.
>
> JUSTICE SCALIA: But the net was surely not cast wide enough if anybody with that race, religion was – was swept in.
>
> MR. REINERT: Well –
>
> JUSTICE SCALIA: I mean, if it's solely for that reason, there would have been hundreds of thousands of others.
>
> MR. REINERT: Justice Scalia, that is the allegation in the complaint, that as individuals were encountered –
>
> JUSTICE SCALIA: – implausible.[71]

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68 *Id.* at 40–41.

69 *Id.* at 41–42. As Justice Stevens pointed out, the allegations that Coca Cola was responsible for having mice in its product were purely hypothetical, and no one was suggesting that such was the case. *Id.* at 43.

70 *Id.* at 55.

71 *Id.* at 55–56.

This exchange and the previous ones described above would appear to expose some of the tensions and shortcomings associated with the plausibility standard, both generally, and specifically in this case. First, Chief Justice Roberts seems to ponder whether the plausibility standard is something a judge can even apply.[72] Second, and more revealing, Justice Scalia simply did not think it plausible that the defendants were responsible for the treatment of the plaintiff because, apparently, "hundreds of thousands" of other individuals would have been treated the same way as the plaintiff if something truly had been awry.[73] At the same time, remember, it was the appellate panel below that considered the plausibility of the plaintiff's allegations, and found that they satisfied that test.[74] That court found the allegations plausible, with no greater amplification, "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11."[75]

Ultimately, the Court's issuance of its 5–4 ruling rejecting Iqbal's claims provided an opportunity for the majority to amplify its own thoughts on the plausibility standard, and it is to that opinion that I now turn.

b. Decision

In May of 2009, two years after *Twombly*, the Court issued its decision in *Ashcroft v. Iqbal*, with Justice Kennedy writing for the majority and with that majority siding with the former Attorney General and the FBI Director. After dealing with some issues related to its jurisdiction, the Court articulated "[t]wo working principles" that "underlie" the decision in *Twombly*.[76] First, a court need not accept "[t]hreadbare recitals of the elements of a cause of action" as true for the purposes of assessing the sufficiency of the pleadings.[77] The second working principle was the following:

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context–specific task that requires the reviewing court to draw on its *judicial experience and common sense*. But where the well pleaded facts do not permit the court to infer more than the

72 *Id.* at 41–42.

73 *Id.* at 56.

74 Iqbal v. Hasty, 490 F.3d 143, 170 (2d Cir. 2007)), *rev'd*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

75 *Id.* at 175–76.

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

77 *Id.*

> mere possibility of misconduct, the complaint has alleged–but it has not "show[n]"–"that the pleader is entitled to relief."[78]

After reviewing the allegations of the complaint through these working principles, the majority found the complaint wanting. First, the Court analyzed those allegations against Ashcroft and Mueller that claimed that the two had condoned harsh conditions of confinement of the plaintiff on invidious grounds.[79] The Court found these allegations conclusory, and thus did not accept them as true under the first working principle.[80] The "bare assertions" of involvement by Ashcroft and Mueller in condoning these practices "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'"[81]

The Court then went on to review the allegations that the policy of "hold until cleared" fell along racial lines against the plausibility standard. There, the Court found the allegations similarly wanting, finding as follows: "[t]aken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But *given more likely explanations*, they do not plausibly establish this purpose."[82]

The Majority went on to review the allegations that the plaintiffs had been targeted based on their race, religion and national origin in detail. The Court measured them against the plausibility standard and found

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78 *Id.* at 1950 (alterations in original) (emphasis added) (citations omitted) (quoting FED. R. CIV. P. 8(a)(2)).

79 *Id.* at 1951.

80 *Id.* This discussion of "conclusory" allegations in *Iqbal* is quite odd, given the discussion of the pleading "paradigm" articulated in *Twombly* itself. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575–76 (2007). The Court, in *Twombly*, specifically endorsed what would appear to be the very definition of conclusory allegations, as found in the sample pleadings accompanying the Federal Rules themselves:

> The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: "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." The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief—namely, the defendant's negligent driving—would have been called a "conclusion of law" under the code pleading of old. But that bare allegation suffices under a system that "restrict[s] the pleadings to the task of general notice–giving and invest[s] the deposition–discovery process with a vital role in the preparation for trial."

Id. (alterations in original) (citations omitted) (internal quotation marks omitted). In *Twombly*, the phrase "negligently drove" a car is recognized—indeed, is held up—as an example of an allegation that provides detail sufficient to satisfy Rule 8(a). *Id.* It is hard to imagine a legal term that is more conclusory or loaded than the word "negligently."

81 *Iqbal*, 129 S. Ct. at 1951 (citation omitted).

82 *Id.* (emphasis added).

them implausible because there were other, alternative explanations for the conduct that were not illegal:

> 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.[83]

The Majority then went on to discuss those aspects of the plaintiff's allegations related to the "hold until clear" policy and found them similarly implausible. The court found that all such allegations "plausibly suggest[]"[84] is the following:

> [T]hat the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."[85]

It is important to note at this juncture that the Court did not support the position that the respondent had to have set forth claims sufficient to overcome the petitioners' anticipated immunity defense, as the petitioners had requested. Rather, the majority of the Court simply found that the allegations were implausible, or, rather, not as plausible as other, potential explanations for some of the conduct the respondent had experienced while in custody. This question goes to the heart of the petitioner's claims, not the nature of any particular defense. Even if the petitioners in *Iqbal* had been private actors, without the benefit of a potential immunity

83 *Id.* at 1951–52 (citation omitted). For a critique of the Court's apparent willingness to infer that the *Iqbal* defendants were acting in good faith in the wake of the September 11 attacks, see Michael C. Dorf, Iqbal *and Bad Apples*, 14 Lewis & Clark L. Rev. 217, 218–19 (2010).

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

85 *Id.* (quoting *Twombly*, 550 U.S. at 570).

defense, it is hard to argue that the Court would have found Iqbal's claims plausible. In other words, and some will disagree, *Iqbal* is not a case about the allegations necessary to overcome the defense of qualified immunity, or any other defense for that matter; rather, it is about the degree of specificity required of plaintiffs in setting forth their affirmative claims, which is wholly unrelated to any particular defense a defendant may or may not raise.

In a dissenting opinion written by Justice Souter, the author of the Court's decision in *Twombly*, four Justices[86] dispute the conclusions reached by the majority, specifically with regard to how the majority cast as conclusory the allegations that Ashcroft and Mueller condoned the discriminatory policies.

> *Twombly* does not require a court at the motion–to–dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.[87]

And there it is. Four justices and three appellate judges found the allegations plausible; five justices did not. It is hard to argue that the plausibility standard, as presently articulated by the Court, does not lie in the eyes of the beholder. The elusiveness and subjective nature of the standard thus may lend itself either to misapplication, because judges are unclear as to how to apply it, or even worse, to abuse, with judges using it as license to dispose of cases on their dockets regardless of their merit.

But all of this may be mere speculation. The real question is, in the time since the Court's decision in *Iqbal*, do facts on the ground—namely, the manner in which courts are using this precedent—raise any cause for concern that these pleading standards are having an impact on litigation in the federal system? Moreover, should one be concerned that specific kinds of cases may fare particularly poorly in the wake of this precedent? The remainder of this article is dedicated to addressing these questions, and assessing the impact of the plausibility standard, specifically in employment and housing discrimination cases. It is to this analysis that I now turn.

II. The Impact of the New Pleading Standards on Employment and Housing Discrimination

In many ways, the decisions in *Twombly* and *Iqbal* are consistent with a general trend, evident in both the courts and legislatures, that has sought

86 Justice Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 1954–61. Justice Breyer also wrote a separate dissent. *Id.* at 1961–62.

87 *Id.* at 1959 (Souter, J., dissenting) (citations omitted).

to limit access to courts, particularly federal courts, to resolve grievances.[88] Where the decades following the amendment to the federal rules saw the court house doors opened to litigants pressing civil rights claims, protecting consumers, and reining in government overreach and abuse, over the last three decades a backlash of sorts has occurred, and courts and legislatures have sought to limit access to the courts through a variety of mechanisms.[89] Courts have utilized a narrow reading of standing requirements to limit access of certain plaintiffs to the courts, and have invoked other mechanisms, such as the political question doctrine, abstention and preclusion, to limit the types of cases that can be adjudicated.[90] They have expanded the availability of summary judgment as a tool for preventing cases from making it to trial.[91] They have narrowed the availability of expert testimony in certain contexts.[92] Furthermore, in a recent term, the Supreme Court scaled back the availability of class action relief in certain types of cases, signifying an end to the costs savings through economies

88 *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 984–85 (2003) (arguing that limitations on court access undermine core democratic principles); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 Ariz. L. Rev. 965, 975 (1998) (noting constriction of access to federal courts). For an analysis of the ways in which modern pleading rules fall within this trend, see Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873 (2009).

89 As Arthur Miller has recently argued:

> Federal civil procedure has been politicized and subjected to ideological pressures. Thus, the Supreme Court's recent decisions in Bell Atlantic Corp. v. Twombly [sic] and Ashcroft v. Iqbal [sic] should be seen as the latest steps in a long–term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth. To a significant degree, the liberal–procedure ethos of 1938 has given way to a restrictive one.

Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 9–10 (2010) (footnotes omitted).

90 The literature on the political nature of many of these doctrinal matters is extensive, a recounting of which is beyond the scope of this article. For example, there is extensive scholarship examining just the standing doctrine. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 223 (1988) (describing the "lawlessness" of many standing decisions); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. Rev. 1741, 1758 (1999) (describing standing doctrine as "malleable" which permits judges to "further their ideological agendas" through them); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 167 (1992) (criticizing standing doctrine). For a defense of the use of some of these doctrines, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979).

91 For a description of the ways in which Supreme Court precedent has increased the availability of summary judgment, see Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95 (1988).

92 *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–95 (1993) (establishing standards for admissibility of expert testimony in federal courts).

of scale that plaintiff–side attorneys often enjoy in many large class action contexts. It has also enforced mandatory arbitration clauses in consumer contracts, making it likely that disputes surrounding many consumer transactions will no longer be resolved in the courts.[93]

But it has not just been the judiciary that has sought to limit the power of courts to adjudicate many types of disputes. Congress has limited access to courts in certain substantive areas of law, like securities cases,[94] prisoner litigation,[95] and many immigration matters.[96] It has also narrowed the availability of class action remedies in certain contexts[97]and habeas relief in many others.[98] As in the securities and class action contexts, in some instances Congress limited access to state courts, while preserving what may have been perceived as the more "defense–friendly" and transaction–costs–heavy federal courts for many litigation contexts.[99]

It is within this historical context that the decisions in *Twombly* and *Iqbal* arise, and the following discussion goes into greater detail about these precedents and their critics.

