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The Scientific Impossibility of Plausibility

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The Scientific Impossibility of Plausibility

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I. INTRODUCTION

This interdisciplinary Article employs a scientific approach to euthanize any suggestion that plausibility pleading is empirically supportable. In the *Twombly*¹ and *Iqbal*² decisions in 2007 and 2009, the Supreme Court replaced the liberal notice pleading standard of *Conley v. Gibson*³ with a heightened requirement⁴ that pleadings must be plausible to survive a motion to dismiss.⁵

Unlike previous scholarship, I address plausibility in light of a broader defect plaguing all legal theory; courts are not required to defend their hypotheses or legal theories in the same empirical manner as scientists.⁶ For example, lower courts and practitioners alike are forced to assume and accept the existence of the plausibility standard simply because it was conjured by the Supreme Court. Admittedly, a scientific perspective may limit development of the law, but it ensures that judges, scholars, and legal practitioners are practicing a body of law which at least partly reflects the reality and limitations of our physical universe. This Article demonstrates plausibility pleading is devoid of any connection to that reality.

The Article begins with a brief analysis of what the language of *Iqbal* and *Twombly* claims plausibility pleading is, followed by a careful examination of the additional subtext in the decisions which explains what plausibility is not.⁷ I demonstrate that the most conspicuous and important aspect of this subtext is the significant judicial effort the *Twombly* Court expended to emphasize the consis-

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

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

3. 355 U.S. 41 (1957).

4. *See infra* note 135 and accompanying text.

5. *See infra* note 43 and accompanying text.

6. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2717 (Lesley Brown ed., 4th ed., 1993) (defining scientific method "as [a] method of procedure that has characterized natural science since the [17th century], consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypothesis").

7. *See infra* Part II.

tency of its decision with the 2002 *Swierkiewicz*⁸ decision, in which a unanimous Supreme Court reaffirmed the previously existing motion to dismiss standard.⁹

Next, in accord with the Article's unique approach, I examine the actual pleadings in the *Swierkiewicz* case.¹⁰ Therein, the analysis of the pleadings reveals the absolute falsity of the Supreme Court's claim that *Twombly* is consistent with *Swierkiewicz*.¹¹ I explain how the motion to dismiss in *Swierkiewicz* expressly argued for the application of the identical plausibility standard adopted in *Twombly* and *Iqbal*,¹² and I further explain how this is the same standard the Court unanimously rejected seven years prior in *Swierkiewicz* as being beyond its power to implement.¹³

Using an analogy to Bayesian mathematical theory, the Article demonstrates, despite the Supreme Court's claim to the contrary, that the plausibility analysis is a *probability* analysis.¹⁴ I argue this probability analysis is abhorrent to the constitutionally mandated division of labor between judge and jury in the civil system,¹⁵ and it represents a radical, normative shift in established pleading standards.¹⁶

The Article next applies modern neuroscientific research discussing limits on human beings' ability to empathize, and it specifically discusses the existence of a genetic predisposition to bias against phenotypically distinct individuals.¹⁷ I explain how this research dispels the scholarly suggestion that plausibility and its encouragement of "judicial experience and common sense"¹⁸ is a waypoint to a laudable, empathy based, utopian judicial state.¹⁹

Additionally, the Article demonstrates the first step in determining plausibility—the separation of law from fact is widely acknowledged, including by the Supreme Court itself—is as an impossible feat.²⁰ Further, the Article reveals how markedly similar plausibility is to a constitutionally prohibited credibility analysis.²¹

8. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

9. *See id.* at 514–15.

10. *See infra* subsection III.A.2.

11. *See infra* subsection III.A.2.

12. *See infra* notes 111–116 and accompanying text.

13. *See infra* notes 117–122 and accompanying text.

14. *See infra* subsection III.B.1.

15. *See infra* section III.B.

16. *See infra* section III.B.

17. *See infra* subsection III.C.1.

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

19. *See infra* subsections III.C.1–2.

20. *See infra* subsections III.D.1–2.

21. *See infra* section III.E.

