

9-2010

## **A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal**

Lisa A. Eichhorn

*University of South Carolina - Columbia*, [eichhorn@law.sc.edu](mailto:eichhorn@law.sc.edu)

Follow this and additional works at: [https://scholarcommons.sc.edu/law\\_facpub](https://scholarcommons.sc.edu/law_facpub)



Part of the [Civil Procedure Commons](#)

---

### **Recommended Citation**

Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 Fla. L. Rev. 951 (2010).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

A SENSE OF DISENTITLEMENT: FRAME-SHIFTING AND METAPHOR IN *ASHCROFT V. IQBAL*

Lisa Eichhorn\*

I.	INTRODUCTION .....	951
II.	PLEADING REQUIREMENTS BEFORE AND AFTER <i>IQBAL</i> .....	953
A.	<i>Pleading Standards from the Advent of the Federal Rules of Civil Procedure to 2007</i> .....	953
B.	<i>Twombly and Plausibility</i> .....	957
C.	<i>Iqbal</i> .....	960
III.	A CLOSE READING OF <i>IQBAL</i> : ENTITLEMENT AND DISENTITLEMENT, MEASURING AND JUDGING.....	963
A.	<i>The Language of Entitlement as a Frame-Shifting Device</i> .....	963
B.	<i>The Judging-as-Measuring Metaphor</i> .....	967
1.	Allegations as Having Mass .....	968
2.	Allegations as Crossing a Line .....	969
IV.	WHY FRAMES AND METAPHORS IN JUDICIAL OPINIONS MATTER.....	970
V.	CONCLUSION .....	974

I. INTRODUCTION

Judicial opinions analyzing civil procedure issues are unlikely sources of rich imagery. Recent legal scholarship on metaphor has focused on sexier areas of the law, such as constitutional interpretation<sup>1</sup> or the

---

\* Professor of Law, University of South Carolina. The author would like to thank Professor Ben Means of the University of South Carolina for his extremely helpful comments on an early draft of this Article.

1. See, e.g., STEVEN L. WINTER, A CLEARING IN THE FOREST 266–73 (2001) (analyzing the roots and implications of Oliver Wendell Holmes’s “marketplace of ideas” metaphor in First Amendment jurisprudence); see generally, e.g., Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319 (2008) (exploring the metaphor of a living Constitution and its implications from a biological perspective); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (promoting the metaphor of a market for partisan control as a useful tool with which to analyze Constitutional boundaries of state regulation of democratic politics); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971 (2006) (critiquing the home-as-castle metaphor as a force galvanizing public opposition to the Supreme Court’s 2005 takings clause decision); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004) (analyzing the Supreme Court’s use of fire as a metaphor and motif in its free expression decisions).

regulation of new technologies.<sup>2</sup> Nevertheless, beneath the superficially arid terrain of civil procedure opinions run streams of metaphor that reveal anxieties, fears, and resentments regarding the litigation process and that propagate a specific characterization of that process. These metaphors may be so subtle as to go unnoticed.

This Article notices and examines the metaphoric content and the frame-shifting technique of a far-reaching procedural opinion from the Supreme Court's most recent term, *Ashcroft v. Iqbal*.<sup>3</sup> That case, which builds upon the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,<sup>4</sup> has increased the required specificity with which plaintiffs must plead their cases in order to avoid early dismissal. Both cases increased this requirement by subjecting the factual allegations of a complaint to a new and amorphous "plausibility" standard.<sup>5</sup> While these rather technical cases drew little media attention, they have profoundly affected arguments regarding access to justice in civil cases.<sup>6</sup> Both decisions, but especially *Iqbal*, place plaintiffs in a Catch-22. In order to enter the discovery phase of the litigation process, where litigants may use the power of the court to gain access to evidence in an opponent's possession, plaintiffs must now state their claims in more factual detail than before. Often, however, plaintiffs cannot allege detailed facts until they gain access to detailed evidence through the discovery process.

Other scholarship has wrestled with the substantive implications of these recent decisions.<sup>7</sup> This Article focuses instead on how the current

---

2. See generally, e.g., Robert C. Cumbow, *Cyberspace Must Exceed Its Grasp, or What's a Metaphor? Tropes, Trips and Stumbles on the Info Highway*, 20 SEATTLE U. L. REV. 665 (1997) (analyzing judicial use of metaphors in decisions concerning applicability of copyright doctrine to internet content); Stephanie A. Gore, "A Rose by Any Other Name": *Judicial Use of Metaphors for New Technologies*, 2003 J.L. TECH. & POL'Y 403 (criticizing judicial use of inapposite metaphors in technology cases and suggesting more appropriate metaphors).

3. 129 S. Ct. 1937 (2009).

4. 550 U.S. 544 (2007).

5. See *Twombly*, 550 U.S. at 556 (noting that complaint must contain "plausible grounds" to allow court to infer elements of plaintiff's claim); *Iqbal*, 129 S. Ct. at 1951 ("We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief").

6. A Westlaw search conducted on April 2, 2010, indicated that *Twombly* had been cited in over 26,000 subsequent judicial opinions and that *Iqbal* had been cited in over 7,100 opinions.

7. See generally, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) [hereinafter Bone, *Plausibility Pleading Revisited*] (criticizing *Iqbal* as an ill-advised expansion of *Twombly*); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) [hereinafter Bone, *Regulation of Court Access*] (evaluating the costs and benefits of screening meritless suits at the pleading stage); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009) (critiquing *Twombly* and *Iqbal*); Scott Dodson, *Essay, Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007) (analyzing the implications of *Twombly*); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) (critiquing *Twombly*); Saritha Komatireddy Tice, *A "Plausible" Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y, 827, 830 (2008) (discussing the significance of *Twombly*). For a review

Court has used frame-shifting and metaphor to achieve such sweeping change with so little apparent effort. Through a close reading of *Iqbal*, I identify two crucial moves. First, through its use of the word “entitlement” and related terms, the Court adopts a new frame of reference by emphasizing the plaintiff’s lack of entitlement to proceed to discovery, rather than the defendant’s lack of entitlement to receive detailed allegations at the pleading stage. Second, by drawing on a metaphor of judging-as-measuring, the Court invests its new plausibility test with the appearance of objective consistency, and in so doing, deflects attention from the unbounded discretion that the opinion grants to judges who will administer that test from now on in the lower courts.

Part II of this Article places *Iqbal* in its historical doctrinal context by describing the change to federal pleading standards brought about by the Federal Rules of Civil Procedure in 1938 and the Supreme Court’s recent tightening of those standards. Part III then critiques *Iqbal*’s pleadings analysis through a close reading of the majority opinion in the case, focusing on the Court’s frame-shifting use of the word “entitlement” and on the judging-as-weighting metaphor used by the majority to justify its application of the plausibility test. Part IV draws briefly upon recent research in cognitive psychology and on theories of metaphor to explain both the power of frame-shifting and metaphorical techniques and also the necessity of identifying and critiquing their use in judicial opinions.

## II. PLEADING REQUIREMENTS BEFORE AND AFTER *IQBAL*

### A. *Pleading Standards from the Advent of the Federal Rules of Civil Procedure to 2007*

The most recent large-scale reform in federal pleading occurred in 1938, when the Federal Rules of Civil Procedure became effective. Charles E. Clark, the chief architect of the Federal Rules, intended to simplify and streamline the pleading process by re-emphasizing the notice-giving function of pleadings and by doing away with the perceived necessity of pleading detailed facts.<sup>8</sup> Indeed, the system established by Rule 8(a)(2) has

---

of scholarly commentary on *Twombly*, see Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U.L. REV. 1217, 1234–38 (2008).

8. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 316 (1938) (explaining that under the Federal Rules, pleadings serve primarily the modest function of stating allegations sufficient to “isolate [the action] from all others, so that the parties and the court will know what is the matter in dispute,” rather than describing parties’ evidence in detail). The code pleading system, in effect before the promulgation of the Federal Rules, had required the pleading of “facts.” See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 150 (1928). While this system did not explicitly require detailed factual allegations, some courts required a relatively high level of technical detail, and litigants risked having pleadings dismissed if courts considered their assertions to be general legal conclusions rather than specific factual allegations. See *id.* at 150–55 (describing the difficulty, under code pleading, of distinguishing among factual, evidentiary, and legal assertions and noting specific instances of pleadings dismissed as asserting

come to be known—for better or worse—as “notice pleading.”<sup>9</sup> The Federal Rules pleading system allows courts to screen out legally insufficient claims at the pleading stage, but it leaves screening based on the factual merits to the discovery phase through summary judgment. Thus, Rule 8(a)(2) requires merely that a pleading set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>10</sup> The Rule 8(a)(2) standard represents a policy choice to minimize the risk that meritorious cases will be prematurely dismissed at the pleading stage—a stage at which plaintiffs may lack access to detailed evidence.<sup>11</sup> This policy, of course, carries some cost. Specifically, a low threshold for stating a claim in the pleadings means that more cases will proceed to the often costly and lengthy discovery phase. Some actions making it to the discovery phase will turn out to be non-meritorious based on the evidence, but even if such actions are disposed of through summary judgment, defending parties will already have invested significant time, money, and energy litigating to that point.

In 1957, the Supreme Court in *Conley v. Gibson*<sup>12</sup> explicitly interpreted Rule 8(a)(2) in terms of this low notice-pleading threshold. Justice Hugo Black’s opinion noted that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim” but instead require only that a complaint give “the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>13</sup> In an earlier paragraph, the opinion had used the following language to begin its analysis of whether the complaint at issue had stated a claim:

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

---

merely general legal conclusions); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 252–53 (4th ed. 2005) (summarizing the spread of code-pleading systems and their replacement, in the federal courts and most state courts, with Rules-based systems requiring less detail in pleadings); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) (“Federal civil pleadings differ from the ‘fact pleading’ of the codes principally in the degree of generality with which the elements of the claim may be stated.”).

9. WRIGHT & MILLER, *supra* note 8, at § 1202 (noting that the label may exaggerate the generality allowed by Rule 8 but conceding that it is too late to remove the term from common parlance).

10. FED. R. CIV. P. 8(a)(2).

11. See RICHARD D. FREER, CIVIL PROCEDURE 302 (2d ed. 2009) (explaining that the Rules drafters intended to “lower the formal barrier . . . to entering the litigation stream” because “the plaintiff is not in a position to plead much detail at the outset of litigation”); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 477 (6th ed. 2002) (noting that the “fundamental notion of all modern procedural reform” is that the object of procedure is to secure “determination on the merits rather than to penalize litigants because of procedural blunders”).

12. 355 U.S. 41 (1957).

13. *Id.* at 47.

his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven[,] there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.<sup>14</sup>

If taken literally, the first sentence above, with its reference to “no set of facts,” would mean that a complaint that alleges only the plaintiff's and defendant's names should not be dismissed as insufficient, because it does not negate the possibility that the plaintiff could prove some set of unmentioned facts that would legally entitle him or her to relief from the defendant.<sup>15</sup> Naturally, the lower courts did not adopt such a literal interpretation.<sup>16</sup> A more reasonable reading of this language takes into account its context, including the description of the allegations at issue in *Conley* and Justice Black's later reference to the need to give fair notice to the defendant of the claim and grounds. Presumably, the “no set of facts” assertion was intended to mean that if a complaint contains sufficient allegations to provide fair notice of the conduct and harm at issue, for which the law provides a remedy, and if the complaint contains no allegations that would negate an element of the claim as a matter of law, then a court must hold that the complaint has stated a legally sufficient claim for purposes of Rule 8(a)(2).

While the “no set of facts” language was not a model of clarity, the general consensus in the fifty years following *Conley* was that if a complaint gave fair notice of the events giving rise to a cognizable claim, it met the Rule 8(a)(2) standard, and that fair notice did not require particularity and detail.<sup>17</sup> The authoritative Wright and Miller treatise, in 2004, summed up the standard as follows:

The rule requires the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished

14. *Id.* at 45–46 (footnote omitted).

15. Indeed, as Professor Richard Marcus has noted, “How can a court *ever* be certain that a plaintiff will prove no set of facts entitling him to relief?” Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986) (emphasis added).

16. See *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (“Although the exceedingly forgiving attitude toward pleading deficiencies that was expressed by Justice Black for the Supreme Court in *Conley v. Gibson* . . . continues to be quoted with approval[,] . . . it has never been taken literally.”) (citation omitted).

17. See, e.g., FRIEDENTHAL, KANE & MILLER, *supra* note 8, at 268 (“What the pleader need not do is allege a specific fact to cover every element or identify the theory of recovery. As long as the opposing party and the court can obtain a basic understanding of the claim being made, the requirements are satisfied.”) (footnotes omitted).

from a bare averment that he wants relief and is entitled to it. Undoubtedly great generality in the statement of these circumstances can be permitted so long as defendant is given fair notice of what is being asserted against him.<sup>18</sup>

Thus, notice pleading after *Conley* focused on the defendant's lack of entitlement to detailed allegations at the pleading stage. Rule 8(a)(2) entitled defendants to nothing more than fair notice.

Certainly, Rule 9(b)'s "particularity" standard, which applies only to pleadings alleging fraud or mistake, stood in sharp contrast to the general understanding of the Rule 8(a)(2) standard.<sup>19</sup> Consequently, the Supreme Court warned courts against requiring particularly detailed pleadings in cases governed by Rule 8(a)(2) rather than by Rule 9(b). For example, in *Leatherman v. Tarrant County*,<sup>20</sup> a unanimous Court struck down what it deemed to be a heightened pleading requirement developed by the Fifth Circuit in a § 1983 action against two municipalities. Fifth Circuit precedent had required that such claims be stated "with factual detail and particularity."<sup>21</sup> In *Leatherman*, Justice William Rehnquist noted that § 1983 claims were not among those subject to heightened pleading under 9(b), and that, therefore, "litigants must rely on summary judgment and control of discovery," rather than on high pleading standards, "to weed out unmeritorious claims sooner rather than later."<sup>22</sup> Similarly, in *Swierkiewicz v. Sorema N.A.*,<sup>23</sup> the Supreme Court held that in an employment discrimination action whose pleadings were governed by Rule 8(a)(2), a complaint states a claim when it alleges generally that the plaintiff was terminated because of his race and national origin and includes some information regarding the dates and persons involved in the decisionmaking process. Even though precedent did—and still does—require that plaintiffs in such cases eventually prove specific circumstances giving rise to an inference of discrimination,<sup>24</sup> the Court held that their complaints need not plead such circumstances in any detail because the substantive precedent sets forth "an evidentiary standard, not a pleading requirement."<sup>25</sup> In the absence of a statute or Rule imposing a higher pleading standard in this context, defendants must use "liberal discovery rules and summary judgment motions" to combat non-meritorious claims.<sup>26</sup>

Thus, on the eve of the Supreme Court's 2007 *Twombly* decision, federal pleading standards were a fairly straightforward matter in first-year

---

18. WRIGHT & MILLER, *supra* note 8, at § 1202 (footnote omitted).

19. See FED. R. CIV. P. 9(b) (requiring that allegations of fraud or mistake be stated "with particularity").

20. 507 U.S. 163, 164 (1993).

21. *Id.* at 167 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

22. *Id.* at 168–69.

23. 534 U.S. 506, 514 (2002).

24. See *id.* at 510 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

25. *Id.*

26. *Id.* at 512.

civil procedure courses around the country: the professor covered the lowering of the pleading threshold brought about by the advent of the Federal Rules, the Supreme Court's explanation of notice pleading in cases like *Conley*, the Court's applications of the notice-pleading standard in cases such as *Swierkiewicz*, and the Rule 9(b) exception to 8(a)(2)'s general standard—before marching through discovery and other topics in the casebook.