A. Critiques of Twombly *and* Iqbal

There is a growing body of criticism of the Supreme Court's new civil pleading jurisprudence, from scholars and practitioners alike. Some argue that the plausibility standard worked a change to the Federal Rules of Civil Procedure through the courts, and not the legislature.[100] Others argue

93 For a discussion of recent procedural opinions of the Supreme Court, see Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal–Mart v. Dukes, *and* Turner v. Rogers, 125 Harv. L. Rev. 78 (2011).

94 *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (imposing heightened pleading requirements in certain securities cases); Securities Litigation Uniform Standards Act of 1998 § 101, 15 U.S.C. § 77p (2006) (limiting state securities litigation).

95 42 U.S.C. § 1997e (2006).

96 *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, § 348, 110 Stat. 3009–546, 3009–639 (codified as amended at 8 U.S.C. 1182(h) (2006 & Supp. 2010)).

97 *See* Class Action Fairness Act of 2005 §§ 4(a), 5, 28 U.S.C. §§ 1332(d), 1453 (2006) (limiting access to state courts for certain types of class actions). For a description of some further efforts to restrict access to courts, see David Marcus, *The Past, Present, and Future of Trans–Substantivity in Federal Civil Procedure*, 59 DePaul L. Rev. 371, 404–09 (2010).

98 The Anti–Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, §§ 101–102, 110 Stat. 1214, 1217 (codified in scattered sections of 26 U.S.C.).

99 For an argument that the Class Action Fairness Act of 2005 will drive up transactions costs for plaintiff–side attorneys, see Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 Denv. U. L. Rev. 437, 448–49 (2010).

100 *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 823 (2010); *see also* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Aschroft v. Iqbal, 85 Notre Dame L. Rev. 849, 852 (2010) (arguing that

that the indeterminate nature of the plausibility standard gives district courts little guidance on how to handle motions to dismiss.[101] Some have expressed concerns that such an indeterminate standard grants too much discretion to judges who might harbor hostility to certain types of cases or particular litigants and will use that discretion to reject certain claims.[102] Others posit that the pleading bar has been raised too high, at too early a phase in litigation, particularly where information about alleged illegal conduct is not generally available to plaintiffs.[103] Still others argue that the

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the Court's "thick" screening approach in *Iqbal* should only be adopted by Congress, not the courts); Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 208 (2010) (arguing that the Court in *Twombly* and *Iqbal* created a "heightened pleading standard" inconsistent with the Federal Rules of Civil Procedure).

101 As David Noll points out, the Court in *Iqbal* "leaves a number of questions unanswered." David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 131 (2010). For example:

> 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.

Id.; *see also* Clermont & Yeazell, *supra* note 100, at 823 (criticizing the plausibility standard as "foggy"). One scholar, in analyzing cases decided in the decade prior to *Twombly*, suggests that the "heft" of an initial pleading in a case bears no relationship to the ultimate outcome. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 120 (2011). For an attempt to reconcile the standard articulated in the holdings in *Twombly* and *Iqbal* with the purposes of pleading rules and prior precedent, see Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

102 *See, e.g.*, *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 61–62 (2009) [hereinafter *Access to Justice* Hearing] (statement of John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation), *available at* http://judiciary.house.gov/hearings/printers/111th/111–36_53090.PDF (criticizing *Iqbal* for the discretion it confers on judges); *id.* at 79, 84–89 (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund) (criticizing *Iqbal* as likely to have a disparate impact on civil rights litigants); *see also Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 25, 32–34 (2009) (statement of Eric Schnapper, Professor, University of Washington School of Law) (expressing concern that *Twombly* and *Iqbal* will result in judges dismissing otherwise meritorious civil rights claims for technical pleading defects), *available at* http://judiciary.house.gov/hearings/printers/111th/111–124_54076.PDF; Ramzi Kassem, Iqbal *and Race: Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1444–46 (2010) (arguing subjective aspects of plausibility determination are likely to adversely impact claims by members of non–dominant, minority communities).

103 *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 61–62, 67–68 (2007) (arguing that the plausibility standard is appropriately deployed where information about a defendant's misconduct is publicly available, while defending the ultimate outcome in *Twombly*); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 39 (2010). As Arthur Miller argues:

new plausibility standard will chill the vindication of important rights and will favor the powerful over the powerless.[104]

A number of legal scholars have conducted empirical studies to determine the impact of the pleading standards of *Twombly* and *Iqbal* in the relative short time frame since their issuance. One such study, in a random selection of cases filed both before *Twombly* and after, found a slight increase in rates of dismissal on pleading grounds, from forty–six to forty–eight percent, from before *Twombly* to immediately thereafter, then a greater increase, to fifty–six percent, in cases in which motions to dismiss were ruled upon after *Iqbal*.[105] In addition to identifying these overall dismissal rates, the study went on to break down cases according to case type, as identified by the federal courts' Civil Cover Sheet, including

> In many modern litigation contexts the critical information is in the possession of the defendant and unavailable to the plaintiff. I can understand requiring a plaintiff to plead what he or she knows or should know, but it is rather futile to tell the pleader to plead what is unknown. Discovery was designed to let each side have access to that type of information so that the litigation playing field would be level to promote more informed settlements and trials.

Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 Tex. Tech L. Rev. 587, 596 (2011); *see also* Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. Ill. L. Rev. 187, 200–01 (2011) (praising staged and limited discovery as a means of weeding out weaker cases and an alternative to outright dismissal where defendants may possess information relevant to plaintiffs' claims); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 Stan. L. Rev. 905, 926–29 (2010) (noting the "paradox" that when information about illegal conduct is not generally available, under *Iqbal*, the plaintiff cannot attempt to file a claim to get access to that information through discovery); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre–Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 Lewis & Clark L. Rev. 65, 68 (2010) (arguing that pre–dismissal discovery can offer alternative to outright dismissal for pleading deficiencies in complaints). As Elizabeth Schneider argues, the Court's decisions in *Twombly* and *Iqbal* lead to "absurd" results:

> *Twombly* and *Iqbal* have effectively commanded district judges to assess pleadings and the credibility of plaintiffs' allegations as though they were summary judgment motions . . . . [As argued elsewhere,] summary judgment decisionmaking has been problematic and controversial. For a district judge to be called on to make a similar assessment on pleading, based on "judicial experience" and "common sense" and before discovery, is absurd.

Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination* Cases, 158 U. Pa. L. Rev. 517, 536 (2010).

104 *E.g.*, Gary S. Gildin, Iqbal *and Constitutional Torts: The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional* Deprivations, 114 Penn St. L. Rev. 1333, 1335 (2010) ("*Iqbal* is but the latest instance in a long line of cases in which the Supreme Court, acting *sua sponte*, legislates a doctrine freeing government and its officials from accountability for proven violations of the Constitution."); Miller, *supra* note 89, at 61–77 (arguing that procedural limitations, such as pleading requirements after *Twombly* and *Iqbal*, have prioritized concerns about defendant litigation costs and docket control over vindication of rights); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 Lewis & Clark L. Rev. 185, 185 (2010) (arguing that *Iqbal* will make it harder for "societal out–groups" to challenge "dominant interests").

105 Hatamyar, *supra* note 9, at 601–02.

"contracts," "torts," and "civil rights."[106] When broken down by case type, the author found some divergence in the success of motions to dismiss under *Twombly* and *Iqbal* depending on the nature of the case. For example, in "constitutional civil rights cases" the dismissal rate was higher across the board: from fifty percent dismissal rate in the year preceding *Twombly*, fifty–five percent in the time–span between *Twombly* and *Iqbal*, and sixty percent after *Iqbal*.[107]

A more recent study, conducted for the federal Judicial Conference Advisory Committee on Civil Rules, found somewhat different results.[108] This study analyzed a sampling of decisions from several district courts found in the federal courts filings database, as opposed to those maintained in electronic databases. Comparing two time frames—a period of time before *Twombly* and then another after *Iqbal*—the results showed a slight rise in the number of motions to dismiss filed in all types of cases.[109] While this study found an increase in the general dismissal rate from sixty–six percent to seventy–five percent, this study did *not* find a rise in dismissal rates in most categories of cases where leave to re–plead was not granted.[110] The one exception was in cases described as concerning "financial

106 *Id.* at 604.

107 *Id.* at 608.

108 *See* Cecil Report, *supra* note 9, at 13. A prior, preliminary study for the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States found the following:

> The findings show some increase in the rate of motions, and — for most case categories — no more than slight increases in the rate of granting motions. Two case categories that have drawn particular attention are "Civil Rights Employment Cases" and "Civil Rights Other Cases." The monthly average in employment cases for nine months before the *Twombly* decision was 1,147 cases, 527 motions to dismiss (46% percent of cases), 169 motions granted (15%), and 108 motions denied (9%). For nine months after *Iqbal*, the monthly average was 1,185 cases, 533 motions to dismiss (45%), 185 motions granted (16%), and eighty motions denied (7%). The monthly average in other civil rights cases for nine months before *Twombly* was 1,334 cases, 903 motions to dismiss (68% of cases), 264 motions granted (28%), and 158 motions denied (12%). For nine months after *Iqbal*, the averages were 1,362 cases, 962 motions to dismiss (68%), 334 motions granted (25%), and 114 motions denied (8%). These figures show a substantial increase in the percent of motions granted. But they cannot show the explanation—whether, for example, the increase is largely in types of pro se cases that survived under notice pleading only because judges felt helpless to dismiss, no matter how manifestly implausible the claim might be.

Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 2–3 (May 17, 2010) (discussing the Report of the Civil Rules Advisory Committee), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05–2010.pdf. That report indicated that a "closer examination of actual cases," had also been performed. *Id.* at 3. The *Cecil Report* is the result of that closer examination. Cecil Report, *supra* note 9, at 13.

109 The study excluded prisoner cases and *pro se* cases. Cecil Report, *supra* note 9, at vii.

110 *Id.* at 13.

instruments," including mortgages.[111] In such cases, there was a significant rise in dismissal rates generally, as well as dismissal without leave to re–plead, after *Iqbal*. In the pre–*Twombly* cases, the general dismissal rate was forty–seven percent (without leave to re–plead); after *Iqbal*, a general dismissal rate of ninety–two percent (without leave to re–plead).[112]

While the methodology for this study included sampling of cases from select district courts, and did not rely on reported decisions in electronic databases,[113] like the other studies conducted before it, it looked simply at success rates for all motions to dismiss, regardless of the basis for the motion, including motions based on exhaustion of administrative remedies, statute of limitations, and other grounds not related directly to the specificity of the pleadings.[114]

The instant study sought to overcome these and other methodological shortcomings. Furthermore, it attempted to narrow the focus of the study, limiting it to employment and housing discrimination cases. The central questions this article attempts to address are the following. First, has the new pleading standard had an adverse impact on certain types of civil rights cases: here, employment and housing discrimination cases? Second, if the courts are using the precedents in *Twombly* and *Iqbal* to dismiss such cases at a higher rate than before, what aspect of those opinions are courts deploying to do so? And third, moving beyond dismissal rates, has the number of cases dismissed on specificity grounds increased after either *Twombly* or *Iqbal*? It is to these questions that I now turn.

