Casenote

Ashcroft in a Defendant's Wonderland: Redefined Pleading Standards in *Ashcroft v. Iqbal*

The United States Supreme Court's decision in *Ashcroft v. Iqbal*[1] is the Court's awaited clarification of its earlier decision in *Bell Atlantic Corp. v. Twombly*.[2] In the wake of *Twombly*, courts and commentators debated its application to cases other than antitrust disputes.[3] The

1. 129 S. Ct. 1937 (2009).

2. 550 U.S. 544 (2007).

3. *See, e.g.*, Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797, 802–03 (7th Cir. 2008). In *Limestone Development*, the court acknowledged that the narrowest possible reading of *Twombly* limits its holding to antitrust cases. *Id.* at 803. However, the court adopted a broader reading for the Seventh Circuit: Plaintiffs must meet the *Twombly* facial plausibility requirement for complaints in any "potentially complex litigation" or in any case when judgment against the defendant creates an "in terrorem" effect. *Id.* (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)); *see also, e.g.*, Scott Dodson, *Pleading Standards after* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 142 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf (positing that after *Twombly*, a plaintiff gives the defendant fair notice in an antitrust case if the complaint states a facially plausible claim for relief, but grounds other than facial plausibility may satisfy the notice requirment in other cases); Amber Pelot, Note, Bell Atlantic Corp. v. Twombly: *Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1385–91 (2008).

Court announced in *Iqbal* that the *Twombly* complaint requirement of facial plausibility applies to all civil actions filed in federal court, not just antitrust cases.[4] Accordingly, *Iqbal* currently governs the standards by which all plaintiffs in federal court must draft complaints to state a legally sufficient claim for relief and survive a defendant's motion to dismiss.[5] Survival will be tougher because this case confirms the end of the liberal pleading standards developed in *Conley v. Gibson*[6] and its progeny.[7]

I. FACTUAL BACKGROUND

The dispute in *Ashcroft v. Iqbal*[8] stems from the response of American authorities to the terrorist attack on the World Trade Center on September 11, 2001 (9–11). After the attack, the Federal Bureau of Investigation (FBI) began searching for persons connected to the event. Some individuals suspected of having links to the attacks were held on immigration charges, and a subset of those individuals was deemed to be of high interest to the investigation and placed in detention centers.[9]

Javaid Iqbal, a Muslim citizen of Pakistan and the plaintiff in this case, was arrested in November 2001 on criminal charges and detained as a high interest individual in the 9–11 search. While those charges were pending, the plaintiff was held at the Metropolitan Detention Center (MDC) in New York and placed in a section of the MDC called the Administrative Maximum Special Housing Unit (ADMAX SHU), which operates under maximum security conditions.[10]

The plaintiff returned to Pakistan after pleading guilty to the criminal charges against him and serving a term of imprisonment.[11] He thereafter filed a *Bivens*[12] action in the United States District Court for the Eastern District of New York against federal officials and corrections officers connected to his detention in the ADMAX SHU.[13] The plaintiff's complaint specifically alleged that the defendants in this appeal —Director of the FBI Robert Mueller III and former United States

4. 129 S. Ct. at 1953.
5. *See id.*
6. 355 U.S. 41 (1957).
7. *See Iqbal*, 129 S. Ct. at 1953.
8. 129 S. Ct. 1937 (2009).
9. *Id.* at 1943.
10. *Id.*
11. *Id.*
12. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
13. *Iqbal*, 129 S. Ct. at 1943.

Attorney General John Ashcroft—violated the First Amendment[14] and Fifth Amendment[15] by designating the plaintiff as a high interest suspect on account of his race, religion, or national origin.[16] The complaint further alleged that the FBI, under Mueller's direction, "'arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11'"[17] and that "'[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by [the defendants] in discussions in the weeks after September 11, 2001.'"[18] According to the complaint, the defendants "'knew of, condoned, and willfully and maliciously agreed to subject' [the plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[19] In addition, the complaint alleged that Ashcroft was a "'principal architect'" of this policy of arresting Arab Muslims[20] and that Mueller was "'instrumental in [its] adoption, promulgation, and implementation.'"[21]

The defendants moved to dismiss the plaintiff's complaint on the ground that the complaint failed to state facts sufficient to support the claim that the defendants had intentionally violated the plaintiff's constitutional rights.[22] Relying on *Conley v. Gibson*,[23] the district court denied the motion, holding that the complaint had alleged at least some facts on which, if true, the plaintiff would be entitled to relief.[24] The defendants then filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit.[25] In the meantime, the

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14. U.S. CONST. amend. I.