### B. *Twombly and Plausibility*

The pleadings leg of the civil procedure march became substantially rockier after the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>27</sup> According to the leading treatise, the *Twombly* majority "articulated what appears to be a new 'plausibility standard' by which pleadings should be judged."<sup>28</sup> The plaintiffs in *Twombly* represented a massive putative class of consumers of local phone and internet services.<sup>29</sup> They alleged that their regional providers had agreed not to compete for business in each other's territories, thereby keeping rates artificially high and violating federal antitrust laws.<sup>30</sup> The consumer-plaintiffs believed an agreement was evident from the fact that each service provider had chosen to do business only in its own region—i.e., that the providers were engaging in "parallel" rather than competitive conduct.<sup>31</sup> In their complaint, the consumers described the nature of this parallel conduct and alleged generally that the providers had agreed not to enter into each other's regional markets.<sup>32</sup>

In holding that the general allegation of an agreement failed to state a claim under the Sherman Antitrust Act, the Supreme Court, with Justice David Souter writing for a seven-Justice majority, noted that parallel conduct was a common phenomenon in business, even in the absence of illegal agreements.<sup>33</sup> The Court therefore concluded that the allegations of parallel conduct failed to render the general allegation of an illegal agreement plausible,<sup>34</sup> and without a plausible allegation of an agreement, the complaint could not meet the Rule 8(a)(2) standard:

---

27. 550 U.S. 544 (2007).

28. WRIGHT & MILLER, *supra* note 8, at § 1202 (Supp. 2010) (quoting *Twombly*, 550 U.S. at 560).

29. 550 U.S. at 550.

30. *Id.* at 550–51. The plaintiffs also alleged that the defendant-service providers conspired to prevent new competitors from entering the defendants' existing service areas. *Id.*

31. *Id.* at 551 (quoting Consolidated Amended Class Action Complaint ¶ 51, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220), 2003 WL 25629874).

32. *Id.*

33. *Id.* at 553–54 (referring to conscious parallel conduct as "a common reaction of 'firms in a concentrated market [that] recognize[e] their shared economic interests and their interdependence with respect to price and output decisions'" (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993))).

34. *Id.* at 564 ("When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short.").



The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct . . . needs some setting suggesting the agreement . . . . An allegation of parallel conduct . . . 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.”<sup>35</sup>

The Court suggested that allegations setting forth the specific time, place, and persons involved in the supposed agreement would render the existence of an agreement plausible and thus allow the complaint to meet the Rule 8(a)(2) standard.<sup>36</sup> But of course, even if an illegal agreement had occurred, the plaintiffs had no access to such details at the pleading stage.

The plaintiffs had argued that their general allegation of an agreement sufficed at the pleading stage because, under *Conley v. Gibson*, “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.”<sup>37</sup> In response, the Supreme Court noted that this passage from *Conley* was not to be taken literally and cited several lower court opinions that had “questioned, criticized, and explained [it] away.”<sup>38</sup> In the end, the Court announced that “after puzzling the profession for 50 years, this famous observation has earned its retirement.”<sup>39</sup>

In an attempt to pre-empt criticism that *Twombly*’s plausibility test would allow courts to find facts at the pleading stage, Justice Souter’s majority opinion explained that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>40</sup> The opinion also pointed to “the potentially enormous expense of discovery” as a reason to impose a plausibility standard at the pleading stage.<sup>41</sup> Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg in dissent, bemoaned the majority’s “dramatic departure from settled procedural law,”<sup>42</sup> opining that the majority’s “‘plausibility’ standard is irreconcilable with Rule 8 and with our governing precedents”—including *Swierkiewicz* and *Leatherman*.<sup>43</sup>

---

35. *Id.* at 557 (quoting FED. R. CIV. P. 8(a)(2)).

36. *Id.* at 564 n.10.

37. *Id.* at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

38. *Id.* at 562.

39. *Id.* at 563.

40. *Id.* at 556.

41. *Id.* at 559.

42. *Id.* at 573 (Stevens, J., dissenting).

43. *Id.* at 586.

Academic criticism of the *Twombly* decision was speedy and abundant. As a general matter, critics charged that *Twombly* imposed an impermissibly higher pleading standard that would restrict access to justice in a class of meritorious civil cases.<sup>44</sup> Others debated questions that *Twombly* appeared to leave open, such as whether the decision was limited to the antitrust context or to the context of large, complex cases.<sup>45</sup> Still others raised concerns as to where *Twombly* now set the bar for pleading other types of claims—especially discrimination claims.<sup>46</sup> In sum, as the Second Circuit noted in 2007, the Supreme Court in *Twombly* had created “[c]onsiderable uncertainty concerning the standard for assessing the

---

44. See, e.g., Dodson, *supra* note 7, at 139 (“[T]he Court’s standard is likely to bar many antitrust cases (and mass tort, discrimination, and a host of other cases) with merit.”); Randal C. Picker, *Twombly*, Leegin, and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161, 177 (“*Twombly* shrinks the domain of private plaintiffs and it does so without even a passing thought about what that will do to the overall level of antitrust enforcement.”); Robert E. Shapiro, *Advance Sheet: Requiescat in Pace*, 34 LITIG., Fall 2007, at 67, 67 (“Now, there can be no real quibbling that Justice Stevens was right, that the Court majority was suddenly veering away from the old rules of notice pleading.”); Spencer, *supra* note 7, at 433 (opining that *Twombly*’s plausibility standard is “an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court”); Tice, *supra* note 7, at 830 (“The Court’s decision in *Twombly* . . . solidifies what has been a growing hostility toward litigation.”). Professor Stephen Burbank, with the benefit of two years of hindsight, commented in 2009 that to the extent Justice Souter and others in the *Twombly* majority did not view their decision as “a change in pleading standards that could fundamentally alter the role of litigation in American society,” their belief was “understandable but, at least in retrospect, naïve.” Burbank, *supra* note 7, at 114. A few commentators have argued that *Twombly* was consistent—or not very inconsistent—with precedent. See, e.g., Bone, *Regulation of Court Access*, *supra* note 7, at 883 (stating that *Twombly* does not “substantially tighten[] pleading requirements” and represents only a “modest” move away from traditional notice pleading); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064–65 (2009) (arguing that the requirements of *Twombly*’s plausibility rule were “mandated by the Federal Rules” and form “an appropriate and necessary standard”). For a helpful summary of commentary on *Twombly* as of 2008, see Hoffman, *supra* note 7, at 1234–38.

45. Compare Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 120–21 (2007) (indicating that the *Twombly* plausibility rule is limited to antitrust cases), with Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008) (describing results of an empirical study indicating lower courts have applied the plausibility standard across many substantive areas), Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1024–25 (stating that the question whether the plausibility standard applied to all types of claims had “no easy answer” but suggesting that such applicability was likely), and Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 910–13 (2008) (opining that a limitation of *Twombly* to antitrust claims or to complex cases was unlikely).