Finally, the Article suggests plausibility analysis is a nonsensical amalgam of *Federal Rules of Civil Procedure* 8, 9(b), 11 and 12.²² I demonstrate any pleading deemed not plausible pursuant to Rule 12(b)(6) also violates Rule 11.²³ Further, I show that the pleading standard of Rule 8 is now indistinguishable from and possibly higher than Rule 9(b)'s heightened pleading standard.²⁴

II. WHAT THE SUPREME COURT CLAIMS PLAUSIBILITY IS AND IS NOT

As a pleading standard, plausibility was birthed in *Twombly* and developed in *Iqbal*.²⁵ *Twombly* involved a suit against a number of telecommunication companies alleging an illegal agreement or conspiracy of noncompetitive behavior, violative of antitrust law, had harmed consumers.²⁶ *Twombly* overruled the language of *Conley*, which for years had been the mantra by which federal courts determined whether to dismiss a complaint.²⁷ The *Conley* standard, however, was reaffirmed by the Supreme Court in *Swierkiewicz* in 2002.²⁸ The *Swierkiewicz* decision is remarkable because a unanimous Supreme Court reaffirmed that it was without constitutional power to change the pleading standard announced in *Conley*.²⁹ Under *Conley*, a complaint would not be dismissed unless it appeared beyond doubt that a plaintiff could develop no set of facts in support of the com-

22. See *infra* section III.F.

23. See *infra* subsection III.F.1.

24. See *infra* subsection III.F.2.

25. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (referring to the *Twombly* decision as a starting point for plausibility analysis and elaborating on the requirements of the plausibility analysis as laid down in *Twombly*).

26. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007) (“[T]his action against petitioners, a group of ILECs, plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” (citation omitted)).

27. *Id.* at 562–63. In overruling *Conley*, the court noted:

We could go on, but there is no need to pile up further citations to show that *Conley*'s “no set of facts” language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.

Id.

28. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

29. *Id.* at 514–15.

plaint.³⁰ *Twombly* altered this liberal test for determining the legal sufficiency of a complaint.³¹

Iqbal followed *Twombly* and was more politically charged. It involved a post-September 11th lawsuit brought by Arab-Muslim detainees against the federal attorney general and the head of the FBI.³² It alleged executive-level, illegal, race-based, and discriminatory policies—developed and enforced by the two named defendants—resulted in their detention.³³ Now, post-*Iqbal*, in determining the legal sufficiency of a complaint under a Rule 12(b)(6) motion, a federal district court judge must determine whether a complaint is *plausible*.³⁴ If not, a complaint is dismissed as failing to state a claim upon which relief can be granted.³⁵

Determining the plausibility of a complaint is a two-step process.³⁶ First, a court must separate factual content from nonfactual content (legal conclusions, etc.).³⁷ The non-factual allegations are ignored as if they do not exist for the purposes of determining the sufficiency of the complaint.³⁸ The justification for ignoring non-factual allegations

30. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

31. *Twombly*, 550 U.S. at 562–63.

32. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009). The relevant and succinct facts of *Iqbal* include the following:

Respondent Javid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

Id.

33. *See id.*

34. *Id.* at 1949 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Twombly*, 550 U.S. at 570)).

35. *Id.*

36. *Id.* at 1950 (“Our decision in *Twombly* illustrates the two-pronged approach.”).

37. *Id.* at 1951 (“In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. . . . When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

38. *Id.* at 1951 (“We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth.”).

is that only well-pleaded facts, as opposed to well-pleaded allegations of the non-factual variety, are entitled to the presumption of truth at the motion to dismiss stage.³⁹ Second, the process involves a determination of whether the factual content of the complaint—taken as true, examined in isolation, and afforded the favorable presumption mentioned above—demonstrates a plausible entitlement to relief.⁴⁰

Under this two-step process, the Supreme Court expanded on the definition of plausibility described above.⁴¹ According to the Court, a complaint which contains factual allegations consistent with the theory of alleged recovery establishes sheer possibility of entitlement to relief, but falls short of the line between possibility and plausibility.⁴² Only a complaint establishing *plausible* entitlement to relief will survive a motion to dismiss, but one which merely establishes possibility of relief is dismissed without discovery.⁴³

The Court further explained that a complaint is plausible only when the factual allegations permit, not merely an inference, but a reasonable inference the plaintiff was harmed as a result of the alleged cause of action.⁴⁴ Despite these references to possibility and plausibility, the Court explains it is not engaging in probability analysis.⁴⁵

Finally, and most remarkably in my opinion, is the great judicial effort the Supreme Court expended in the *Twombly* opinion to reassure that plausibility is no different than the pleading standard reaf-

39. *Id.* (distinguishing the presumptions afforded legal conclusions and facts in a complaint, and stating “[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’”).