B. Results Overview

In a nut shell, the study revealed more of an *Iqbal* effect than a *Twombly* effect. In sum, there were noticeable changes in the dismissal rates after the issuance of *Iqbal* as opposed to the time period immediately following *Twombly*. In the pre–*Twombly* group of cases, what I refer to as Group I,

111 *Id.* at 12. In defining "financial instrument cases" the study combined "nature–of–suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and 'other real property.'" *Id.*

112 *Id.* at 14 tbl.4.

113 A common criticism of using decisions contained exclusively in electronic databases is that using such sources is likely to result in an increased number of opinions in which claims were dismissed, because, it is believed, these tend to be overrepresented in such databases. *See id.* at 2 n.5. Since this study looks at trends over time, using just electronic databases, any biases of the data would exist throughout the entire time frame studied for this analysis. I make no claim here that the dismissal rates revealed in the data used in the study are representative of all cases, just of cases contained in these databases.

114 For critiques of the *Cecil Report*, see Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. Rich. L. Rev. 603 (2012); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* 5–6 (Univ. Hous. L. Ctr., Working Paper No. 1,904,134, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134.

sixty–one percent of all motions to dismiss were granted, at least in part, and forty–six percent of cases were dismissed, at least partially "with prejudice."[115] In what I call the Group II decisions (those decided during the time period between the Court's decision in *Twombly* and its decision in *Iqbal*), the dismissal rate for those cases was fifty–six percent, but the dismissal rate, at least partially "with prejudice," was only forty percent. Finally, in the so–called Group III cases, which were decided post–*Iqbal*, the dismissal rate for all cases went up to seventy–two percent, with the "with prejudice" rate going up to fifty percent. Graphic displays of these and other results are set forth in the following section.

As more fully described below, further analysis of these outcomes—for example, by looking at different dismissal rates for cases filed *pro se* as opposed to cases in which the plaintiffs were represented by counsel, by looking at dismissal rates for cases in which disparate impact theories were raised and those in which they were not—shows that the *pro se* litigants generally did not fare as well as litigants represented by counsel. In addition, at least some types of disparate impact claims fared better than the cases analyzed as a whole, namely, cases alleging reverse redlining in the subprime mortgage market. Overall, however, there appears to be a clear *Iqbal* effect, yet no apparent *Twombly* effect, at least with respect to the universe of cases studied here.

Furthermore, this study included additional analysis to determine the manner in which district courts may be using the plausibility standard, and to what extent courts are relying on judges' "experience and common sense." In reviewing these questions, it seems clear that courts are rarely using the plausibility standard, if they are at all, in the manner in which the Supreme Court did in both *Twombly* and *Iqbal*. In the cases studied, when courts ruled on motions to dismiss, they did not attempt to identify an arguably more plausible—and entirely legal—explanation for the conduct alleged. Moreover, district court judges rarely, if ever, resort to their own experience and common sense, at least not explicitly, when ruling on the sufficiency of the pleadings.

Finally, this study looked at two additional issues: at what rate did plaintiffs face motions to dismiss based on the specificity of the pleadings and did the number of dismissals increase after *Twombly* and/or *Iqbal*. Here, since three different time frames were utilized in developing the database for this analysis, the study explored the following questions: what was the

115 Cases were categorized as dismissed "with prejudice" when the deciding court explicitly denied leave to re–plead; found that the matter was dismissed with prejudice; or, simply, if the opinion was silent on whether the plaintiff could re–plead any claims. According to Federal Rule of Civil Procedure 41(b), a dismissal is considered "adjudication on the merits" unless the deciding court explicitly states that the outcome is without prejudice. Categorizing decisions in this way is consistent with the methodology used in the *Cecil Report*, *supra* note 9, at 5.

average number of decisions issued per month in which plaintiffs faced a motion to dismiss challenging the specificity of the pleadings and how many decisions were issued in which the pleadings were dismissed on specificity grounds? These final pieces of analysis revealed disturbing trends. Among the universe of cases studied here, plaintiffs faced a considerably higher number of motions to dismiss in which their pleadings were challenged as lacking specificity. Indeed, decisions on such motions were generated at a rate greater than five times the rate pre–*Twombly*. Moreover, apart from the mere dismissal rate, the number of cases in which complaints were dismissed, either in whole or in part, rose dramatically after *Iqbal*.

These and other findings are more fully developed and explained in the following section.

C. Dismissal Rates Analysis

1. *Methodology*.—As stated previously, this study attempted to identify employment and housing discrimination cases in which the defendants tested the specificity of the pleadings through either a motion to dismiss for failure to state a claim or for judgment on the pleadings.[116] To identify any potential impact of the *Twombly* or *Iqbal* decisions on the manner in which lower courts treated such motions, this study created a database of trial court decisions from the federal courts during the time period immediately preceding the Court's decision in *Twombly* and the period after. To gauge any greater impact in these classes of civil rights cases after *Iqbal*, the post–*Twombly* decisions were divided into two classes of cases: those cases decided after *Twombly* but before *Iqbal*, and those cases decided after *Iqbal*. The study identified three different groups of cases, based on the three time frames laid out above, namely the 41–month period prior to the Court's decision in *Twombly*; the 24–month period between the Court's decisions in *Twombly* and *Iqbal*; and the 19–month period from the decision in *Iqbal* and when this study was started (mid–May 2009 through mid–December 2010).[117]

The first group of cases was identified using a range of searches on the Lexis database. Initially, the search sought to identify decisions in employment and housing discrimination cases in which the deciding court cited the Court's precedent in *Conley v. Gibson*.[118] In order to ensure that

116 Under federal practice, the same standard applies to 12(b)(6) motions to dismiss as 12(c) motions for judgment on the pleadings. Conry v. Daugherty, No. 10–4599, 2011 U.S. Dist. LEXIS 66658, at *9 (E.D. La. June 22, 2011). Courts are applying the plausibility test to review pleadings filed under either of these sub–parts of Rule 12. *See, e.g.*, *id.*

117 While there may have been a value to analyzing an identical time frame before *Twombly* and after, since the analysis was commenced in mid–December 2010, it seemed of greater value to incorporate all decisions then available than to hew to some rigid time frame.

118 Using Lexis's combined federal cases database, the search identified decisions in this

the search terms utilized did not miss any relevant cases, and to recognize the possibility that courts, pre–*Twombly*, might not have always cited *Conley* in assessing the specificity of the pleadings on a motion to dismiss, the study included two additional searches of the 41–month period before the *Twombly* decision. The first sought decisions on motions to dismiss in employment and housing discrimination cases that referenced *Conley's* "no set of facts" language, but did not cite the *Conley* precedent itself.[119] The reasoning behind conducting such a search was that the Supreme Court, and lower, appellate courts, had incorporated the "no set of facts" language into subsequent precedents, and district court judges sometimes quoted this language but cited another decision or decisions that had adopted that language. The final search conducted of the pre–*Twombly* time frame attempted to identify decisions on motions to dismiss in employment or housing cases that cited neither *Conley* nor its "no set of facts" language at all.[120]

The second group of cases was compiled through searches[121] that attempted to identify decisions with the same characteristics as those sought in the first search, but used a different date filter: from May 22, 2007 to May 18, 2009 (the first date being the date of the Court's decision in *Twombly*, and the second, the date of the Court's decision in *Iqbal*). It also added the search term "Twombly" in the search.

Finally, the third group of cases was identified through searches using similar terms,[122] but with a date filter of May 19, 2009 through December 19, 2010.

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database issued between January 1, 2004 and May 21, 2007 (the date of issuance of the Court's decision in *Twombly*). The initial search used the following search terms: "conley /4 gibson & disparate /4 impact or treatment & employment or housing."

119 The search of Lexis's federal cases combined database was the following, using the pre–*Twombly* date restrictions: "disparate /4 impact or treatment and employment or housing and "no" set of facts and not conley."

120 That search, once again conducted using Lexis's federal cases combined database, was the following: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not conley." This search was further refined, using the Lexis "focus" feature to exclude those opinions in which the language "no set of facts" appeared. Again, the pre–*Twombly* date restrictions described above were imposed. The "within 200" modifier was deployed in this and several other searches to winnow down the total number of cases generated using these search terms. The large sample size ultimately identified—well over 1800 cases across all three time periods—likely tempered any distortions in the data that may have been created by using this type of modifier. Moreover, differences across time periods that might have been generated by the use of such a modifier were similarly balanced out by the use of this modifier across the different time frames with certain supplemental searches.

121 Again, using Lexis's federal cases combined database, the study ran the following search: "twombly & disparate /4 impact or treatment & employment or housing" within the date range described above.

122 For this third group, the study utilized the following search "twombly or iqbal & disparate /4 impact or treatment & employment or housing" using, once again, the Lexis federal cases combined database.

Similarly, additional searches were conducted to ensure that the study did not miss cases in the post–*Twombly* period, where the specificity of the pleadings were challenged, but courts did not reference either the *Twombly* or *Iqbal* opinions in reaching their decisions on such motions.[123]

Knowing that the searches conducted would likely yield more decisions than those germane to the study, this author then reviewed the results from these searches to filter out cases beyond the scope of the study. A description of the filtering techniques is included below. Using these techniques, the study winnowed down the cases initially identified using the various searches described above, from the 1,739 originally selected, to a total of 625 cases in which the defendants, through motions to dismiss for failure to state a claim and/or for judgment on the pleadings, challenged the specificity of the allegations of the complaints in employment and housing discrimination cases. After applying the exclusions described below, the search yielded 187 relevant decisions in the first time frame; 160, in the second; and 278, in the third.

The study deployed a range of techniques to narrow the searches and generate this smaller collection of cases for the data review. Such techniques included excluding the following:

- Decisions from appellate courts—The narrower data set includes only decisions of district judges, and, in some instances, magistrate judges.[124] The set includes no appellate decisions. Furthermore, since this study reviewed the conduct of district court judges and magistrates, whether a particular opinion was reviewed on appeal and whether the opinion was reversed or affirmed was irrelevant to the study.

- Decisions on motions for summary judgment—Where defendants filed motions to dismiss or, in the alternative, motions for summary judgment, the analysis took into account only the outcome on the Rule 12 component of those decisions.[125]

123 The study included the following additional search of the post–Twombly/pre–Iqbal time–period: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not twombly." The study included the following additional search of the post–Iqbal time–period: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not twombly or iqbal."