46. See, e.g., Burbank, *supra* note 7, at 117 (predicting that “[e]mployment discrimination cases are one category likely to suffer at the hands of district judges implementing a contextual ‘plausibility’ regime” under *Twombly*); Hannon, *supra* note 45, at 1815 (reporting on an empirical study indicating that “[t]he rate of dismissal in civil rights cases has spiked in the four months since *Twombly*”); Seiner, *supra* note 45, at 1035–41 (surveying lower courts’ applications of the *Twombly* standard to employment discrimination claims).

adequacy of pleadings.”<sup>47</sup>

### C. Iqbal

Against this backdrop, a civil rights case brought by Javaid Iqbal was percolating through the federal court system. As a result of post-September 11th terrorism investigations, the federal government had identified over one hundred persons “of high interest,” and this group included Iqbal, a Pakistani Muslim living in the United States.<sup>48</sup> Iqbal’s *Bivens* complaint<sup>49</sup> alleged that this designation led to his detention at a maximum security facility where, he further alleged, guards brutally beat him and denied him the opportunity to engage in daily prayer and religious study.<sup>50</sup> His complaint named as defendants his prison guards and wardens, but most significantly, it also named then-Attorney General John Ashcroft and FBI Director Robert Mueller.<sup>51</sup> Paragraph sixty-nine of Iqbal’s complaint alleged that the “policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were “cleared” by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”<sup>52</sup> Paragraph ninety-six alleged that these two defendants “each knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to the harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”<sup>53</sup> The complaint labeled Ashcroft the “principal architect” of this policy and alleged that Mueller was “instrumental in [the policy’s] adoption, promulgation, and implementation.”<sup>54</sup>

Ashcroft and Mueller moved in the district court for dismissal of the claims against them, arguing that their qualified immunity required the complaint to show their personal involvement in constitutional violations and that Iqbal’s allegations failed to do so.<sup>55</sup> The court denied their motion, pointing to the above allegations and citing the “no set of facts” language from *Conley v. Gibson*.<sup>56</sup> While the Second Circuit was considering Ashcroft and Mueller’s interlocutory appeal, the Supreme Court issued its

---

47. *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

48. *Iqbal*, 129 S. Ct. at 1943.

49. Named for *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*, 403 U.S. 388 (1971), a *Bivens* complaint alleges a constitutional violation on the part of federal agents and seeks monetary damages.

50. *Iqbal*, 129 S. Ct. at 1955 (Souter, J., dissenting) (citing First Amended Complaint and Jury Demand).

51. First Amended Complaint and Jury Demand at 1–2, *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), 2004 WL 3756442.

52. *Iqbal*, 129 S. Ct. at 1944 (quoting First Amended Complaint and Jury Demand, *supra* note 51, at 13–14).

53. *Id.* (quoting First Amended Complaint and Jury Demand, *supra* note 51, at 17–18).

54. First Amended Complaint and Jury Demand, *supra* note 51, at 4–5.

55. *See Elmaghraby*, 2005 WL 2375202, at \*20.

56. *Id.* at \*11.

decision in *Twombly*, which lay to rest *Conley*'s "no set of facts" language and imposed the plausibility standard on pleadings.<sup>57</sup> Applying *Twombly*, the Second Circuit held that the complaint sufficiently alleged Ashcroft's and Mueller's personal involvement in allegedly discriminatory policy decisions.<sup>58</sup>

In May 2009, Justice Anthony Kennedy, writing for a five-justice majority of the Supreme Court, reversed the Second Circuit and held that Iqbal had failed to state a claim against Ashcroft and Mueller under Rule 8(a)(2).<sup>59</sup> First, the Court held that because Ashcroft and Mueller were subject to qualified immunity, Iqbal was required to plead his claims against them with "sufficient factual matter to show that [they] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."<sup>60</sup>

Next, the majority explained that it need not accept "legal conclusions" in the complaint as true for purposes of a Rule 12(b)(6) motion.<sup>61</sup> The majority then identified the particular allegations it deemed to be legal conclusions. These included paragraphs alleging that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to subject Iqbal to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin"; that Ashcroft was the "principal architect" of this discriminatory policy; and that Mueller was "instrumental" in the policy's adoption and execution.<sup>62</sup> The remaining allegations, which *were* entitled to be taken as true, stated nothing about a discriminatory motive on the Ashcroft's and Mueller's parts; instead, they noted principally that Mueller's FBI detained thousands of Arab Muslim men after September 11th and that Ashcroft and Mueller had discussed and approved a policy of holding high-interest detainees in highly restrictive conditions.<sup>63</sup>

Lastly, the Supreme Court majority engaged in a *Twombly*-style analysis, considering whether these remaining allegations "plausibly" showed that Ashcroft and Mueller had "purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin."<sup>64</sup> Of course, because the Court had

---

57. See *supra* notes 33–39 and accompanying text.

58. *Iqbal v. Hasty*, 490 F.3d 143, 174–76 (2d Cir. 2007).

59. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

60. *Id.* at 1948–49. Justice Souter, in dissent, disputed the majority opinion on this point by arguing that Ashcroft and Mueller had earlier conceded that a weaker standard applied; specifically, Justice Souter pointed to Ashcroft and Mueller's petition for certiorari, in which they had indicated that officials in their position could be liable merely for exhibiting "deliberate indifference" to the known discriminatory conduct of their subordinates. *Id.* at 1956 (Souter, J., dissenting) (citing *Petition for Writ of Certiorari*).

61. *Id.* at 1949–50 (majority opinion).

62. *Id.* at 1951 (quoting First Amended Complaint and Jury Demand, *supra* note 51, at 4–5, 17–18).

63. *Id.*

64. *Id.* at 1952.

already chosen to disregard the allegations averring Ashcroft's and Mueller's discriminatory intent and their direct involvement in the allegedly discriminatory policy, the result of the plausibility analysis was a foregone conclusion: the majority held that Iqbal's complaint did not "contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."<sup>65</sup>

Justice Souter, who had authored the majority opinion in *Twombly*, disagreed vehemently with the *Iqbal* majority's approach to the plausibility analysis.<sup>66</sup> Specifically, he objected to the majority's characterization of allegations regarding discriminatory intent as mere legal conclusions. He distinguished these allegations from the *Twombly* allegation asserting that the defendant-service providers had conspired not to compete in each others' territories.<sup>67</sup> Souter in *Twombly* had labeled the conspiracy allegation a mere conclusion because it failed to define the time, place, or scope of the conspiracy and because it failed to show any connection between the alleged conspiracy and the defendants' parallel conduct described elsewhere in the complaint.<sup>68</sup> In contrast, in *Iqbal*, Souter's dissent stressed that the complaint had alleged that Ashcroft and Mueller

"knew of, condoned, and willfully and maliciously agreed to subject" [Iqbal] to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described.<sup>69</sup>

As a result, Souter wrote that the Court was bound to accept the allegations of discrimination as true for purposes of the 12(b)(6) motion and, therefore, to conclude that the complaint had stated a claim.

Thus, the *Iqbal* majority had taken *Twombly* beyond its author's intentions. Specifically, in categorizing allegations as either factual contentions or ignorable legal conclusions, the *Iqbal* majority had interpreted the legal-conclusion category very broadly indeed—certainly more broadly than Justice Souter had contemplated. The majority's application of *Twombly* in *Iqbal* thus makes 12(b)(6) dismissal a threat to even more potentially meritorious lawsuits. This threat has generated not

---

65. *Id.*

66. *Id.* at 1955 (Souter, J., dissenting). Justice Stephen Breyer was the other *Iqbal* dissenter who had been among the majority in *Twombly*. See *id.* at 1961 (Breyer, J., dissenting).

67. *Id.* at 1959–60 (Souter, J., dissenting).

68. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (noting that the complaint failed to specify which service providers allegedly participated in an illegal agreement and when and where the alleged agreement took place); *id.* at 556–57 (“Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”).

69. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting) (quoting First Amended Complaint and Jury Demand, *supra* note 51, at 17).

only scholarly criticism<sup>70</sup> but also Congressional hearings<sup>71</sup> and proposed federal legislation to undo the changes wrought by the two cases.<sup>72</sup>

### III. A CLOSE READING OF *IQBAL*: ENTITLEMENT AND DISENTITLEMENT, MEASURING AND JUDGING

Despite the arguably significant changes to established pleading law wrought by both *Twombly* and *Iqbal*, their linguistic surfaces appear relatively calm. A closer reading, however, shows that the text of the majority opinion in *Iqbal* makes two revealing moves that couch the Court's plausibility analysis as a noncontroversial application of existing pleading doctrine. First, Justice Kennedy's references to "entitlement" and related terms shift the analytical frame so that *Iqbal*'s argument against dismissal appears as an inappropriate request for special treatment. Second, the *Iqbal* opinion, like *Twombly* before it, relies on a judging-as-measuring metaphor that associates the plausibility test with notions of consistency and objectivity.