15. U.S. CONST. amend. V.

16. *Iqbal*, 129 S. Ct. at 1944.

17. *Id.* (alteration in original) (quoting First Amended Complaint & Jury Demand ¶ 47, Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *rev'd sub nom.* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom. Iqbal*, 129 S. Ct. 1937 [hereinafter Complaint]).

18. *Id.* (first alteration in original) (some internal quotation marks omitted) (quoting Complaint, *supra* note 17, ¶ 69).

19. *Id.* (second alteration in original) (quoting Complaint, *supra* note 17, ¶ 96).

20. *Id.* (quoting Complaint, *supra* note 17, ¶ 10).

21. *Id.* (alteration in original) (quoting Complaint, *supra* note 17, ¶ 11).

22. *Id.*

23. 355 U.S. 41 (1957).

24. *Iqbal*, 129 S. Ct. at 1944. According to the Supreme Court's decision in *Conley*, "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." 355 U.S. at 45–46.

25. *Iqbal*, 129 S. Ct. at 1944.

Supreme Court decided *Bell Atlantic Corp. v. Twombly*.[26] Accordingly, the Second Circuit attempted to apply *Twombly* and held that the plaintiff's complaint adequately alleged facts sufficient to raise its claim—that the defendants personally participated in unconstitutional discrimination against the plaintiff—to the level of plausibility.[27]

The Supreme Court granted certiorari, and in a 5–4 decision, the Court held that the facial plausibility pleading standard enunciated in *Twombly* applies to all civil actions in federal court.[28] Therefore, allegations that assert only legal conclusions, or that are merely consistent with liability, do not meet the plausibility standard.[29] Reasoning that the plaintiff's allegations suggested only that the defendants' liability was possible rather than plausible, the Court reversed the ruling of the court of appeals.[30]

II. LEGAL BACKGROUND

One of the first Supreme Court decisions to address the standards for pleading under the Federal Rules of Civil Procedure was *United States v. Employing Plasterers Ass'n of Chicago*,[31] in which the Court considered the sufficiency of the plaintiff's complaint in an antitrust dispute.[32] The complaint alleged that the defendants, a Chicago trade association and local labor union of plastering contractors, violated the Sherman Act[33] by conspiring (1) to suppress competition from local plastering contractors, (2) to prevent contractors outside the state from doing business in Chicago, and (3) to stop new local contractors from entering into business by requiring approval of new contractors by the defendants' private examining board.[34] Noting that local business restraints can constitute violations of the Sherman Act, the Court held that the plaintiff's complaint sufficiently stated a claim for relief because it related "every element necessary to recover" under the statute.[35] In reaching this conclusion, the Court explained that in the pleading stage of a case, courts must take all of the plaintiff's allegations into account, whether factual or conclusory.[36] The Court advanced two policy

26. 550 U.S. 544 (2007); *see Iqbal*, 129 S. Ct. at 1944.
27. *Iqbal*, 129 S. Ct. at 1944.
28. *Id.* at 1953.
29. *Id.* at 1949–50.
30. *Id.* at 1950–51, 1954.
31. 347 U.S. 186 (1954).
32. *See id.* at 187.
33. 15 U.S.C. §§ 1–7 (2006).
34. *Employing Plasterers*, 347 U.S. at 187–88.
35. *Id.* at 189.
36. *Id.* at 188.

reasons for declining to impose a stricter pleading standard: (1) parties already have the right to request more facts via a Federal Rule of Civil Procedure 12(e)[37] motion for a more definite statement; and (2) Federal Rule of Civil Procedure 56[38] motions for summary judgment already prevent frivolous claims from reaching trial.[39]

It is the Court's decision in the seminal case of *Conley v. Gibson*,[40] however, that is most cited for the law of "notice pleading" that subsequently became the recognized standard for pleading under Federal Rule of Civil Procedure 8(a)(2).[41] In *Conley* the Court addressed whether the plaintiff's complaint stated a sufficient claim for relief that could survive the defendant's motion to dismiss.[42] The plaintiffs alleged that the defendant had discriminated against them in violation of the Railway Labor Act.[43] In their complaint, the plaintiffs further alleged that the defendants, a local railway union with whom the plaintiffs had contracted for certain protection against discharge and loss of seniority, failed to protect them from discriminatory discharges and in some instances from losing seniority when rehired after discharge. The plaintiffs, who were black employees, further alleged that the defendants gave more protection to white employees and had not represented black employees with equal good faith.[44] Justice Black, writing for the majority, concluded that the plaintiffs had sufficiently stated a claim of discriminatory representation[45] and in doing so laid the foundation for the standard of notice pleading.[46] Justice Black explicitly endorsed the decisions of several courts of appeal, holding 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."[47] Justice Black further elaborated that a plaintiff's complaint need not plead detailed