40. *Id.* (describing the second step of the plausibility analysis as “consider[ing] the factual allegations in respondent’s complaint to determine if they plausibly suggest an entitlement to relief”).

41. *See supra* notes 25–31 and accompanying text.

42. *Id.* at 1949 (explaining the difference between possibility and plausibility, stating “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007))).

43. *See id.* Some scholars analogize the hasty, plausibility-based, pre-discovery, and judicial dismissal of the discrimination claims in *Iqbal* to the infamous *Korematsu* case, which upheld the constitutionality of the internment of Japanese Americans, and find the result just as offensive. *See, e.g.,* Dawinder S. Sidhu, *First Korematsu and now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 *BUFF. L. REV.* 419, 426–27 (2010).

44. *See Iqbal*, 129 S. Ct. at 1949 (describing “facial plausibility” as “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”).

45. *See id.* (stating, unambiguously, that “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully”).

firmed in *Swierkiewicz*.⁴⁶ As a result of this consistency, the *Twombly* Court explains plausibility is not a heightened pleading standard.⁴⁷ Consistency with *Swierkiewicz* was critical to the validity of *Twombly* because *Swierkiewicz* emphasized that heightened pleading standards can only be achieved via the procedure established in the *Rules Enabling Act* and not by judicial interpretation.⁴⁸

III. THE IMPOSSIBILITY OF PLAUSIBILITY

A. Ignored Pleadings

1. *The Pre-Iqbal Possibility of Consistency between Twombly and Swierkiewicz*

In order to appreciate the importance of the Court's 2002 *Swierkiewicz* decision, it is necessary to put that case in the context of reaffirming the pleading standard *Conley* announced. Much has been written on the difference in the old *Conley* standard and the famous language now retired by the *Twombly* decision. In my conversations with professor Glashausser, he believed it was unnecessary for the *Twombly* Court to retire the "no set of facts"⁴⁹ language from *Conley* in order to conclude the *Twombly* complaint was legally insufficient.⁵⁰ I agree. The *Conley* complaint was plausible under the *Twombly* plausibility standard and the *Twombly* complaint did not provide enough notice to satisfy the *Conley* standard.⁵¹ If *Twombly* truly was consistent with *Swierkiewicz*, plausibility in *Twombly* would then merely be alternative phraseology for the requirement that a pleading provide adequate notice.⁵² Before *Iqbal*, but not after, this was a plausible⁵³ interpretation of *Twombly*.

The oft-quoted language from *Conley* is 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."⁵⁴ According to the *Twombly* opin-

46. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569–70 (2007) (explaining at length the consistency between *Swierkiewicz* and plausibility).

47. *See id.* at 569 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002))).

48. *Id.* at 569–70 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)).

49. *Id.* at 562–63 (criticizing and overruling *Conley's* language).

50. Thanks to my colleague Alex Glashausser for indulging me in many debates over the impact of *Twombly*.

51. *See infra* notes 70–77 and accompanying text.

52. *See infra* notes 70–77 and accompanying text.

53. Pun intended.

54. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

ion, this was an appropriate standard in the context of the *Conley* complaint.⁵⁵

Examining that context, *Conley* involved Black railway workers suing under the *Railway Labor Act*.⁵⁶ They alleged their union representative discriminated against them on the basis of race and did not represent them fairly.⁵⁷ They further alleged this discrimination was a direct violation of the *Railway Labor Act*, which mandated equal representation of all workers fairly and without discrimination based on race.⁵⁸

According to the Supreme Court, the concrete allegations of the *Conley* complaint can be summed up as follows:

[1] Petitioners were *employees* of the Texas and New Orleans Railroad at its Houston Freight House. [2] Local 28 of the Brotherhood was the designated bargaining agents under the Railway Labor Act for the bargaining unit to which petitioners belonged. [3] A *contract* existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. [4] In *May 1954*, the Railroad *purported to abolish 45 jobs* held by petitioners or other Negroes all of whom were either discharged or demoted. [5] In *truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority*. [6] Despite *repeated pleas by petitioners*, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. [7] The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. [8] And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.⁵⁹

In support of dismissal for failure to state a claim, the union in *Conley* argued “that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper.”⁶⁰ In rejecting this assertion, the Supreme Court stated:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a “short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.⁶¹

55. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (“To be fair to the *Conley* Court, the passage should be understood in light of the opinion’s preceding summary of the complaint’s concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief.”).