#### A. *The Language of Entitlement as a Frame-Shifting Device*

Any legally trained reader would expect the Court to mention the word "entitlement" in a decision exploring the boundaries of Rule 8(a)(2). The Rule, after all, requires pleaders to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>73</sup> Similarly, one would expect the term to turn up in cases where a government official relies on the doctrine of qualified immunity, given that qualified immunity is both a defense to liability and a limited "entitlement not to stand trial or face the other burdens of litigation."<sup>74</sup>

The majority opinion in *Iqbal* certainly refers to entitlement in these straightforward contexts,<sup>75</sup> but it also phrases its ruling against *Iqbal* as the

70. For scholarly criticism of *Twombly*, see *supra* note 44. For scholarly criticism of *Iqbal*, see, e.g., Bone, *Plausibility Pleading Revisited*, *supra* note 7, at 867 (commenting that *Iqbal*'s overall approach is "incoherent" and that its plausibility analysis is stricter than that of *Twombly* and "not appropriate for many cases"); Burbank, *supra* note 7, at 115–16 (commenting that the *Iqbal* majority wrought "mischief" by inconsistently choosing to ignore certain allegations, thereby leaving open an "invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices"). Professors Helen Hershkoff and Arthur Miller have asserted that *Twombly* and *Iqbal* have precipitated a "contemporary crisis" of rulemaking through a "radical reinterpretation" of Rules 8 and 12(b)(6). Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 GEO. WASH. L. REV. 9, 28 (2009).

71. See generally *Has the Supreme Court Limited Americans' Access to Courts? Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (webcast available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>); *Access to Justice Denied: Ashcroft v. Iqbal Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) (webcast available at [http://judiciary.house.gov/hearings/hear\\_091027\\_1.html](http://judiciary.house.gov/hearings/hear_091027_1.html)).

72. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

73. FED. R. CIV. P. 8(a)(2).

74. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

75. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("When there are well-pleaded

denial of an entitlement he has mistakenly assumed. According to the majority, *Iqbal* “is not entitled to discovery, cabined or otherwise,”<sup>76</sup> and he was wrong to “expect” his allegations of discriminatory intent to allow his complaint to survive dismissal.<sup>77</sup> These allegations are “not entitled to the assumption of truth,”<sup>78</sup> and Rule 8 “does not empower” *Iqbal* to change that fact.<sup>79</sup>

This language accomplishes a shift in frame<sup>80</sup> with respect to older understandings of notice pleading. Traditional notice pleading jurisprudence emphasized that defendants lacked entitlement to detailed allegations at the pleading stage.<sup>81</sup> By speaking instead in terms of the *plaintiff’s* lack of entitlement—a lack of entitlement to proceed to litigation absent a showing of a plausible claim—the *Iqbal* opinion reframes the 12(b)(6) picture. Specifically, this new use of the language of entitlement transforms the plaintiff from someone who was generally presumed to have a right to proceed to discovery into someone who is being presumptuous and displaying an outsized sense of entitlement in even requesting to proceed.

The subtlety of this frame-shift obscures the fact that the majority opinion is actually implementing an enormous change in the law of federal pleadings. *Twombly’s* plausibility test increased the level of detail necessary to survive a motion to dismiss,<sup>82</sup> and *Iqbal’s* implementation of that test narrowed the set of allegations that could count as “factual” and thus weigh in favor of plausibility.<sup>83</sup> Nevertheless, the Court in both cases insists that it is simply applying existing law.<sup>84</sup> With respect to the *Iqbal*

factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”); *id.* at 1953 (“Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.”).

76. *Id.* at 1954.

77. *Id.*

78. *Id.* at 1950; *see also id.* at 1951 (“We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. . . . [T]he allegations are conclusory and not entitled to be assumed true.”).

79. *Id.* at 1954.

80. *See* STEVEN PINKER, *THE STUFF OF THOUGHT* 243 (2007) (providing numerous examples of frame-shifting language and asserting that “[m]any disagreements in human affairs turn not on differences in data or logic but on how a problem is framed”).

81. *See supra* notes 12–18 and accompanying text.

82. *See supra* notes 44–46 and accompanying text.

83. *See supra* notes 66–72 and accompanying text.

84. The *Twombly* opinion asserts at several points that both its plausibility test and its retirement of *Conley’s* “no set of facts” language comply with precedent. For example, it states that any conflict between the majority’s analysis and *Conley* is merely “ostensible,” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560–61 (2007), and that the majority’s analysis “comports with this Court’s statements in the years since *Conley*,” *id.* at 563 n.8. The opinion also indicates that its plausibility test is consistent with precedent when it notes that the *Twombly* plaintiffs “do not, of course, dispute the requirement of plausibility.” *Id.* at 560 (emphasis added). The *Iqbal* opinion, in turn, emphasizes that its analysis is merely applying *Twombly*. Indeed, in Parts IV.A–B of the opinion, where the majority applies Rule 8(a)(2) specifically to *Iqbal’s* complaint, the Court cites

opinion, Justice Kennedy's deft use of the language of entitlement shifts the frame so subtly that we hardly notice the significance of the accompanying doctrinal change. Indeed, only once does the opinion's entitlement language inadvertently betray itself and indicate that a change in the law has occurred: Justice Kennedy at one point explains that it is the "conclusory nature" of Iqbal's discrimination allegations that "disentitles them to the presumption of truth."<sup>85</sup> Presumably, that which is now "disentitled" was once entitled, even if the *Iqbal* majority insists it is only implementing *Twombly*, and the *Twombly* majority insists it is only applying the existing law.

Elsewhere in the *Iqbal* opinion, the entitlement frame-shift inspires further language indicating that Iqbal is asking for special treatment in opposing the motion to dismiss. For example, the entitlement frame-shift no doubt underlies the majority's characterization of Iqbal's argument as seeking "license" to "evade" the Rules' pleading requirements.<sup>86</sup> Once again, Iqbal appears to be expecting indulgence. In reality, Iqbal had argued not that he should be excused from having to comply with the Rules but rather that his complaint *did* comply with the Rules. His argument, as described at that point in the opinion, was based on Rule 9(b), which allowed him to allege Ashcroft's and Mueller's discriminatory motive "generally."<sup>87</sup> Iqbal's interpretation of "generally" was consistent with that of the Supreme Court in *Swierkiewicz*, which held that a similarly general allegation of discriminatory motive was sufficient to state a claim.<sup>88</sup> Indeed, his position on this point was particularly compelling, given that the *Twombly* Court had taken pains to explain that it was not overruling *Swierkiewicz*.<sup>89</sup> Thus, the majority characterizes Iqbal as seeking "license" to get the Court to follow its own, recently reaffirmed precedent.

---

*Twombly* twenty-two times. See *Iqbal*, 129 S. Ct. at 1949–52.

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

86. *Id.* at 1954. The note of deception inherent in the word "evade" also echoes in the Court's statement that it need not assume the truth of "a legal conclusion *couched* as a factual allegation." *Id.* at 1950 (emphasis added) (quoting *Twombly*, 550 U.S. at 555).

87. *Id.* at 1954 (citing FED. R. CIV. P. 9(b)).

88. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002); see also *supra* notes 23–26 and accompanying text.

89. *Twombly*, 550 U.S. at 569–70. Despite the Court's attempt to reconcile its decisions in *Twombly* and *Iqbal* with *Swierkiewicz*, lower courts have split as to whether the two more recent decisions have effectively overruled the earlier case. Compare *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) ("We have to conclude . . . that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."), with *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909, 2009 WL 3003244, at \*3 (S.D.N.Y. Sept. 18, 2009) ("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*"). Within the Fourth Circuit, one district court has noted simply that "the impact of *Twombly* and *Iqbal* on employment discrimination cases . . . is still unsettled." *Murchison v. Astrue*, No. 08-cv-02665-JFM, 2010 WL 46410, at \*10, n.10 (D. Md. Jan. 6, 2010).