37. FED. R. CIV. P. 12(e).
38. FED. R. CIV. P. 56.
39. *Employing Plasterers*, 347 U.S. at 189.
40. 355 U.S. 41 (1957).
41. FED. R. CIV. P. 8(a)(2).
42. *See Conley*, 355 U.S. at 45–46.
43. 45 U.S.C. §§ 151–88 (2006); *Conley*, 355 U.S. at 43.
44. *Conley*, 355 U.S. at 43.
45. *Id.* at 45.
46. *See id.* at 45–46.
47. *Id.* (citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Cont'l Collieries, Inc. v. Shober, 130 F.2d 631 (3d Cir. 1942); Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8th Cir. 1940)).

facts; instead, it need only give a defendant notice of and grounds for the claim.[48]

Justice Black provided three reasons for adopting the rule of notice pleading. First, the forms appended to the Federal Rules of Civil Procedure plainly illustrate that a plaintiff is not required to plead detailed facts in his complaint.[49] Second, the Rules established the process of discovery and other pretrial procedures in order to further define the factual basis for a plaintiff's claim beyond the allegations contained in the complaint.[50] Third, this standard best accords with Federal Rule of Civil Procedure 8(e),[51] which states that "[p]leadings must be construed so as to do justice."[52] It would not be just, the Court opined, to allow a pleading mistake by counsel to affect the entire outcome of an action.[53]

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[54] the Supreme Court affirmed its holding in *Conley* in the context of a claim for municipal liability.[55] The Court granted certiorari to resolve a conflict among the courts of appeal on the issue of whether courts could apply a heightened standard of pleading to claims for municipal liability under 42 U.S.C. § 1983.[56] The United States Court of Appeals for the Fifth Circuit had held in *Elliot v. Perez*[57] that in cases involving claims against government officials who would likely invoke the defense of qualified immunity, the plaintiff's complaint must plead facts with detail and particularity to overcome that defense and state a claim for relief.[58] The Fifth Circuit later applied this same pleading standard to cases alleging violation of § 1983 by municipal corporations.[59] The Supreme Court rejected this heightened standard and reiterated the decision in *Conley*, holding that except in cases of

48. *Id.* at 47.
49. *Id.*
50. *Id.* at 47–48.
51. FED. R. CIV. P. 8(e).
52. *Id.*; *accord Conley*, 355 U.S. at 48. Prior to the 2007 amendments to the Rules, the text of Rule 8(e) appeared in Rule 8(f) and included the word *substantial* immediately before the word *justice*. *Compare* FED. R. CIV. P. 8(e), *with* FED. R. CIV. P. 8(f) (amended 2007), *reprinted in* FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES, CASES, AND OTHER MATERIALS 31 (Stephen C. Yeazell ed., 2007).
53. *See Conley*, 355 U.S. at 48.
54. 507 U.S. 163 (1993).
55. *See id.* at 168.
56. 42 U.S.C. § 1983 (2006); *Leatherman*, 507 U.S. at 165.
57. 751 F.2d 1472 (1985).
58. *Leatherman*, 507 U.S. at 167.
59. *Id.*

fraud or mistake under Federal Rule of Civil Procedure 9(b),[60] the plaintiff need not plead facts with particularity.[61]

Chief Justice Rehnquist advanced three reasons for the Court's affirmation of *Conley*.[62] He relied first on the interpretive canon of *expressio unius est exclusio alterius*:[63] Because Rule 9(b) expresses that complaints alleging fraud or mistake must allege facts with particularity, he explained, the Rules exclude application of that standard in any other case.[64] Chief Justice Rehnquist further stated that requiring plaintiffs to plead facts with specificity in cases other than those alleging fraud or mistake would be a substantive change to the Rules that, if made at all, must be made by Congress.[65] Finally, as did Justice Black in *Conley*, Chief Justice Rehnquist reasoned in *Leatherman* that courts can look to other pretrial procedures, such as summary judgment and discovery management, to keep unmeritorious claims from reaching trial.[66]