124 In order to prevent double–counting of a single case, if a magistrate's decision was adopted by a district court judge, and that judge cited to either *Conley*, *Twombly*, or *Iqbal*, only one of those two opinions were included in the database. Typically, such district court judge opinions were short on details and rarely referenced any of these cases in such decisions. In such cases, the database included only the magistrate's opinion.

125 In contrast, when a moving party sought relief through a motion to dismiss or, alternatively, for summary judgment – if the deciding court considered the motion only as one for summary judgment – that opinion was not included in the data set. Similarly, if a trial judge converted a motion to dismiss into a motion for summary judgment, that decision, too, was

- Decisions on motions to dismiss that were not directed to the specificity of the allegations in the pleadings—Previous studies of the impact of *Twombly* or *Iqbal* included outcomes in all motions to dismiss. Such an approach would, necessarily, include the outcomes in cases having nothing to do with the change in pleading standards brought about by *Twombly* and *Iqbal*. Thus, those studies would include the outcomes in cases that likely would have been the same after *Twombly* as before, since the *Twombly/Iqbal* precedents would bear no relation to the issues before the district courts in such cases. In order to focus solely on the impact of *Twombly* and *Iqbal*, this study excluded any decisions in which a defendant challenged whether the plaintiff had properly exhausted his or her administrative remedies prior to filing suit or filed the suit in an untimely fashion. Similarly, where a defendant sought dismissal based on res judicata, collateral estoppel, or complete or partial immunity, and the specificity of the pleadings were not otherwise challenged, such cases were also excluded from the database. If any aspect of a motion raised any of these issues, yet the specificity of the pleadings were also challenged, the case was included in the database on the outcome of that portion of the motion that challenged the specificity of the pleadings only. Similarly, if a defendant challenged the specificity of the pleadings with respect to any question related to exhaustion of remedies or the timeliness of the complaint, even though these are both affirmative defenses, decisions on such motions were included in the database.

- Cases the searches identified that were not related to either employment or housing discrimination—In some instances, a case involving special education rights under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA)[126] or some other claim under a separate civil rights statute might reference the standards used in employment or housing discrimination cases. In such instances, the search methods utilized generated "false positives." The study excluded such cases from a deeper review. As mentioned earlier, the study excluded special education cases, discrimination in education generally, claims under Title VI of the Civil Rights Act of 1964,[127] cases under the Employee Retirement and Income Security Act (ERISA),[128] and detainee/prisoner litigation challenging conditions of confinement.

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excluded from the study.

126 Individuals with Disabilities Education Improvement Act of 2004 § 615(h)(i)(2)(A), 20 U.S.C. § 1415(h)(i)(2)(A) (2006).

127 Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

128 Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2006).

At the same time, a wide range of employment and housing discrimination claims were included in the collection of cases analyzed fully for this study including: Title VII,[129] the Rehabilitation Act,[130] the Americans with Disabilities Act (ADA),[131] the Age Discrimination in Employment Act (ADEA),[132] the Equal Pay Act,[133] the Family Medical Leave Act,[134] Equal Protection claims implicating employment or housing discrimination[135] and claims under the Fair Housing Act (FHA).[136] Additionally, retaliation claims, where viable under any of these other laws or causes of action, were also considered as appropriate for deeper study.[137]

The study includes this constellation of laws in order to capture the full range of employment and housing discrimination cases, and because many utilize similar approaches to the types of allegations required of plaintiffs when attempting to establish their right to relief as well as, ultimately, their prima facie case under such laws: namely, the now–familiar burden–shifting methodology utilized in so many discrimination contexts.[138] At the same time, the study excluded two

129 Civil Rights Act of 1964 § 703(a)(1)–(2), 42 U.S.C. § 2000e–2(a)(1)–(2) (2006).

130 Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006).

131 Americans with Disabilities Act of 1990 § 102(a), 42 U.S.C. § 12112(a) (2006).

132 Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2006).

133 Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

134 Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

135 For a discussion of constitutional employment law claims, see David W. Lee, Handbook of Section 1983 Litigation § 2.15[A][1], at 323–28 (2011).

136 Civil Rights Act of 1968 § 801–819 (Fair Housing Act), 42 U.S.C. §§ 3601–3619 (2006).

137 For a discussion of the elements necessary to establish a prima facie case of retaliation, see Anna Ku, Note, *"You're Fired!" Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 Wash. & Lee L. Rev. 1663, 1667–68 (2007).

138 The burden–shifting approach to Title VII cases in the context of a claim in which discriminatory treatment under Title VII is alleged requires that the plaintiff, in order to make out a prima facie case of discrimination, must show the following:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). For an overview of the burden–shifting framework in employment and other civil rights actions, see generally 1 Charles R. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in Federal Court (2d ed. 2011). By contrast, in a disparate impact case, in order to establish a prima facie case of discrimination, the plaintiff must show the following: "(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices." Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996) (alterations in

types of claims because the law and jurisprudence is deeply unsettled in these areas. Such claims included those for insurance redlining under the Fair Housing Act and claims challenging allegedly discriminatory policies in the aftermath of Hurricane Katrina in the Mississippi Gulf Region. The study excluded these types of cases because of the fear that including them, when the outcomes in so many of these cases are unfavorable to the plaintiffs because of the unsettled nature of the substantive law and the hostility many courts have exhibited to such claims as a result, would have distorted the results.

- Cases involving no allegations of invidious discrimination—This rule excluded cases in which Equal Protection violations were alleged in situations involving public employment, public housing or other government conduct, yet the plaintiff failed to articulate a basis for his or her claim that implicated a suspect classification. Similarly, cases were excluded from further study if a substantive law did not forbid the conduct complained of, even accepting the allegations as true and when such allegations were sufficiently specific. For example, the study did not include a review of cases where a challenged complaint contained allegations of discrimination in employment based on sexual preference where such claims are not covered under federal anti–discrimination laws. At the same time, if a particular motion challenged the specificity of the pleadings on any of these grounds, it was included in the database. For example, if a defendant challenged a complaint on the grounds that a plaintiff failed to state with specificity whether he or she was a member of a protected class, the outcome in that proceeding was included in the database. In most instances, however, plaintiffs were pursuing "class of one" claims, admitting that they were not members of a suspect class.

- Those decisions where the basis for a defendant's motion was that there was no individual liability under a particular civil rights statute—As in the previous few bases for exclusion, if individual liability was just a part of a motion in which the sufficiency of the allegations of the complaint was also challenged, the study took into account only that aspect of the decision not related to individual liability. Whether a particular individual defendant might be liable under the relevant substantive law is irrelevant to the specificity of the pleadings, and motions where a defendant objected on this ground were excluded

original) (quoting Palmer v. United States, 794 F.2d 534, 538 (9th Cir. 1986)). Of course, the burden–shifting framework should not be utilized by the trial court to test the strength of the specificity of a particular plaintiff's allegations at the motion to dismiss phase. Swierkewicz v. Sorema, 534 U.S. 506, 510 (2002)(holding burden–shifting analysis inappropriate when assessing the strength of the allegations of a complaint challenged by a motion to dismiss).

from further study unless other grounds relevant to the study were also raised, in which case the outcome of the motion on those grounds alone was made a part of the study.

In addition to these general grounds for excluding cases, there were additional grounds in individual cases for excluding such cases from the database for this study. A full catalog of the reasons for excluding cases originally flagged for analysis through the searches described above is included in the on–line appendices available for external review.[139]

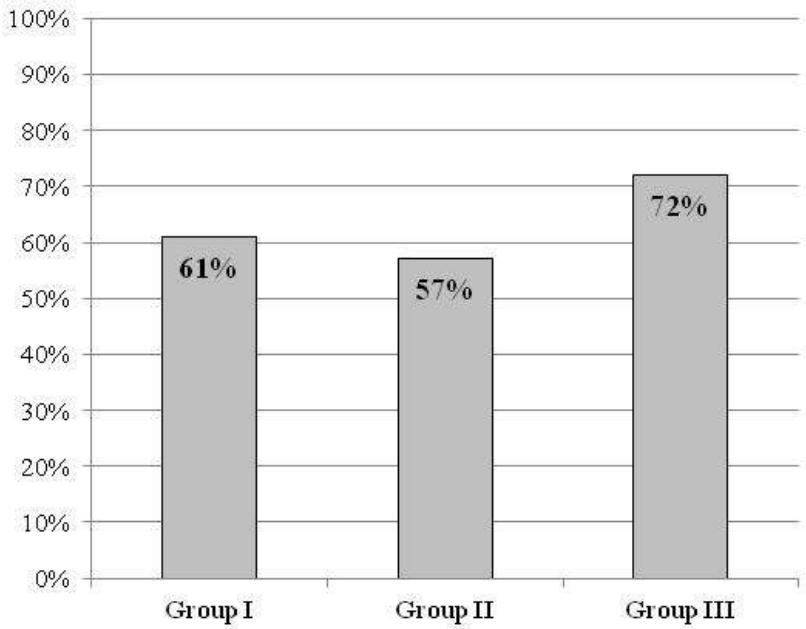
2. *Results*.—This analysis yielded results that reflected, in most instances, that courts were more likely to dismiss cases, and dismiss them with prejudice, at least in part, after *Iqbal*, than in the time frame immediately preceding the decision in *Twombly*, and in the period between *Twombly* and *Iqbal*.[140]

For all cases, including those in which the plaintiff was proceeding *pro se* and those in which he or she had counsel, the overall dismissal rates in such cases were as follows: Group I, sixty–one percent; Group II, fifty–seven percent; and Group III, seventy–two percent. The change in outcomes from Group I to Group III represented an eighteen percent increase in dismissal rates; surprisingly, the change from Group II to Group III was even more dramatic: a twenty–six percent increase.

139 The databases used in this study can be found online at: www.albanylaw.edu/sub.php?navigation_id=157&user_275&view=publications.

140 Consistent with the ways in which other studies have categorized motion outcomes, this study classified decisions in which motions were granted, either in whole or in part, as "dismissal granted"; similarly, cases in which any aspect of the motion was granted with prejudice, or the opinion was silent on the matter of whether the motion was granted with prejudice, such decisions were classified for the purposes of this study as "with prejudice" dismissals. *See supra* note 115 and accompanying text.