And *Iqbal*'s argument is not just a special request for license; it is an "invitation to relax the pleading requirements."<sup>90</sup> One can almost hear the majority saying, "But if we relaxed the rules for you, we'd have to do it for everybody." Of course, whether rules are being "relaxed" or merely "applied" is a matter of perspective. From Justice Souter's perspective, the *Iqbal* majority was neither relaxing Rule 8 nor applying it in a manner consistent with *Twombly*.<sup>91</sup> Instead, the *Iqbal* majority was increasing the Rule's requirements for *Iqbal* and all future civil plaintiffs. The status quo ante can be described as "relaxed" only after this ratcheting occurs. Thus, by labeling *Iqbal*'s argument as a request for relaxation of the pleading requirements, the majority was able to obscure the fact that it was, indeed, increasing those requirements.

The language of entitlement and of outsized expectations appears elsewhere in the opinion as well. After labeling *Iqbal*'s direct allegations of discrimination as conclusory, and thus setting them aside, the Court identifies the remaining, factual allegations and notes that *Iqbal* "asks us to infer" discrimination from them.<sup>92</sup> These allegations stated merely that Mueller's FBI arrested and detained thousands of Arab Muslim men after September 11th and that Ashcroft and Mueller agreed to a policy of holding high-interest detainees in highly restrictive conditions.<sup>93</sup> The Court held that these factual allegations did not give rise to a plausible inference of discrimination on Ashcroft's and Mueller's parts, and that "[i]t should come as no surprise" that a legitimate policy of arresting and detaining those with suspected links to the September 11th tragedy would have a disparate impact on Arab Muslims, given that the September 11th perpetrators were themselves Arab Muslims.<sup>94</sup> Thus, according to the majority, *Iqbal* had "ask[ed]"<sup>95</sup> the Court to draw an inference of discrimination that ran counter to an "obvious alternative explanation."<sup>96</sup>

In fact, *Iqbal* had asked for no such inference at all. He had explicitly *alleged* discriminatory intent on the part of Ashcroft and Mueller, rather than leaving it to be inferred. It was only after the majority effectively struck his direct allegations of discrimination that his argument morphed into a seemingly unreasonable request for an inference. Once these allegations were disregarded, the majority's ruling on the plausibility of discrimination may have been "no surprise," but many have expressed surprise that the Court chose to disregard the direct allegations of discrimination in the first place.<sup>97</sup>

---

90. *Iqbal*, 129 S. Ct. at 1953–54.

91. *Id.* at 1958–61 (Souter, J., dissenting).

92. *Id.* at 1951–52 (majority opinion).

93. *Id.* at 1951 (citing First Amended Complaint and Jury Demand, *supra* note 51, at 10).

94. *Id.* at 1951–52.

95. *Id.* at 1952.

96. *Id.* at 1951 (quoting *Bell Atlantic Corp. v. Twombly*, 555 U.S. 544, 567 (2007)).

97. *See id.* at 1960–61 (Souter, J., dissenting) ("By my lights, there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination."). For scholarly commentary criticizing the majority's disregard of *Iqbal*'s allegations, see *supra* note 70.

Lastly, the entitlement frame-shift appears to drive the opinion's characterization of Iqbal's lawsuit as a "substantial diversion" for high federal officials, who must instead spend their time executing the work of the government in a time of national emergency.<sup>98</sup> This characterization may be apt in the context of the qualified immunity defense raised by Ashcroft and Mueller and the post-September 11th backdrop of the case, but it also sums up a more general hostility to litigation exhibited in both *Twombly* and *Iqbal*. The *Iqbal* opinion goes on to note that litigation through the discovery phase will exact "heavy costs in terms of efficiency and expenditure of valuable time and resources" and that it is impossible for a district court to manage discovery in a way that would effectively minimize these costs.<sup>99</sup> The *Twombly* majority mentioned a similar justification for its ruling, noting that discovery in the potentially enormous antitrust action would impose an extreme burden on the defendant-service providers.<sup>100</sup> Perhaps a Rule amendment could one day define a class of large or complex cases to be subject to a pleading standard higher than that of Rule 8(a)(2). However, by effectively imposing a higher standard through judicial interpretation of Rule 8, the Court in *Twombly* and *Iqbal* has ratcheted up the requirements for all civil plaintiffs, whatever the size and nature of their claims. Even in actions where qualified immunity can never come into play, the threatened continuation of a lawsuit to the discovery phase has now become a "substantial diversion" that, absent a showing of plausibility, a plaintiff is not entitled to create.

### B. *The Judging-as-Measuring Metaphor*

In addition to using frame-shifting to cast Iqbal's plausibility argument in a particular light, the *Iqbal* opinion, like *Twombly* before it, relies on a judging-as-measuring metaphor to reinforce the legitimacy of the plausibility test itself. Theorists of metaphor have noted that humans often speak of abstract concepts by relating them to more concrete and familiar physical experiences.<sup>101</sup> Thus, love might be spoken of as a journey, or language might be compared to a container that holds ideas.<sup>102</sup> Indeed, people speak of ideas themselves as physical objects<sup>103</sup> that can be "big" or "heavy" or "deep." In a similar vein, judging can be compared to measuring—the act of using a ruler or a scale to determine the length or

---

98. *Iqbal*, 129 S. Ct. at 1953.

99. *Id.*

100. *Twombly*, 550 U.S. at 558–59.

101. See, e.g., GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 25 (1980) ("Our experience of physical objects and substances provides a . . . basis for understanding . . . . Once we can identify our experiences as entities or substances, we can refer to them, categorize them, group them, and quantify them—and, by this means, reason about them."); PINKER, *supra* note 80, at 237 ("[E]ven the airiest of our ideas are expressed . . . in thumpingly concrete metaphors.")

102. See LAKOFF & JOHNSON, *supra* note 101, at 11–12 (discussing the metaphor that linguistic expressions are containers for meaning); *id.* at 85 (discussing metaphors regarding love, including the metaphor that love is a journey); PINKER, *supra* note 80, at 240 (listing variations of the love-is-a-journey metaphor).

103. LAKOFF & JOHNSON, *supra* note 101, at 10–11.

weight of a given idea or argument.

Metaphors like those above have been called conceptual metaphors, because they suggest a particular conception of their targets (whether love, or language, or ideas, or judging) that can generate families of related metaphors, tropes, and images.<sup>104</sup> For example, if love is a journey, one might speak of a relationship that has stalled, or encountered bumps in the road, or arrived at a crossroad.<sup>105</sup> In the case of the *Iqbal* decision, the implicit conceptual metaphor of judging-as-measuring spurs two more specific metaphors to which the text of the opinion repeatedly refers: the first posits *Iqbal*'s allegations as physical objects whose mass can be determined, and the second posits them as physical forces that may or may not propel his claim across a fixed line between possibility and plausibility. Both of these images associate the plausibility analysis with notions of consistency and objectivity, while obscuring the fact that *Iqbal* entrusts the plausibility question not to yardsticks and scales, but to a judge's "judicial experience and common sense."<sup>106</sup>

### 1. Allegations as Having Mass

The *Iqbal* majority's text frequently refers to the complaint's allegations as lacking sufficient mass or physical substance to state a plausible claim. For example, the opinion begins by noting that "'naked assertion[s]'"<sup>107</sup> and "[t]hreadbare recitals" of elements<sup>108</sup> are insufficient. These images recall *Twombly*'s reference to "the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft" to show entitlement to relief.<sup>109</sup> Further, the *Iqbal* opinion notes that a complaint's allegations must register more than a "sheer possibility" that the defendant may be liable.<sup>110</sup> In addition, in setting aside *Iqbal*'s direct allegations of discrimination, the Court refers to them as "bare" assertions that therefore add nothing of substance to the plausibility determination.<sup>111</sup> The opinion refers to legal conclusions as providing an empty "framework" that lacks the substance to state a claim unless that framework is supported with factual allegations.<sup>112</sup>

The word choices above give the persuasive force of *Iqbal*'s allegations a measurable physicality. One need only view and weigh the allegations to determine whether they are sheer or hefty, bare frameworks or massive reinforced structures. Thus, the plausibility analysis is reduced to a physical process of observing and measuring mass, and the results of this process will be reassuringly consistent and seemingly objective. In this

---

104. PINKER, *supra* note 80, at 240.

105. *Id.*

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

107. *Id.* at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

108. *Id.*

109. *Twombly*, 550 U.S. at 557 (quoting FED. R. CIV. P. 8(a)(2)).