In *Bell Atlantic Corp. v. Twombly*,[67] the Supreme Court rejected *Conley*'s "no set of facts" standard of pleading,[68] but the decision left lower courts wondering when that new pleading standard should be applied. Like the Court in *Employing Plasterers*, the Court in *Twombly* considered whether the plaintiff's complaint alleged facts sufficient to survive a motion to dismiss in an antitrust dispute.[69] In a 7–2 decision, the Court held as follows: (1) a complaint does not state a claim for relief if it contains only legal conclusions, and a mere recitation of the elements of a cause of action is conclusory;[70] (2) a complaint only sufficiently alleges an antitrust conspiracy if it shows that a conspiracy was plausible on the face of the complaint;[71] and (3) a conspiracy is facially plausible if the court can reasonably infer that discovery will yield evidence of an illegal agreement[72] but is not facially plausible if the complaint alleges facts merely consistent with unlawful conduct.[73]

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60. FED. R. CIV. P. 9(b).
61. *Leatherman*, 507 U.S. at 168.
62. *See id.*
63. *Id.*; *see generally* BLACK'S LAW DICTIONARY 661 (9th ed. 2009) ("[T]o express or include one thing implies the exclusion of the other . . . .").
64. *Leatherman*, 507 U.S. at 168.
65. *Id.*
66. *Id.* at 168–69.
67. 550 U.S. 544 (2007).
68. *Id.* at 562–63.
69. *Id.* at 548–49.
70. *Id.* at 555.
71. *Id.* at 556.
72. *Id.*
73. *Id.* at 556–67.

Justice Souter, author of the majority opinion, provided two policy justifications for the facial plausibility standard of pleading. Noting the famous words in *Conley* often cited for the rule of notice pleading, Justice Souter remarked that a complaint probably does not provide the defendant with "'fair notice of what the . . . claim is and the grounds upon which it rests'" if the plaintiff pleads only legal conclusions rather than facts.[74] Justice Souter also opined that given the increased costs and scope of discovery in antitrust cases, plaintiffs should at least be required to plead facts with some specificity in those cases in order to forestall expensive discovery on a potentially massive scale.[75]

Justice Souter explained that the Court's decision had not created a new standard for pleading; rather, the Court simply interpreted Rule 8(a)(2) to require more than reciting the elements of a claim and alleging conclusions that those elements have been met.[76] Although this requirement appears to conflict with the Court's holding in *Employing Plasterers* that a complaint will survive a motion to dismiss if it relates all of the elements necessary to a claim for recovery,[77] the decision in *Employing Plasterers* was not explicitly overruled.[78] The Court in *Twombly* did, however, expressly reject the proposition in *Conley* 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.'"[79] The Court reasoned that *Conley* is better read to mean that after a complaint alleges a facially plausible claim, any set of facts consistent with the allegations contained in the complaint will support that claim.[80]

Justice Stevens authored a dissent in *Twombly*, joined by Justice Ginsburg, in which he asserted that a court must accept *all* factual allegations of a complaint as true[81] and that the *Conley* "no set of facts" test is a well-established and adequate standard for pleading complaints.[82] In addition to illustrating that a plethora of legal precedent has relied on the "no set of facts" interpretation of *Conley*,[83] Justice Stevens pointed out several major reasons why he disagreed with the majority's facial plausibility pleading standard. First, as the older

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74. *Id.* at 555 (alteration in original) (quoting *Conley*, 335 U.S. at 47).
75. *See id.* at 558.
76. *See id.* at 555–56.
77. *See supra* text accompanying notes 47–48.
78. *See Twombly*, 550 U.S. 544.
79. *Id.* at 561–63 (quoting *Conley*, 335 U.S. at 45–46).
80. *Id.* at 563.
81. *Id.* at 571 (Stevens, J., dissenting).
82. *See id.* at 577–78.
83. *See id.* at 577 & n.4.

decisions supporting more liberal pleading standards had asserted, he suggested that discovery control and summary judgment can adequately manage the burdens of discovery in antitrust disputes.[84] Second, Justice Stevens argued that there is no practical way of distinguishing between facts and legal conclusions.[85] Third, he claimed that the decision defeats the purpose of Rule 8(a)(2), which is intended to facilitate litigation rather than forestall it.[86] While factual allegations were distinguished from legal conclusions in the requirements of code pleading, that distinction was abolished by the enactment of the Federal Rules of Civil Procedure.[87] Finally, like Chief Justice Rehnquist in *Leatherman*, Justice Stevens flatly stated that this kind of change in federal pleading standards must be made by Congress, not by the judiciary.[88] The scope of the change, Justice Stevens said, was such that it "rewrite[s] the Nation's civil procedure textbooks and call[s] into doubt the pleading rules of most of its States."[89]

The Court's decision in *Twombly* left several questions open for resolution: Does the facial plausibility pleading standard apply to any civil action filed in federal court, or only to antitrust disputes? What precisely does it mean to be merely consistent with plausibility? And what sorts of facts justify a reasonable inference that the plaintiff will produce evidence of liability?