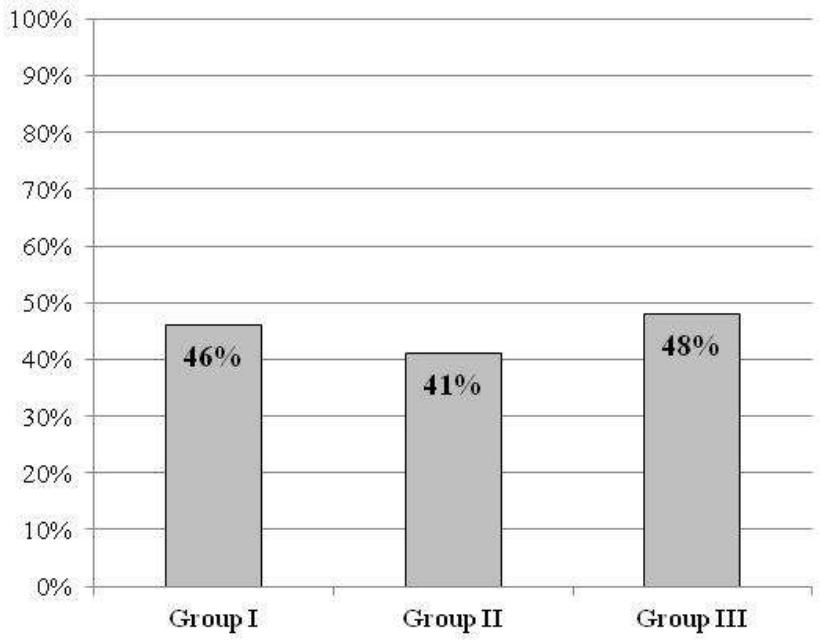
TABLE 1: Overall Dismissal Rates of Cases in Database[141]



Turning to cases in which dismissal was granted with prejudice, at least in part, the dismissal rates for cases in which at least some claims were dismissed with prejudice were as follows: Group I, forty–six percent; Group II, forty–one percent; and Group III, forty–eight percent.

141 The numerical totals for this chart, and all others, are set forth in Appendix A, *infra*. Furthermore, measures of statistical significance are set forth in Appendix C, *infra*.

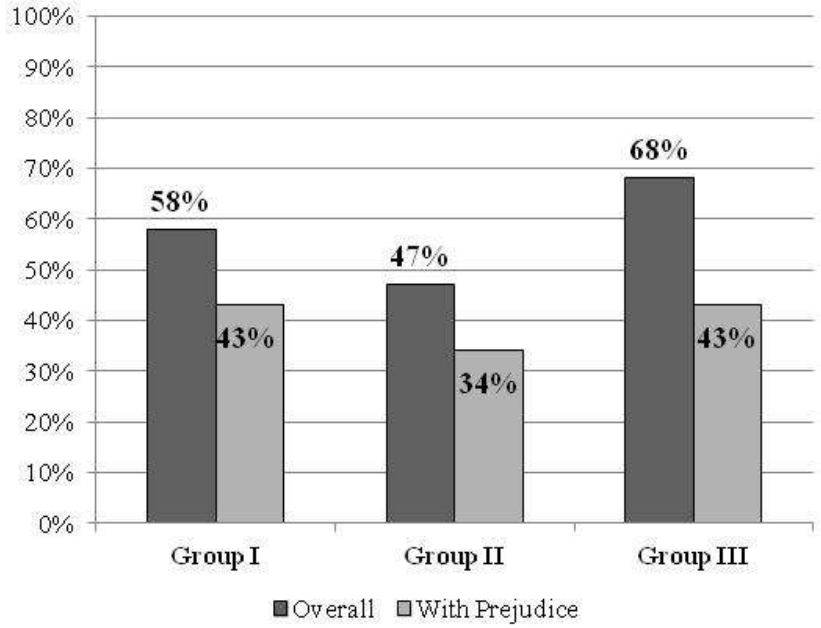
TABLE 2: "With Prejudice" Dismissal Rates



Admittedly, although the overall dismissal rates certainly increased considerably after *Iqbal*, the "dismissal with prejudice" rate increases only nine percent after that decision as compared to the pre–*Twombly* period. Again, the increase from Group II to Group III was more dramatic: a twenty–five percent increase.

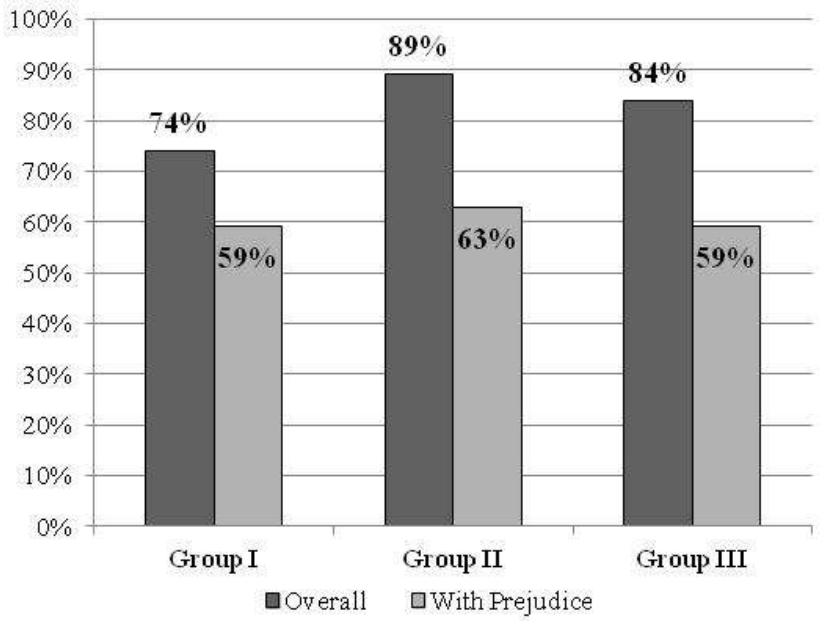
The outcomes in cases in which the plaintiffs were represented by counsel revealed similar trends. In those cases, the overall dismissal rates were as follows: Group I, fifty–eight percent; Group II, forty–seven percent; and Group III, sixty–eight percent. Turning to cases in which at least partial dismissal with prejudice was granted, for non–*pro se* cases, the results were similar: Group I, forty–three percent; Group II, thirty–four percent; and Group III, forty–three percent. These outcomes are displayed graphically below.

TABLE 3: Dismissal Rates for Cases
in which Plaintiff Represented by Counsel



Turning to cases in which plaintiffs were proceeding *pro se* yielded somewhat different results, at least with respect to the period between *Twombly* and *Iqbal*. The overall dismissal rates for the *pro se* cases were as follows: Group I, seventy–four percent; Group II, eighty–nine percent; and Group III, eighty–four percent. The rates of dismissal in which at least some of the claims were dismissed with prejudice were as follows: Group I, fifty–nine percent; Group II, sixty–three percent; and Group III, fifty–nine percent. These figures are displayed graphically below.

TABLE 4: Dismissal Rates for Cases in which Plaintiff was *Pro Se*



The data on *pro se* cases shows that *Twombly* and *Iqbal* did seem to have an impact on the overall dismissal rates, but that dismissal rates with prejudice in such cases remained roughly constant. *Pro se* cases made up almost one quarter of the cases analyzed (153 of 625 cases, or twenty–four percent).

Further analysis of the data yielded interesting results when comparing the outcome in cases in which parties alleged claims of disparate impact as opposed to disparate treatment or other types of related claims, like claims involving retaliation.[142] Further, cases were labeled "mixed" when they involved allegations of both disparate impact and disparate treatment.

The results show several different trends. First, cases alleging disparate impact theories fared much better than disparate treatment claims both before *Twombly* and immediately thereafter. After *Iqbal*, however, the different appears to dissipate considerably, though they were still surviving

142 For the purposes of this study, the claims were separated into two broad types of cases, disparate impact and all others, a category of cases I have labeled "disparate treatment" because it made up the overwhelming majority of the claims. At the same time, in just a small handful of cases did plaintiffs set forth so–called direct evidence of discrimination, which would take a case out of the burden–shifting framework used in disparate impact and disparate treatment cases generally. This small number of cases was excluded from this study.

dismissal at a higher rate than disparate treatment cases generally. With mixed cases, at least some of the claims raised by plaintiffs were dismissed at a higher rate than average, and this was across the board during all time frames. At the same time, one does see a reduction in overall dismissal rates post–*Twombly* in these cases, with a considerable increase, again, after *Iqbal*. These results are displayed graphically below.

TABLE 5: Overall Results in Disparate Treatment, Disparate Impact and Mixed Cases

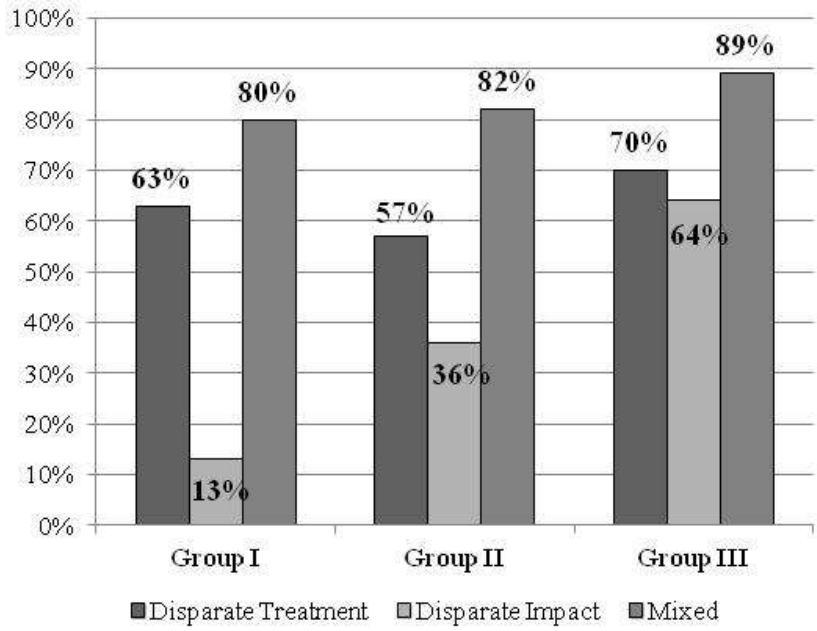
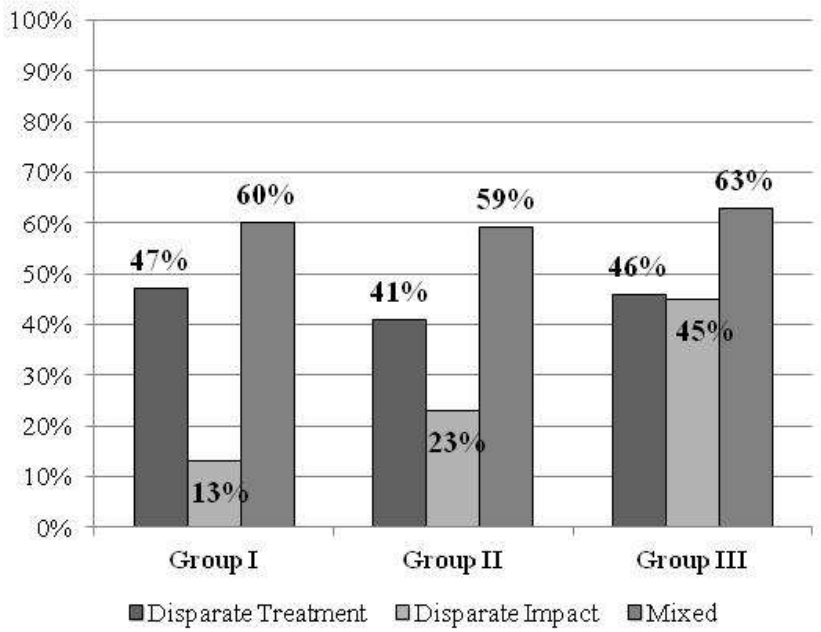


TABLE 6: Dismissal with Prejudice Rates in Disparate Treatment, Disparate Impact and Mixed Cases



An even deeper analysis of the substantive cases included in the study yields an interesting fact. One particular kind of disparate impact case fared much better than other employment and housing discrimination cases in the window of time between the *Twombly* and *Iqbal* decisions. In fact, it is the outcomes in these cases that actually help to explain much of the dip in dismissal rates that occurred after *Twombly* but before *Iqbal*.