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

111. *Id.* at 1951.

112. *Id.* at 1950.

way, the mass-related images hide the breadth of discretion *Iqbal* grants to judges applying the plausibility test.<sup>113</sup> Additionally, it is worth noting that several of the adjectives the Court uses to describe lack of mass—"naked," "threadbare," and "bare"—also refer to lack of clothing. These choices evoke the revelation from the fairy tale that the emperor has no clothes. In so doing, they reinforce the idea that *Iqbal*, like the emperor, has unreasonable expectations regarding the reception to which his presentation is entitled.

## 2. Allegations as Crossing a Line

In describing the plausibility analysis, both the *Twombly* and *Iqbal* opinions speak in terms of a fixed line separating the merely possible from the plausible. For example, the *Twombly* opinion, later quoted in *Iqbal*, describes a complaint whose insufficient allegations cause the pleading to "stop[] short of the line between possibility and plausibility of 'entitle[ment] to relief.'"<sup>114</sup> Similarly, the *Iqbal* majority, quoting *Twombly*, explains that dismissal of the complaint is warranted because *Iqbal*'s allegations have not "'nudg[ed]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"<sup>115</sup> This emphasis on a fixed line allows both opinions to indicate that they are not increasing the showing required to state a claim; the line between stating a claim and not doing so is still fixed in the same location where it has always been, and the pre-*Twombly* requirements for stating a claim therefore remain the same. This line image also indicates that it is possible to differentiate consistently between the possible and the plausible; one need only look to see whether the allegations have crossed some agreed-upon, fixed boundary.

The line image, of course, obscures as much as it clarifies. As explained above, rather than measuring the plaintiffs' complaints against some eternally fixed line, *Twombly* and *Iqbal* each appear to have drawn new lines by increasing the level of detail required for allegations to state a claim. Thus, "the line" is not a pre-existing boundary against which allegations may be measured; instead, it is the *product* of an individual court's exercise of its own discretion in deciding whether a given complaint plausibly suggests a right to relief. It is an individually determined outcome rather than an external aid to arriving at an outcome. Further, the line metaphor serves to obscure the slippery nature of the "judicial experience and common sense" that *Iqbal* instructs courts to use when determining whether a complaint states a plausible claim.<sup>116</sup> As Professor Steven Burbank has noted, "[j]udgments about the plausibility of a complaint are necessarily comparative" and depend on "a judge's background knowledge and assumptions, which seem every bit as

---

113. See *supra* note 106 and accompanying text.

114. *Twombly*, 550 U.S. at 557 (quoting FED. R. CIV. P. 8(a)(2)), quoted in *Iqbal*, 129 S. Ct. at 1949.

115. *Iqbal*, 129 S. Ct. at 1952 (quoting *Twombly*, 550 U.S. at 570).

116. *Id.* at 1950.

vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts."<sup>117</sup>

#### IV. WHY FRAMES AND METAPHORS IN JUDICIAL OPINIONS MATTER

In a January 2010 town hall meeting, South Carolina Lieutenant Governor Andre Bauer used the following words to explain his position that the government should be more active in holding accountable those whose families receive public assistance such as free or reduced-price school lunches:

My grandmother . . . told me as a small child to quit feeding stray animals. You know why? Because they breed. You're facilitating the problem if you give an animal or a person ample food supply. They will reproduce, especially ones that don't think too much further than that. And so what you've got to do is you've got to curtail that type of behavior. They don't know any better.<sup>118</sup>

While the Lieutenant Governor shortly thereafter told reporters he regretted the remarks,<sup>119</sup> reaction to the way in which his words had framed the debate was voluminous.<sup>120</sup> The volume and fervor of the response indicates that people sense inherently that metaphors and other framing devices have power to guide thoughts and actions—and that the frames and metaphors adopted by government decision makers can therefore have significant practical consequences.<sup>121</sup>

117. Burbank, *supra* note 7, at 118.

118. Nathaniel Cary, *Bauer: Needy 'Owe Something Back' for Aid*, THE STATE (Columbia, S.C.), Jan. 23, 2010, at A1, available at <http://www.thestate.com/local/v-print/story/1123844.html>.

119. Roddie Burris, *Bauer Regrets Stray Remarks*, THE STATE (Columbia, S.C.), Jan. 26, 2010, at A1, available at <http://www.thestate.com/2010/01/26/v-print/1127678.html>. A linguistic analysis of Bauer's explanation that he regretted the remark specifically because "now it's being used as an analogy, not a metaphor," *id.*, is beyond the scope of this Article.

120. Within the state of South Carolina, letters to the editor regarding the stray-animal metaphor continued to appear in newspapers even two weeks after the speech. *See, e.g.*, Vince Ward, Letter to the Editor, *Bauer Reveals Much with Animal Comment*, THE STATE (Columbia, S.C.), Feb. 5, 2010, available at <http://www.thestate.com/letters/v-print/story/1142447.html>. In all, *The State* newspaper in Columbia, South Carolina, received well over 100 letters in response to Bauer's comments, and this number "far and away dwarfs the number of letters typically received regarding a state or local issue." Telephone Interview with Claudia Raby, Letters to the Editor Dep't, *The State* (Feb. 15, 2010). Reaction outside the state was voluminous as well. My Google search of the words "Andre Bauer stray animals" on Feb. 9, 2010, retrieved over 450,000 entries. A *New York Times* editorial, published a few days after the remarks were made, condemned the metaphor but noted that it had "at least stirred an encouraging furor." Editorial, *So It's Granny's Fault?*, N.Y. TIMES, Jan. 28, 2010, at A32, available at <http://www.nytimes.com/2010/01/28/opinion/28thu3.html>.

121. Donald A. Schön has insightfully described the role that metaphorical frames play in the setting of social policy. *See* Donald A. Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT 137, 143–50 (Andrew Ortony ed., 2d ed.

Theorists in several fields have attested to the persuasive power of metaphor and its relation to human cognition. Linguist George Lakoff and philosopher Mark Johnson have famously argued that human thought processes are largely metaphorical<sup>122</sup> and that metaphors can create reality in the sense that they structure the way in which people perceive their experiences in the world.<sup>123</sup> According to these two theorists, once a person accepts a specific metaphor, that metaphor may guide the person's actions, and those "actions will, of course, fit the metaphor," turning the metaphor into a "self-fulfilling prophec[y]."<sup>124</sup>

Cognitive psychologist Steven Pinker has posited a more moderate approach, asserting that while "conceptual metaphor really does have profound implications for the understanding of language and thought,"<sup>125</sup> humans "can't think with a metaphor alone."<sup>126</sup> Pinker nevertheless acknowledges that metaphors "are not just literary garnishes but aids to reason [that] can power sophisticated inferences."<sup>127</sup> In the legal context, theorist Steven L. Winter has noted that a metaphor "colors and controls our subsequent thinking about its subject" and "enables us to see systems of analogies not previously recognized."<sup>128</sup> He has argued that some of the most forceful metaphors in American jurisprudence, such as the envisioning of free speech as "a marketplace of ideas," did not spring free-form from their authors' pens but instead arose from the combination of existing conceptual metaphors (such as the ideas-are-objects metaphor) and societal changes (such as the rise of laissez-faire capitalism) that for the first time enabled a particular comparison to carry revelatory and persuasive force.<sup>129</sup>

Under any theory, metaphors operate by highlighting points of experienced similarity between a source concept, such as a journey, and a target concept, such as love.<sup>130</sup> In so doing, of course, they also hide or suppress attributes of the target that do not correspond to any attributes of the source.<sup>131</sup> For example, the metaphor of labor-as-resource highlights that labor can be quantified (in terms of hours worked) and that it can be assigned a value, but the metaphor suppresses notions concerning who is

1993) (using the urban renewal movement of the 1960s as a case study).