III. COURT'S RATIONALE

In *Ashcroft v. Iqbal*,[90] the United States Supreme Court granted certiorari to address the proper standards for notice pleading under Federal Rule of Civil Procedure 8(a)(2).[91] The Court ruled that (1) in order to survive a motion to dismiss, a plaintiff's complaint must contain sufficient factual matter that, if accepted as true, states a facially plausible claim for relief;[92] and (2) this standard applies to all civil

84. *Id.* at 573.

85. *Id.* at 574 (arguing that "it is virtually impossible logically to distinguish among ultimate facts, evidence, and conclusions" (internal quotation marks omitted) (quoting Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 520–21 (1957))).

86. *See id.* at 575.

87. *Id.* at 589–90; CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1201 at 86 & n.11 (3d ed. 2004).

88. *Twombly*, 550 U.S. at 579.

89. *Id.*

90. 129 S. Ct. 1937 (2009).

91. FED. R. CIV. P. 8(a)(2); *see Iqbal*, 129 S. Ct. at 1949.

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

actions in United States district courts.[93] Under *Iqbal* a claim is facially plausible if it asserts more than legal conclusions or allegations merely consistent with the unlawful conduct alleged.[94]

A. *The Majority Opinion*

Justice Kennedy wrote the Court's majority opinion and was joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito.[95] Justice Kennedy attempted to clarify the standards for notice pleading in light of the Court's recent decision in *Bell Atlantic Corp. v. Twombly*,[96] which overturned long-standing interpretations of Rule 8(a)(2).[97] In addressing the sufficiency of the allegations in the plaintiff's complaint, Justice Kennedy first outlined the current state of the law on notice pleading.[98] He noted that Rule 8(a)(2) provides that in order to state a claim for relief, a pleading must contain a "'short and plain statement of the claim showing that the pleader is entitled to relief.'"[99] Justice Kennedy cited *Twombly* for the proposition that a short and plain statement of a claim need not allege detailed factual allegations.[100] He then related the Court's holding in *Twombly* as follows: (1) the plaintiff's claim must allege factual matter sufficient to state a claim for relief that is plausible on its face; (2) a claim is facially plausible when the court can reasonably infer from the facts alleged that the defendant is liable for the misconduct alleged; and (3) when a complaint pleads facts merely consistent with a defendant's liability, the court can only infer that the defendant is *possibly* rather than *plausibly* liable.[101]

Justice Kennedy next discussed two legal principles that supported the Court's decision in *Twombly*. First, although a court typically must accept all of the facts alleged in a plaintiff's complaint as true, acceptance does not extend to legal conclusions "'couched as . . . factual allegation[s].'"[102] Second, a complaint only survives a motion to dismiss if it "states a plausible claim for relief."[103] Justice Kennedy endorsed the statement by the United States Court of Appeals for the

93. *Id.* at 1953.
94. *Id.* at 1949–50.
95. *Id.* at 1941.
96. 550 U.S. 544 (2007).
97. *See Iqbal*, 129 S. Ct. at 1949–54; *Twombly*, 550 U.S. at 544.
98. *See Iqbal*, 129 S. Ct. at 1949.
99. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).
100. *Id.* (citing *Twombly*, 550 U.S. at 555).
101. *Id.*
102. *Id.* at 1949–50 (quoting *Twombly*, 550 U.S. at 555).
103. *Id.* at 1950.

Second Circuit in the decision below that judges must "draw on [their] judicial experience and common sense" to determine whether a complaint states a plausible claim for relief within the specific context of each case.[104] Justice Kennedy then explained that facts merely consistent with a defendant's liability illustrate only a possible rather than plausible claim for relief.[105]

Justice Kennedy proceeded to apply the *Twombly* construction of Rule 8 to the facts of the instant case, first noting what the Court perceived to be the legal conclusions in the plaintiff's complaint that were not entitled to an assumption of truth.[106] The plaintiff's assertion that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,'" was, Justice Kennedy reasoned, only conclusory because it did nothing more than formulaically recite the elements of a claim for unconstitutional discrimination.[107] Thus, Justice Kennedy declined to treat those allegations as true.[108]