This dip is mostly attributable to cases alleging discrimination in the mortgage market in the lead up to the Financial Crisis of 2008, so–called "reverse redlining" cases.[143] Indeed, of the thirteen such cases in which

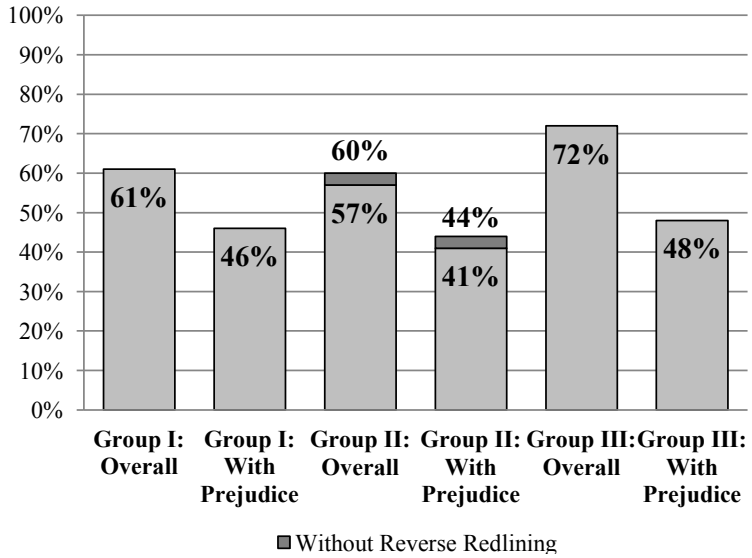
143 The term "redlining" refers to bank practices of discriminating against certain communities—often communities of color—by not offering bank services there. The term comes from the practice of drawing red lines around communities where a bank would not lend. *See* Black's Law Dictionary 1391 (9th ed. 2009) (defining redlining); *see also* Rashmi Dyal–Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 Rutgers L.J. 59, 81–82 n.116 (2007) (referring to Senator William Proxmire's description of redlining). Reverse redlining refers to the opposite phenomenon: financial institutions targeting certain communities for services on unfair terms. *See* Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 Alb. Gov't. L. Rev. 164, 179–80 (2009) (defining reverse redlining). For statistical data supporting claims that subprime lending was more prevalent with

decisions were issued between May of 2007 and May of 2009, only two were dismissed and only one with any claims dismissed with prejudice.[144] When these cases are removed entirely from the Group II database, the decrease in dismissal rates in the Group II cases almost completely disappears, as the following graph shows.

borrowers of color during the heyday of the housing bubble in the mid–2000s, even controlling for economic factors, see Robert B. Avery et al., *Higher–Priced Home Lending and the 2005 HMDA Data*, Fed. Res. Bull., Oct. 2006, at A125, A159–60 tbl.13 (showing higher rate of subprime loans going to African–Americans and Latinos, compared to Whites, even controlling for income discrepancies), *available at* http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf; Robert B. Avery et al., *The 2006 HMDA Data*, Fed. Res. Bull., Dec. 2007, at A73, A95–96 tbl.11 (2007) (further evidence of higher subprime loans rates based on race and ethnicity), *available at* http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf. For other studies confirming that borrowers of color received subprime loans at a higher rate than White borrowers, again, controlling for creditworthiness and other factors, see for example Paul S. Calem et al., *The Neighborhood Distribution of Subprime Mortgage Lending*, 29 J. Real Est. Fin. & Econ. 393 (2004); Paul S. Calem, et al., *Neighborhood Patterns of Subprime Lending: Evidence from Disparate Cities*, 15 Housing Pol'y Debate 603 (2004). For an analysis of racial discrepancies in mortgage pricing even within the subprime market, see Debbie Gruentstein Bocian, et al., Ctr. for Responsible Lending, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages (2006), *available* http://www.responsiblelending.org/mortgage–lending/research–analysis/rr011–Unfair_Lending–0506.pdf. *See, e.g.*, U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Treasury, Curbing Predatory Home Mortgage Lending 17, 72 (2000), *available at* www.huduser.org/publications/pdf/treasrpt.pdf [hereinafter HUD–Treasury Report] (noting reasons predatory lenders flourish in communities of color); Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 Fordham Urb. L.J. 1571, 1583–84 (2002) (arguing that predatory lenders flourish in markets underserved by traditional lenders); *see also* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. Rev. 513, 534–40 (2005) (providing overview of economic reasons for failure of the mortgage market to serve certain communities).

144 These actions typically raise claims under the Fair Housing Act (FHA), and/or the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (2006). The FHA makes it unlawful "to discriminate against any person in making available [any real estate related transaction], or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2006), and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b) (2006). The ECOA forbids discrimination based on "race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)," because any part of an applicant's income "derives from any public assistance program; or because the applicant has in good faith exercised any right under this chapter." 15 U.S.C. § 1691(a)(1)–(3) (2006).

TABLE 7: Table 1 + Table 2 with Reverse Redlining Removed from Group II



Rulings in a series of cases challenging reverse redlining practices as violations of the Fair Housing Act (FHA), have denied motions to dismiss in these cases, permitting a number of these cases to proceed to the discovery phase.[145]

145 *See, e.g.*, Ramirez v. Greenpoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 924 (N.D. Cal. 2008); Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253 (D. Mass. 2008). For a more comprehensive list of cases alleging the extension of credit on discriminatory terms in the subprime mortgage market, see Alys Cohen, Nat'l Consumer Law Ctr., Credit Discrimination 169 n.17 (5th ed. 2009). One case not included in this analysis is an action commenced by the Mayor and City Council of Baltimore against Wells Fargo alleging a pattern of discriminatory lending within city limits. Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., No. JFM–08–62, 2011 U.S. Dist. LEXIS 44013, at *2 (D. Md. April 22, 2011). That case has a tortured procedural history. The first district court judge to whom the matter was assigned denied the defendants' initial motion to dismiss. And then, after the case was re–assigned, a second judge,granted a renewed motion to dismiss, citing *Twombly*. On the second motin, the new judge found that the plaintiffs had not established a plausible argument for why they had standing to sue. *Id.* at *3. The complaint was dismissed several times without prejudice for lack of standing. Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 852 (D. Md. 2010). Most recently, an amended complaint survived the defendants' latest motion to dismiss and the case is now proceeding to the discovery phase. *Mayor of Balt.*, 2011 U.S. Dist. LEXIS 44013, at *18. Since the motion to dismiss was based on standing grounds alone, and did not attack the complaint for its sufficiency with respect to the underlying claims, it was excluded from this analysis. *See also* City of Memphis v. Wells Fargo Bank, N.A., No. 09–2857–STA, 2011 U.S. Dist. LEXIS 48522, at *36 (W.D. Tenn. May 4, 2011)

The timing of the decisions in *Twombly* and *Iqbal* may help to explain this anomaly; the period between these decisions coincided with a rise in this type of case in the mid–2000s: i.e., the lead up to, and ultimate wake of, the Financial Crisis of 2008. The plaintiffs in these cases may have been so successful in defeating motions to dismiss for one or more of several reasons. First, they may have benefited from the fact that at least some district court judges were reticent to extend the holding in *Twombly* beyond the antitrust context. Second, perhaps in line with the holding in *Twombly*, judges applied their judicial common sense, given the context, to accept the plausibility of the plaintiffs' allegations.[146] Or, third, simply put, the complaints in these cases were strong enough to overcome the defendants' motions to dismiss because they contained sufficient allegations to satisfy Rule 8 of the Federal Rules of Civil Procedure.

While these pre–*Iqbal* decisions indicate a willingness of judges to entertain these claims, even in the face of challenges to the sufficiency of the pleadings, post–*Iqbal*, at least during the period studied, the outcomes in these decisions do not reflect the same acceptance of the claims. Caution is appropriate here, as with the Group II cases as well, given that there were only seven reported decisions in reverse redlining cases during the post–*Iqbal* time frame analyzed. In those decisions, five were dismissed (seventy–one percent), three (forty–three percent) with at least some of the claims dismissed with prejudice. These numbers are consistent with Group III's general trends.

D. The Lasting Value of the "Plausibility" Standard from Twombly *and* Iqbal

The next review of the decisional law following *Twombly* and *Iqbal* tested the manner in which courts deployed the so–called "plausibility standard" utilized by the Supreme Court in these two cases. This review yielded somewhat surprising results. The review consisted of assessing those decisions in the database of cases decided after the Court's decision in *Iqbal*[147] in which the specificity of the pleadings were challenged by defendants to determine to what extent courts did or did not use the plausibility standard in that assessment. This review was conducted in the following manner.

(denying motion to dismiss on standing grounds).

146 Given the findings below regarding the extent to which judges are applying their "common sense" given the context, it is doubtful that this explanation carries much weight. *See infra* Part II.F.

147 To the extent some courts may have been reluctant to apply *Twombly*'s plausibility standard to cases outside the context of antitrust actions, *Iqbal*'s application of the standard to a broader class of cases appears to have signaled to trial courts that the standard is applicable in all civil cases. Accordingly, the final piece of this review of *Twombly* and *Iqbal*'s impact focuses only on post–*Iqbal* decisions.

1. *Methodology*.—This review looked at the largest group of cases in the database in which motions to dismiss were granted in their entirety: cases in Group III in which non–disparate impact claims were raised exclusively. The assumption was that with these cases, given that the complaints in them were dismissed in full, one is likely to see courts utilizing the plausibility standard with great force. These opinions numbered ninety–five in total, and the analysis invoked the following methods for assessing these outcomes.