122. See generally LAKOFF & JOHNSON, *supra* note 101 (arguing that all cognition except the most fundamental thinking regarding primary physical experiences is metaphorical).

123. *Id.* at 144–46.

124. *Id.* at 156.

125. PINKER, *supra* note 80, at 247.

126. *Id.* at 251.

127. *Id.* at 253.

128. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1383 (1988).

129. See WINTER, *supra* note 1, at 271–73.

130. See Winter, *supra* note 128, at 1383–84 (explaining that a metaphor "carrie[s] over" attributes of the source and applies them to the target).

131. *Id.* at 1386–87 (explaining that metaphor hides dissimilarities between a target and a source, reducing these dissimilarities to "a species of epistemic 'noise'") (internal citation omitted).

performing the labor and how meaningful it is to him or her.<sup>132</sup> And it is from this highlighting of some ideas and the suppressing of others that metaphors draw their persuasive force.<sup>133</sup>

In the context of *Ashcroft v. Iqbal*, we do not ordinarily think of the Supreme Court as needing to use metaphor and framing to persuade an audience of the correctness of a decision it has issued. The Court, after all, is the final authority. However, Steven L. Winter has perceptively argued that “the higher the court, the larger the audience that must be persuaded”<sup>134</sup> because in Western societies, where “‘law’ is synonymous with objective delineations of right and wrong . . . a court can produce that automatic, tacit sense of validity only if its judgments conform with the most conventional values of the culture.”<sup>135</sup>

In the *Iqbal* majority opinion, the entitlement frame-shift described in Part III persuades, subtly, by highlighting the risk that, if Rule 8(a)(2) is interpreted loosely, an “unentitled” plaintiff with a non-meritorious claim will impose upon a defendant the burdens of discovery. Of course, the frame-shift simultaneously and persuasively suppresses the risk that, under the plausibility test, some plaintiffs with meritorious claims will experience dismissal simply because they lack access to detailed evidence at the pleading stage. The judging-as-measuring metaphor buttresses this persuasive effect by offering assurance that judges can make consistent and objective decisions regarding who is and is not entitled to proceed to discovery.

To the extent that 20th Century notice-pleading jurisprudence emphasized the entitlement of a plaintiff to proceed to discovery upon providing fair notice,<sup>136</sup> perhaps the entitlement frame-shift, with its characterization of a plaintiff as having an outsized sense of entitlement, was a predictable 21st Century rejoinder to that jurisprudence, given the growing perception that the Federal Rules discovery process had grown significantly more burdensome in the intervening years.<sup>137</sup> In highlighting this burden, the frame-shift is seductive. The judging-as-measuring metaphor is equally seductive to a society that longs to equate judicial

---

132. LAKOFF & JOHNSON, *supra* note 101, at 65–68.

133. Winter, *supra* note 128, at 1387 (explaining how, through highlighting and suppressing certain aspects of a target concept, a metaphor can come to be recognized as representing the truth about the target).

134. WINTER, *supra* note 1, at 322.

135. *Id.* at 323.

136. *See supra* notes 8–18 and accompanying text.

137. Bryant Garth in 1998 noted that while empirical studies showed that the discovery process worked reasonably efficiently in the great majority of cases, discovery in the much smaller group of complex, high-stakes cases was characterized by “dissatisfaction, delay and expense.” Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 605 (1998). Because the lawyers handling these complex cases were often prosperous and prominent, they tended to have a greater voice at conferences and on committees examining issues of civil discovery, and their experiences of “enormous problems” with discovery tended to dominate the debate. *Id.*

decisionmaking with objectivity.<sup>138</sup> However, the important question is not whether the frames and metaphors seduce but whether they have led to a decision that comports with the foundational assumptions underlying the Federal Rules. In Part III of this Article, I join others<sup>139</sup> who have argued that the decision has changed the law in a way that does not comport with these assumptions.

Both the frame-shift and the judging-as-measuring metaphor that support *Iqbal*'s plausibility analysis are now linguistically and conceptually embedded in precedent. Given *stare decisis* and the generative power of conceptual metaphor, they will replicate themselves and spawn related tropes in lower court opinions, becoming even further embedded in 21st-Century pleadings jurisprudence. However, the frames and metaphors of *Iqbal* need not block any reform efforts aimed at the Rules Advisory Committee and Congress. Although frames and metaphors have power, they do not control us absolutely: "People certainly are affected by framing . . . . And metaphors, especially conceptual metaphors, are an essential tool of . . . thought itself. But this doesn't mean that people are enslaved by their metaphors . . . . Like other generalizations, metaphors can be tested on their predictions and scrutinized on their merits . . . ." <sup>140</sup>

Indeed, it is only by actively noticing what metaphors highlight and suppress that true critical inquiry of an issue can begin.<sup>141</sup> Thus, an important first step for reformers, post-*Iqbal*, is to engage the Rules Advisory Committee and Congress in true critical inquiry by explaining what the *Iqbal* decision hides. The Justices were not well-positioned to engage in such critical inquiry—an inquiry that should take account of recent empirical research regarding discovery costs and that should be informed by those with a broad base of experience in federal trial court litigation.<sup>142</sup>

Thus, it is only by persuading the Rules Advisory Committee to step back from the seductive frames and metaphors of *Iqbal* that reformers may inspire a more appropriate inquiry into pleadings jurisprudence to begin—an inquiry that could bring federal pleading practice back into line with the foundational principles of the Federal Rules.

138. See WINTER, *supra* note 1, at 323 (asserting that in Western societies, law "is synonymous with objective delineations of right and wrong").

139. See *supra* note 70.

140. PINKER, *supra* note 80, at 261.

141. See Schön, *supra* note 121, at 150 (explaining that "critical inquiry" becomes possible only when people engage in "awareness and reflection" regarding existing conceptual, or generative, metaphors).

142. See Burbank, *supra* note 7, at 116 (critiquing *Twombly* and *Iqbal* and noting that the policy questions in those cases were not appropriate for judicial determination); *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. 27 (2009) (statement of Arthur Miller, University Professor, New York Univ. School of Law) ("With *Twombly* and *Iqbal*, the Court may have forsaken [its] commitment [to the rulemaking and legislative processes] by reformulating the Rules' pleading and motion to dismiss standards by judicial fiat.").



## V. CONCLUSION

After having imposed a plausibility test on pleadings in *Twombly*, the Supreme Court has further increased the requirements for pleadings to state a claim in its recent *Iqbal* decision. This change in pleading standards, which affects access to justice in all civil cases, is all the more remarkable given the Court's insistence that it has not changed those standards at all. In the text of the majority opinion in *Iqbal*, frame-shifting and metaphor downplay the substantive shift in the law, reinforcing the notion that the Court's analysis is simply a fair and consistent application of precedent, rather than a usurpation of the Congressional power to change the Federal Rules.

Specifically, by framing the Rule 12(b)(6) issue in terms of a plaintiff's lack of entitlement to proceed to discovery, the Court de-emphasizes its abandonment of fifty years of notice-pleading jurisprudence, which emphasized the defendant's lack of entitlement to detailed allegations at the pleading stage. This frame-shift is accompanied by a judging-as-measuring metaphor that offers reassurance regarding the possibility of consistent, objective decisions regarding which plaintiffs are indeed entitled to survive early dismissal. Because frame-shifting and metaphor both reflect and guide cognitive processes, reformers seeking to reverse these recent changes to pleading jurisprudence will succeed only if they can enable Congress and the Rules Advisory Committee to step back from the frame and metaphor imposed by *Iqbal* to consider, more fully and critically, whether the changes wrought by both *Twombly* and *Iqbal* truly align with the fundamental principles underlying the Federal Rules.