Justice Kennedy next considered whether the facts in the plaintiff's complaint alleging discrimination suggested a plausible claim for relief and determined that it did not.[109] The Court admitted that the facts alleged were *consistent* with purposeful, invidious discrimination but proffered an "'obvious alternative explanation'" for the plaintiff's arrest and detention.[110] It was more likely, Justice Kennedy reasoned, that the plaintiff and other Arab Muslims were detained as high interest suspects in the 9–11 investigation because the 9–11 hijackers were Arab Muslims belonging to the Islamic fundamentalist group Al-Qaeda, which was headed by the Arab Muslim Osama bin Laden and whose members were also largely Arab Muslims.[111] Justice Kennedy stated that under this alternative explanation, the defendants' detention of Arab Muslims was lawful because the defendants had a nondiscriminatory purpose to detain illegal aliens with potential connections to the 9–11 terrorist attacks.[112] Thus, Justice Kennedy explained that because this lawful

104. *Id.*
105. *See id.*
106. *See id.* at 1951.
107. *Id.* (quoting Complaint, *supra* note 17, ¶ 96).
108. *Id.*
109. *Id.* at 1951–52.
110. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 567).
111. *Id.*
112. *Id.*

alternative more likely explained the defendants' conduct, a court could not infer that discrimination was plausible.[113]

Finally, Justice Kennedy noted that the plaintiff had completely failed to allege facts showing that the defendants had purposefully adopted a discriminatory policy of classifying some detainees as high interest because of their race, religion, or national origin.[114] Justice Kennedy pointed out that an individual is not liable for discrimination unless he personally acts on the basis of a constitutionally protected characteristic.[115] Therefore, Justice Kennedy reasoned that for the complaint to state a claim for relief, the plaintiff must have alleged that the defendants themselves had purposefully decided to classify some Arab Muslims as high-interest suspects because of their race, religion, or national origin.[116] Justice Kennedy looked at what he considered to be the only related allegation in the plaintiff's complaint, which was the defendants' approval of "'restrictive conditions of confinement'" for persons detained in the 9-11 terrorist investigation.[117] However, Justice Kennedy determined that this allegation did "not show, or even intimate, that [the defendants] purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin."[118]

Justice Kennedy next addressed the plaintiff's argument that the pleading standard applied in *Twombly* should be limited to the context of antitrust disputes.[119] Justice Kennedy explained that such a reading of *Twombly* would be incompatible with the Federal Rules of Civil Procedure because the Court's decision in *Twombly* depended on its interpretation of Rule 8, which applies to all civil actions in district courts.[120] Thus, the Court ruled that the Rule 8 plausibility standard of pleading expounded in *Twombly* applies to all civil actions in federal courts.[121]

Finally, Justice Kennedy addressed whether a complaint "generally" alleges discriminatory intent according to Federal Rule of Civil Procedure 9(b)[122] when the plaintiff alleges only the legal conclusion that a defendant's intent was discriminatory.[123] Justice Kennedy

113. *Id.* at 1951–52.
114. *Id.* at 1952.
115. *Id.*
116. *Id.*
117. *Id.* (quoting Complaint, *supra* note 17, ¶ 69).
118. *Id.*
119. *Id.* at 1953.
120. *Id.*
121. *Id.*
122. FED. R. CIV. P. 9(b).
123. *See Iqbal*, 129 S. Ct. at 1954.

noted that under Rule 9(b), intent and other conditions of a person's mind may be alleged generally, but he then cited Charles Wright and Arthur Miller's *Federal Practice and Procedure*[124] in asserting that the standard of generally alleging intent in Rule 9 is simply another articulation of the short and plain statement standard in Rule 8(a)-(2).[125] On that basis, Justice Kennedy reasoned that the *Twombly* standard of facial plausibility of a claim also applies to allegations of intent, including discriminatory intent.[126]

Having explained that alleging legal conclusions does not state a plausible claim for relief under Rule 8(a)(2), Justice Kennedy extrapolated that a plaintiff does not sufficiently allege intent if he merely asserts a conclusion of intent.[127] Accordingly, the Court held that the plaintiff had asserted only a conclusion of discriminatory intent when he alleged that the defendants had discriminated against him because of his race, religion, or national origin.[128] Thus, the Court ruled that he had failed to sufficiently allege discriminatory intent.[129]

B. Justice Souter's Dissent

Justice Souter, who wrote for the majority in *Twombly*, dissented because he believed that the majority misinterpreted the pleading standard espoused in *Twombly* and incorrectly characterized some of the plaintiff's allegations as legal conclusions.[130] His dissent was joined by Justice Stevens, Justice Ginsburg, and Justice Breyer.[131]

According to Justice Souter, the plaintiff's complaint stated a claim for relief under Rule 8(a)(2).[132] First, Justice Souter pointed out that the defendants actually admitted they would be liable for the conduct of their subordinates if the defendants had actual knowledge that their subordinates had discriminated against detainees in classifiying some as being of high interest.[133] Reciting the plaintiff's allegations in the complaint,[134] Justice Souter determined that if the allegations were taken as true, the defendants not only had knowledge that their

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124. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1301, at 291 (3d ed. 2004).