First, the analysis identified those decisions in the database in which the plausibility standard was invoked in a substantive way by using either or both of the cases and the plausibility standard they introduce in a manner that goes beyond a mere recitation of the motion to dismiss standard under Rule 8. Then, second, where the term "plausibility" or "plausible" was utilized by a deciding court in reaching a decision on the substance of the claim or claims in question in a particular case, the analysis categorized the manner in which the standard was applied.

In this analysis, cases were classified as follows. First, the study analyzed whether the deciding court used the "more plausible" standard articulated by the Court in *Twombly* and *Iqbal*. Second, the review determined whether courts invoked these precedents to find that so–called conclusory allegations were not entitled to the presumption of truth typically afforded the allegations in complaints challenged by a motion to dismiss. Third, the review asked whether courts were assessing the allegations in light of the "context" of the claim, as urged by the Court. Finally, the review classified those cases in which the deciding court, while explicitly invoking the term plausibility, did little more than assess whether the complaint in a particular case failed or succeeded in setting forth the basic elements of an underlying claim or claims, as opposed to testing any plausibility of those claims.

2. *Results*.—In the end, only rarely did the application of the plausibility standard by the deciding court resemble the way the Supreme Court applied it in *Twombly* and/or *Iqbal*. First and foremost, in over half of the cases reviewed, deciding courts failed to even apply the plausibility standard in any way whatsoever. Rather, if the *Twombly*/*Iqbal* precedents were cited, they were often invoked simply in boilerplate language articulating the new standard for deciding a motion to dismiss. Despite citing this language initially, roughly half of the courts went on to disregard it altogether, proceeding to rule on the motion to dismiss without applying any plausibility standard to the underlying claims.

Moreover, even where courts may have called upon the plausibility standard in some substantive fashion, district courts rarely invoked the plausibility standard in a way that seemed central to the Court's holdings in *Twombly* and *Iqbal*. As described above, the Court in those two cases

compared the plaintiffs' allegations in those cases as against what were considered "more plausible" explanations for the defendants' conduct in each case; these alternative explanations, in the eyes of the Justices, were entirely lawful (I call this the "More Plausible Test"). Unlike the Supreme Court, in the decisions reviewed in this study, district courts rarely applied the plausibility standard in this way. In other words, they simply did not assess whether the plaintiffs' claims were more or less plausible than entirely lawful explanations for the defendants' conduct. In fact, of the ninety–five cases, district courts only applied any version of the More Plausible Test in four of those cases.

Instead, when courts did invoke the term plausibility when testing the specificity of the complaint, what they appear to be doing, far more often than not, is finding that the allegations lack sufficient specificity to establish that the plaintiff can make out the elements of his or her particular claim for relief, without any regard for whether those factual contentions were plausible or not. In other words, though attempting to invoke the plausibility standard, if at all, courts, most often, simply applied a relatively straightforward, and traditional, Rule 8(a) analysis: i.e., they asked whether the plaintiff set forth the basic elements of his or her claims to put the defendant on notice of the nature of those claims.

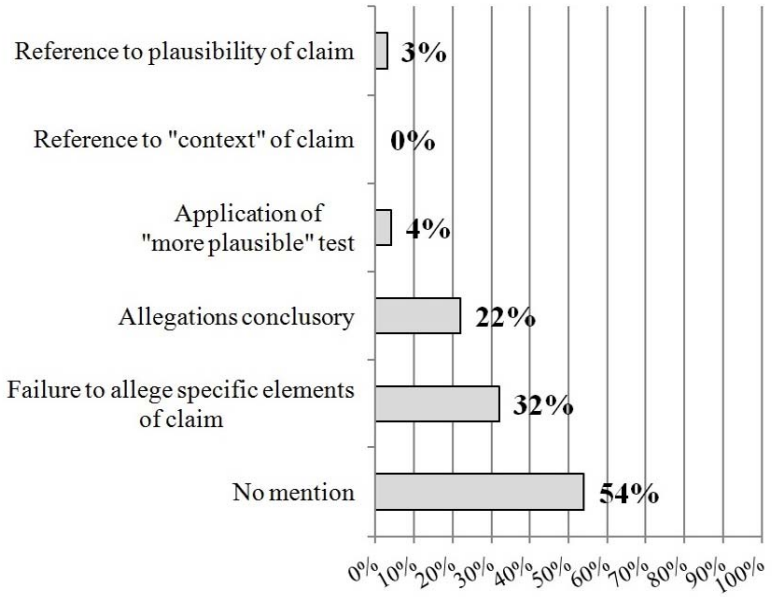
In other cases in which the plausibility standard was actually invoked in more than mere boilerplate language, courts found that the plaintiffs made no more than conclusory allegations in support of their claim, and such allegations, under *Twombly* and *Iqbal*, were not entitled to deference when ruling on the defendants' motion to dismiss. But such holdings have little to do with whether the underlying claims were plausible or not.

To some extent then, perhaps the most wide–ranging impact and most important legacy of *Twombly* and *Iqbal* is that courts have focused in on the prominence the Court gave in those opinions to the rejection of conclusory allegations, even if under the mantle of conducting a plausibility analysis.[148]

The following table shows the frequency and quality of the manner in which district courts invoked the *Twombly*/*Iqbal* plausibility standard. Since several courts applied different aspects of the *Twombly*/*Iqbal* opinions in a single opinion, the combined percentages exceed one hundred percent.

148 This rejection of so–called conclusory allegations, of course, raises the specter that the Court is returning pleading standards to the Field Code era, where litigants could only cite ultimate facts, and not conclusions or mere evidence. *See supra* text accompanying notes 20–25.

TABLE 8: Analysis of Application of Plausibility Standard



These results show that, first, in over half of the opinions in this subset of cases the plausibility standard was not even invoked. Second, they also showed that in only a small handful of cases did the court use the More Plausible Test, as opposed to simply rejecting allegations for their lack of specificity, or, in a smaller number of cases, because they were conclusory. As a result of these findings, it would appear that one of the more confounding aspects of the *Twombly* and *Iqbal* decisions is not, for the most part, being followed by the district courts. In other words, few lower court judges appeared to follow the Supreme Court's use of the plausibility standard to weigh the relative likelihood that conduct complained of was illegal or legal.

E. Rate of Motions

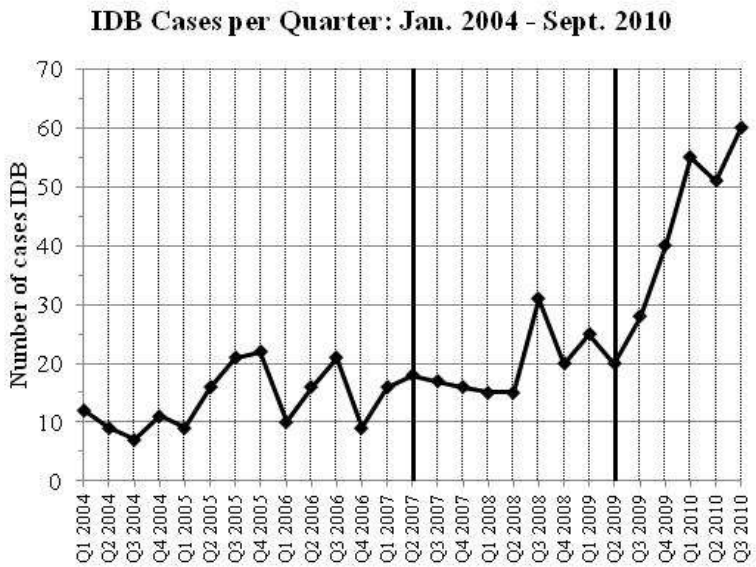
1. *Methodology*.—For this analysis, the study reviewed two data sets. First, it looked at the number of cases in which decisions were reached on motions to dismiss in which defendants challenged the specificity of the pleadings. For the pre–*Twombly* period, as more fully described above, the study conducted a number of different searches to identify as many cases as possible that might have involved challenges to the specificity of the pleadings, regardless of whether *Conley* was cited in those decisions. Similarly, the study involved additional searches of the post–*Twombly*

and post–*Iqbal* periods that included cases in which the specificity of the pleadings was challenged, whether the deciding court cited *Twombly* and/or *Iqbal* or not. This analysis yielded a raw number for each time period. In addition to the further analysis, however, the study identified the average number of decisions included in the database based on their date of issuance, compiling a raw number per calendar quarter based on that date. A word of caution here: I am only claiming that of the 1,800 cases analyzed, the rate at which motions to dismiss based on specificity of the pleadings were filed accelerated considerably within this database in the months after issuance of the *Iqbal* decision. Certainly further study is needed on this issue, particularly analysis that is based on all case filings, and all reported and unreported decisions.

Second, I created a second data set made up of decisions from three similar time periods: the nineteen months immediately preceding the decision in *Twombly*, the nineteen months immediately preceding the decision in *Iqbal*, and the nineteen months immediately following *Iqbal*. Once the decisions issued in these time frames were identified, the study looked at the number of decisions granting, either in whole or in part, the motions to dismiss, and then the extent to which such decisions were granted with prejudice.

2. *Results*.—The results of this analysis yields the time line set forth below. As one can see, the number of decisions issued per quarter, on average, rises slightly after *Twombly*, but then increases dramatically after *Iqbal*. Indeed, the number of decisions on such motions in the first quarter of 2004 was only twelve. In contrast, courts issued sixty–one such decisions in the last full quarter of the study, the third quarter of 2010: a greater than five hundred percent increase.

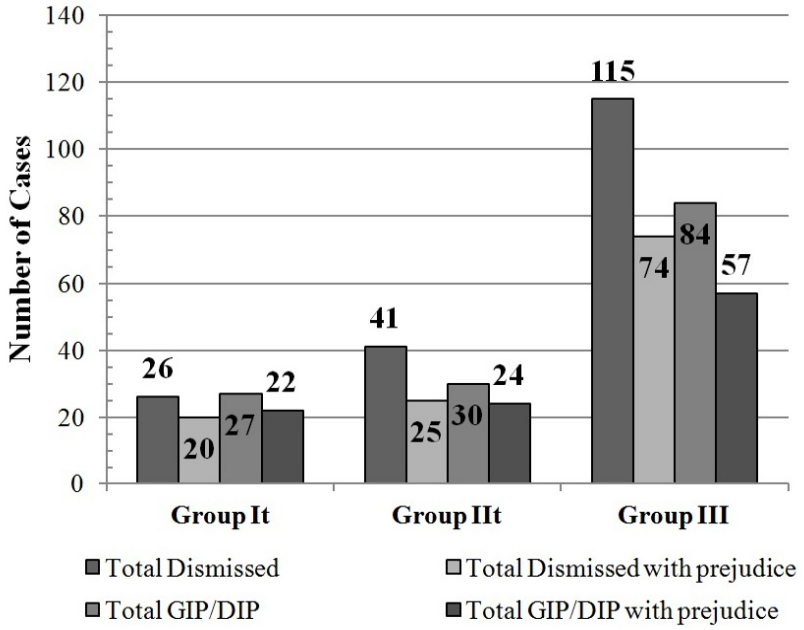
TABLE 9: Cases "In Database"



Furthermore, looking beyond the dismissal rates, the number of decisions granting motions increases exponentially, especially after *Iqbal*, as the following chart shows.