125. *Iqbal*, 129 S. Ct. at 1954.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.* at 1958–61 (Souter, J., dissenting).

131. *Id.* at 1954.

132. *Id.* at 1958.

133. *Id.*

134. *See supra* text accompanying notes 17–21.

subordinates discriminated against Arab Muslims but also created the discriminatory policy their subordinates followed.[135]

Justice Souter next spoke to the majority's interpretation of the Court's decision in *Twombly*, which he asserted was inaccurate.[136] Justice Souter stated that the decision in *Twombly* did not require a court to consider whether factual allegations were probably true; rather, Justice Souter said the Court clearly held in *Twombly* that a court must take all allegations as true even if the court doubts their veracity.[137] Justice Souter maintained that there is only one exception under which the court need not accept the plaintiff's allegations as true: when the allegations are "sufficiently fantastic to defy reality as we know it."[138] He duly noted that such allegations were not at issue here.[139] In response to the majority's finding that the plaintiff's allegations were merely consistent with liability, Justice Souter differentiated the example of mere consistency in *Twombly* from the plaintiff's allegations in this case.[140] He remarked that in *Twombly* the allegation that the defendant companies had engaged in parallel conduct was consistent with both legal, free-market activity and an illegal agreement not to compete.[141] In contrast, the plaintiff in *Iqbal* alleged that the defendants discriminated against him on the basis of his race, religion, or national origin, which is inconsistent with legal conduct.[142] Justice Souter thus appears to suggest that a claim is facially plausible under *Twombly* and Rule 8(a)(2) if the complaint alleges facts that are inconsistent with lawful conduct, even if those facts are probably not true because a more likely alternative may explain the defendant's actions.[143]

Justice Souter also took issue with the majority's characterization of the allegations in the plaintiff's complaint as conclusory.[144] He did not dispute the proposition that mere legal conclusions are not entitled to an assumption of truth, but he determined that the plaintiff's allegations were *not* legal conclusions and therefore should have been taken as

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135. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting).

136. *See id.* at 1959–61.

137. *Id.* at 1959 (citing *Twombly*, 550 U.S. at 555 (stating that a court must assume all allegations are true even if they are doubtful)).

138. *Id.*

139. *Id.*

140. *See id.* at 1959–60.

141. *Id.* (citing *Twombly*, 550 U.S. at 557).

142. *Id.* at 1960.

143. *See id.* at 1959–60.

144. *See id.* at 1960–61.

true.[145] According to Justice Souter, the plaintiff pleaded specific facts, not a legal conclusion, when he alleged that certain named individuals discriminated against Arab Muslim men on the basis of their race, religion, or national origin.[146] Thus, because the plaintiff's complaint also alleged that the defendants knew of and condoned this discrimination, the plaintiff had shown that the defendants were plausibly liable for discrimination.[147] The majority's fault, Justice Souter contended, was in its consideration of this latter allegation in isolation without reference to the allegations of specific conduct by the defendants' subordinates.[148]

C. *Justice Breyer's Dissent*

Justice Breyer's dissent rebutted what he perceived to be the majority's policy reasons for its interpretation of the Court's decision in *Twombly*.[149] He noted the majority's emphasis on the importance of freeing government officials from the burdens of litigation, but he posited that the law can forestall interference with official government work without resorting to the facial plausibility standard for pleading.[150] For example, a trial court could respond to a defendant's assertion of qualified immunity by structuring discovery in a way that diminishes unwarranted burdens on government officials, such as by obtaining and evaluating discovery from lower level officials before allowing discovery related to higher level officials.[151] Justice Breyer decisively stated that the majority did not provide any convincing arguments for why these alternative means of managing cases are inadequate, and he would have affirmed the denial of the defendant's motion to dismiss.[152]

IV. IMPLICATIONS

The Court's decision in *Ashcroft v. Iqbal*[153] affects every party to a civil lawsuit filed in any district court in the United States. Important-

145. *Id.*

146. *Id.* at 1960. The plaintiff named the chief of the FBI's International Terrorism Operations Section and the assistant special agent in charge for the FBI's New York field office as specific individuals who unconstitutionally discriminated against Arab Muslims. *Id.*

147. *See id.* at 1960–61.

148. *Id.* at 1960.

149. *See id.* at 1961–62 (Breyer, J., dissenting).

150. *Id.* at 1961.

151. *Id.* at 1961–62.

152. *Id.* at 1962.

153. 129 S. Ct. 1937 (2009).

ly, if the pleading standards developed in civil procedure jurisprudence prior to *Bell Atlantic Corp. v. Twombly*[154] and *Iqbal* did in fact give defendants fair notice of any claims against them, the effects of *Iqbal* will unfairly disadvantage plaintiffs in a "dramatic departure from settled procedural law."[155] But that is probably an understatement. The Supreme Court's decision has the potential to confuse the traditional roles of judge and jury, result in the dismissal of many meritorious claims, and undermine the civil process of discovery. Ultimately, the decision may be superseded by an act of Congress.

Under *Iqbal* facts are merely consistent with liability and thus do not state a plausible claim for relief if the court believes a defendant's conduct can be explained by a more likely alternative.[156] Thus, the Court in *Iqbal* is essentially asking judges to assess the credibility of plaintiffs' allegations because a judge must consider whether those allegations are probably true when the judge determines whether a more likely alternative may explain the conduct alleged. The Court asks judges to make that determination according to their common sense and experience.[157] Yet, a critical justification for the American right to trial by jury has been that jurors, unlike an individual judge, bring to bear a broad spectrum of experiences and opinions that reduces the potential for bias and better ensures that the law will be applied according to society's current values.[158] That justification is lost when an individual judge can, according to his common sense and experience, conclude that the allegations in the plaintiff's complaint probably did not happen, thus dismissing the plaintiff's claim before the plaintiff ever gets the chance to discover evidence that may show its claim *was* probable.

The *Iqbal* decision also frustrates the purpose of discovery because the standard for pleading, which occurs before discovery, now more closely resembles the nonmovant's burden in a motion for summary judgment, which usually occurs after discovery is complete. In order to defeat a defendant's motion for summary judgment, after the defendant has met its burden of production by showing that the plaintiff cannot produce evidence on one or more of the elements of its claim,[159] the plaintiff must produce evidence on which a jury could reasonably find in favor of

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154. 550 U.S. 544 (2007).

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

156. *See Iqbal*, 129 S. Ct. at 1950.

157. *Id.*

158. *See* CHARLES W. JOINDER, CIVIL JUSTICE AND THE JURY 138 (Greenwood Press 1972) (1962).

159. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

the plaintiff, and evidence is construed in favor of the plaintiff.[160] Similarly, in order to survive a motion to dismiss under *Iqbal*, a complaint must allege facts that, if taken as true, prove the plaintiff's version of events is the most likely one.[161] The plaintiff's version must be the "most likely one" in the eyes of the judge because the judge's perception of a more likely factual alternative will render the plaintiff's allegations "merely consistent" with the defendant's liability and, therefore, insufficient to state a claim for relief under the plausibility pleading standard.[162]

The Court's decision in *Iqbal* imposes a burden on a plaintiff defending a motion to dismiss that is probably even greater than the burden of a plaintiff on the receiving end of a summary judgment motion; the latter plaintiff does not have to show that its version of the facts is more likely than any other alternative. Rather, summary judgment is inappropriate when a genuine issue of material fact exists, or when the defendant fails to meet its burden of proving that the plaintiff cannot show evidence in support of one or more elements of a claim.[163] Thus, the *Iqbal* decision can kick plaintiffs out of court before discovery starts when courts have previously refrained from doing so even after discovery ends. Moreover, under *Iqbal* the defendant who moves to dismiss before discovery—unlike the defendant who moves for summary judgment after discovery—has no burden of production whatsoever.

Given these problematic implications of *Iqbal*, it is perhaps unsurprising that Congress reacted swiftly to the decision. On July 22, 2009, Senator Arlen Specter introduced a bill called the Notice Pleading Restoration Act of 2009,[164] which would supersede *Iqbal* and restore the authoritative force of *Conley*'s "no set of facts" test for the sufficiency of pleading.[165] Similar legislation was proposed in the House of Representatives on Novemember 11, 2009, by Representative Jerrold Nadler.[166] Because seven of nine Supreme Court Justices decided in favor of *Iqbal*'s precursor *Twombly*, however, these bills may face more opposition than this quick congressional reaction suggests.

CASSIDY M. FLAKE

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160. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) (citing Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)).

161. *See Iqbal*, 129 S. Ct. at 1951.

162. *See id.* at 1950–52.

163. FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 323.

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

165. *See id.*

166. *See* Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

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