TABLE 10: Volume of Decisions, Similar Time Frames:

Pre–*Twombly*, Pre–*Iqbal*, Post–*Iqbal*



At the same time, if there was a corresponding increase in civil rights case filings generally, or employment or housing cases in particular, then one could explain this rise in reported decisions on motions to dismiss based on a concomitant rise in case filings. Yet, despite the fact that during the time frame studied, the United States was in a deep recession,[149] there has been no increase in case filings, at least in terms of filings in the U.S. courts. Indeed, as the charts in Appendix B reveal, while there have been fluctuations in civil rights case filings over the last few years, there has been only a slight rise in civil rights case filings involving employment discrimination and a decrease in civil rights case filings related to housing.

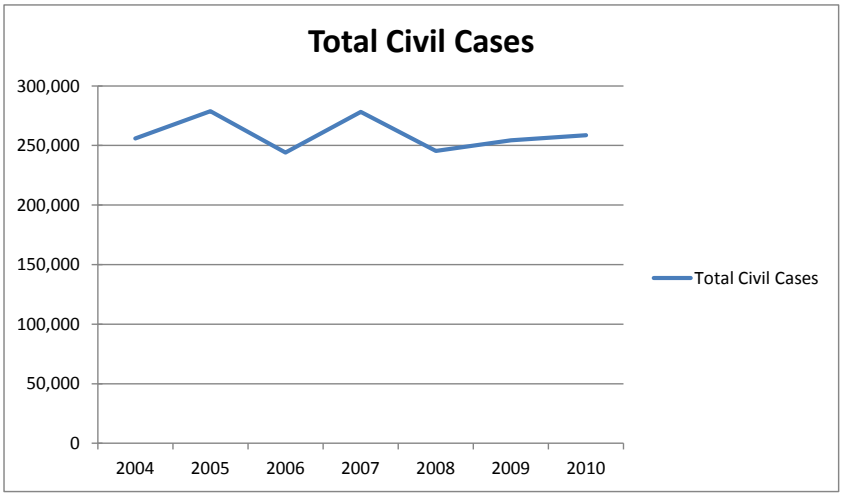
149 As Donohue and Siegelman show, the rate of employment discrimination filings in the twenty–year period between 1969 and 1989 tended to increase in the wake of a depressed business cycle. John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. Cal. L. Rev. 709, 716–17 (1993) ("When the economy booms, employment discrimination case filings fall in the next half year; when the economy slumps, case filings rise over the next half year."). Preliminary data on federal case filings does not reflect a similar trend in the global recession of the late 2000s. *See infra* Appendix B.

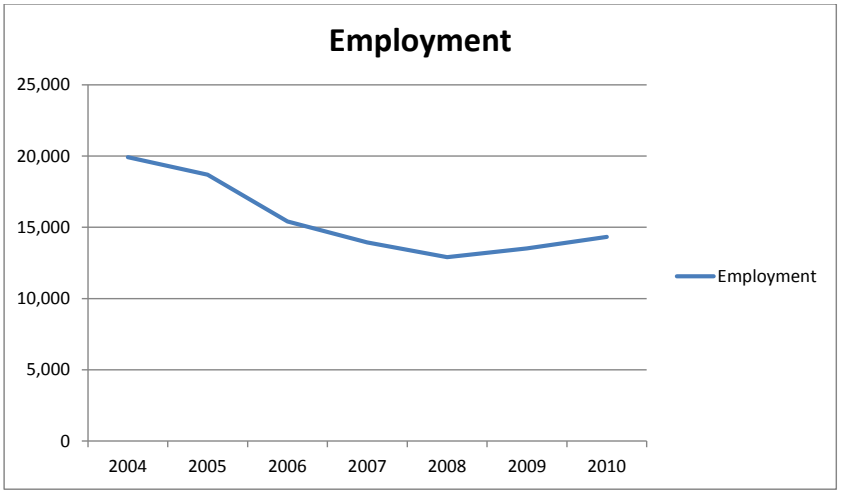
Appendix A

	Total	Total Dismissed	Total Dismissed with prejudice
Group I	187		
Non Pro Se	145	84	62
Pro Se	42	31	25
Disparate Treatment	169	106	80
Disparate Impact	8	1	1
Mixed	10	8	6
Group II	160		
Non Pro Se	122	57	41
Pro Se	38	34	24
Disparate Treatment	121	69	50
Disparate Impact	22	8	5
Mixed	17	14	10
Group III	278		
Non Pro Se	205	139	89
Pro Se	73	61	43
Disparate Treatment	240	169	110
Disparate Impact	11	7	5
Mixed	27	24	17

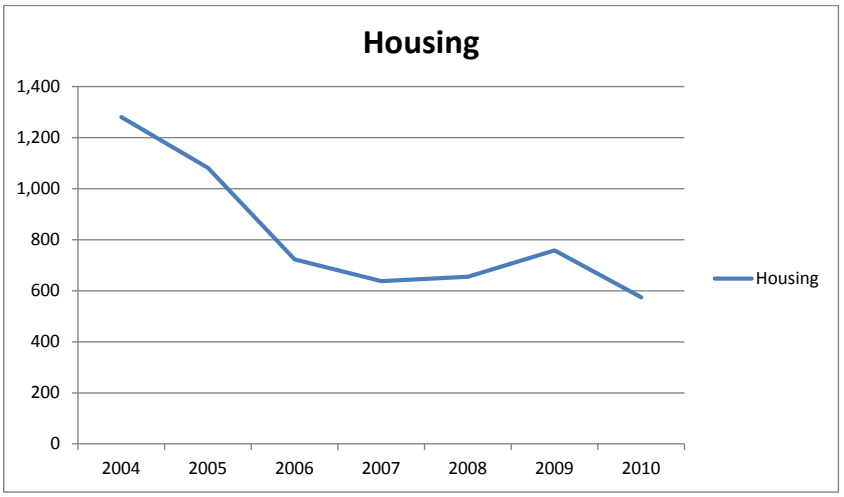
Appendix B

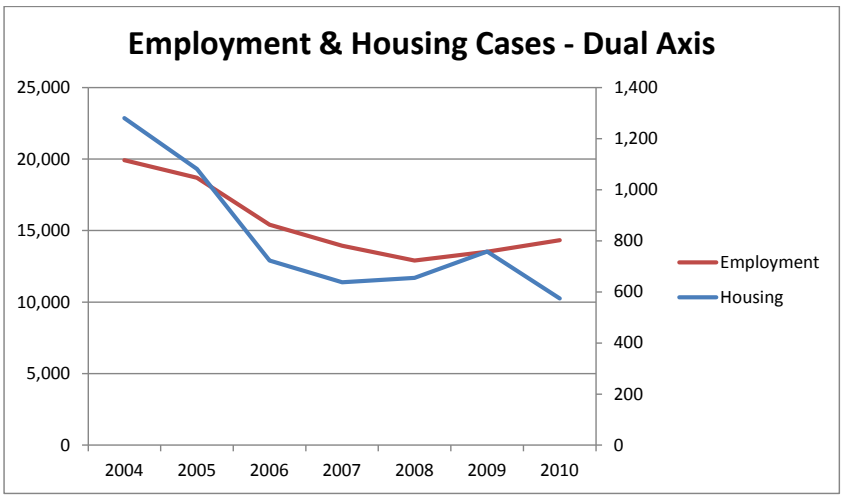
Civil Cases Filed in U.S. District Courts Since 2004[159]





159 The following data was derived from periodical reports of statistical on the federal judiciary caseloads from 2001 to 2011 prepared by the Administrative Officer of the United States Courts. *Federal Judicial Caseload Statistics*, U.S. CTS., http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx (last visited Oct. 25, 2011).


Housing
1,400
1,200
1,000
800
600
400
200
0
2004
2005
2006
2007
2008
2009
2010
Housing


Employment & Housing Cases - Dual Axis
25,000
20,000
15,000
10,000
5,000
0
1,400
1,200
1,000
800
600
400
200
0
2004
2005
2006
2007
2008
2009
2010
Employment
Housing

Appendix C

Statistical Significance

This appendix sets forth the results of the tests conducted to reveal the statistical significance of the varied findings contained in this study. To calculate the significance of the findings on the various charts in this piece, I used the Pearson Chi-Square Test. This test measures the probability that I would observe an apparent association between the independent variable and the dependent variable as strong as the one I actually observe if there were no actual association (i.e., if the null hypothesis of no association were correct). Other things equal, a larger chi-square test statistic value indicates a stronger apparent association between the dependent and independent variables. Each value of the chi-square test statistic has an associated p-value that indicates the probability of observing a test statistic value as great as or greater than the actually observed value. P-values of .05 or less are commonly referred to as statistically significant. The following chart sets forth the p-value for the chi-square test statistic associated with each of the different data sets. Again, p-values of less than .05 represent statistically significant differences in the different outcomes analyzed. In some instances, the higher p-value below is likely a reflection of the small differences in the outcomes in a particular chart; in others, as with the outcomes in disparate impact cases in Tables 5 and 6, it is likely a result of the small sample size utilized in that analysis.

Table	Analysis	P-Value
1	Overall Dismissal Rates	0.003
2	"With Prejudice" Dismissal Rates	0.358
3	Overall Dismissal Rates/Plaintiffs Represented by Counsel	0.014
3	"With Prejudice" Dismissal Rates/Plaintiffs Represented by Counsel	0.180
4	Overall Dismissal Rates/Pro Se Plaintiffs	0.173
4	"With Prejudice" Dismissal Rates/Pro Se Plaintiffs	0.906
5	Overall Dismissal Rates/Disparate Treatment Cases	0.001
5	Overall Dismissal Rates/Disparate Impact Cases	0.032
5	Overall Dismissal Rates/Mixed Cases	0.156
6	"With Prejudice" Dismissal Rates/Disparate Treatment Cases	0.077
6	"With Prejudice" Dismissal Rates/Disparate Impact Cases	0.187
6	"With Prejudice" Dismissal Rates/Mixed Cases	0.318
10	Volume of Decisions/Total Dismissed	< 0.001
10	Volume of Decisions/Total Dismissed with Prejudice	< 0.001
10	Volume of Decisions/Total Granted in Part-Denied in Part	< 0.001
10	Volume of Decisions/Total Granted in Part-Denied in Part with Prejudice	< 0.001