56. *Conley*, 355 U.S. at 42–43.

57. *Id.*

58. *Id.* at 43.

59. *Id.* (emphasis added).

60. *Id.* at 47.

61. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

The Court reiterated the “purpose of pleading is to facilitate a proper decision on the merits.”⁶² In 2002, *Swierkiewicz* also reaffirmed that a complaint will survive a motion to dismiss “because it gives . . . fair notice of the basis for petitioner’s claims.”⁶³

The *Conley* pleadings would have survived the *Twombly* plausibility analysis. In fact, *Twombly* noted that the language quoted above may have been suitable for *Conley*, in light “of the complaint’s concrete allegations.”⁶⁴ For this same reason, the *Swierkiewicz* pleadings would have survived the *Twombly* plausibility analysis. That complaint—like the *Conley* complaint—also contained concrete allegations which would give notice:

Applying the relevant standard, petitioner’s complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner’s claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner’s claims are and the grounds upon which they rest. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.⁶⁵

Central to the plausibility debate is the *Twombly* Court’s determination that the *Twombly* complaint’s allegation of parallel conduct made conspiracy conceivable but not *plausible*.⁶⁶ The *Twombly* Court is clear, however, that even if there was no allegation of parallel conduct as the basis of an agreement, the complaint would still be dismissed because it failed to satisfy *Conley*’s standard, which was an articulation of Rule 8(a)(2)’s notice requirement:

If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint’s references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a seven-year span in which the [section] 1 violations were supposed to have occurred . . . the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form [11], which the dissent says exemplifies the kind of “bare allegation” that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to

62. *Id.* at 48.

63. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

64. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007).

65. *Swierkiewicz*, 534 U.S. at 514 (emphasis added) (citations omitted).

66. *See Twombly*, 550 U.S. at 556–58 (explaining that parallel conduct does not plausibly suggest conspiracy).

answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the [section] 1 context would have little idea where to begin.⁶⁷

In *Twombly*, the Supreme Court "retired" the no set of facts language from *Conley*, not because it thought it was wrong but because it felt it was wrongly interpreted.⁶⁸ As a result, the Court in *Twombly* is careful to define any inconsistency between plausibility and the *Conley* standard not as conflict, but only as "ostensible conflict," or conflict in the application.⁶⁹

The *Twombly* Court interpreted the *Conley* language to mean "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."⁷⁰ *Conley* therefore described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.⁷¹

The *Twombly* Court is absolutely correct. Interpreted literally, the *Conley* language could be extrapolated to a ludicrous extent. Consider the following hypothetical pleading:

On *date*, in Topeka, Kansas, the Pope, after getting stoned while attending a pro-choice rally, on a secret trip from the Vatican to attend a Kansas City Royals game, negligently drove a motor vehicle against the plaintiff, Sarah Palin, while the plaintiff was tooling around town with her best friends Michelle Obama and Hillary Clinton. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses.⁷²

Under established jurisprudence regarding motions to dismiss, the allegations in this hypothetical pleading must be taken as true even if the allegations seem improbable or unlikely to be proven true.⁷³ Even post-*Iqbal*, the factual allegations are purportedly still taken as true at the motion to dismiss stage.⁷⁴ Under *Conley*, as long as the claim

67. *Id.* at 565 n.10 (emphasis added) (citations omitted).

68. *Id.* at 563 (describing the language of *Conley* as not incorrect per se, but as "an incomplete, negative gloss on an accepted pleading standard," stating that the "language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

69. *Id.* at 560–61 ("Plaintiffs' main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley's* statement construing Rule 8: '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.'" (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957))).

70. *Id.* at 563.

71. *Id.*

72. Thanks to Alex Glashauser for inspiring this illustrative complaint. Of course this assumes that Sarah Palin earns wages.

73. *Hughes v. Roe*, 449 U.S. 5, 10 (1980).

74. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–52 (2009) (comparing the presumption of truth afforded factual allegations with the lack of any such presumption for legal conclusions); see also *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("[W]hen ruling

was possible or conceivable, it survived the 12(b)(6) motion even if it appeared, as above, “that a recovery is very remote and unlikely.”⁷⁵ The reason for this is that the merits of the claim should not be addressed at the pleading stage.⁷⁶ True, the above pleading might violate Rule 11(b)(3),⁷⁷ but it would survive a motion to dismiss. Despite *Conley’s* liberal standard for surviving a motion to dismiss, not every complaint survived.

For example, even under *Conley*, a complaint against Superman for emerging from a comic book and battering the reader might not survive. A court could take judicial notice of the fact that Superman does not exist and that he cannot come to life from a comic book. In fact, such allegations would probably not survive a Rule 12(f) motion to strike. Despite these limits, taken to the fullest extrapolation, the language of *Conley* potentially allowed factually ludicrous complaints to survive a Rule 12(b)(6) motion as long as the underlying legal claim was cognizable.

As a result, the *Twombly* Court may have concluded *Conley’s* no set of facts language should be interpreted as presupposing that the allegations of the complaint put the defendant on “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁷⁸ In other words, according to *Twombly*, the *Conley* language should mean that once a plaintiff has stated a claim, it should not be dismissed unless no facts in support of the claim were alleged.⁷⁹ Significantly, *Twombly* did not dispel *Conley’s* notice requirement for stating a claim, but added *plausibility* to notice as an additional requirement for stating a claim.⁸⁰

on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.”); *Twombly*, 550 U.S. at 556 (“[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”).

75. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 326 (1974)).
76. *See, e.g.*, *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (“A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.”).
77. FED. R. CIV. P. 11(b)(3) (requiring that the factual contentions appear to have evidentiary support).
78. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).
79. *Twombly*, 550 U.S. at 56 (“[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”).
80. *Id.* at 558 (“Some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.” (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003))).

The complaint in *Twombly* failed to satisfy the *Conley*-based notice requirement for stating a claim. As a result, a *plausible*⁸¹ interpretation of plausibility after *Twombly* but before *Iqbal*—by those seeking to marginalize *Twombly*'s impact on pleading—permits relegation of the plausibility test to the stature of harmless error, dicta, superfluous analysis, or of being applicable only to antitrust claims.⁸² The complaint would not have stated a claim even if plausibility was never applied.⁸³

The specificity of the *Conley* and *Swierkiewicz* complaints, on the one hand, are distinguishable from the *Twombly* complaint, on the other. The italicized language in the block quotes⁸⁴ from the *Swierkiewicz* and *Conley* cases reveals the similarity of the specificity. In *Conley*, the complaint specified the month the alleged discrimination took place, the number of Black workers fired, the fact that Whites were hired largely to fill the positions, and the specific bargaining agent who allegedly violated federal law.⁸⁵ Likewise, the *Swierkiewicz* complaint alleges the dates when the alleged discriminatory acts took place and the national origins and ages of the persons involved in the firing of the plaintiff.⁸⁶ The contrasting absence of notice in the *Twombly* complaint is conspicuous, as discussed in footnote ten of the *Twombly* opinion.⁸⁷

This interpretation of *Twombly* relegates the importance of plausibility to the decision's outcome and simultaneously emphasizes the decision as a mere modification of the *Conley* notice-based standard, which accounts for the fact-specific complaint in *Conley*. The *Erickson v. Pardus*⁸⁸ opinion—which came down only two months after *Twombly*—provides further support for this limiting interpretation of *Twombly*.

In *Erickson*, a prisoner alleged a “constitutional violation under 42 U.S.C. § 1983.”⁸⁹ He further alleged: “(1) he had hepatitis C; (2) he was receiving treatment in prison; (3) prison officials were withholding his hepatitis C medicine; and (4) his life was in danger as a re-

81. Again, pun intended.

82. See *Twombly*, 550 U.S. at 558 (demonstrating the plausibility standard was introduced to balance the costs of discovery in an antitrust suit with what the plaintiff must show to subject the defendant to the burdens of antitrust discovery).

83. See *id.* at 565 n.10.

84. See *supra* notes 59, 61, and 65 and accompanying text.

85. *Conley v. Gibson*, 355 U.S. 41, 43–44 (1957).

86. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

87. *Twombly*, 550 U.S. at 558 n.10.

88. 551 U.S. 89 (2007).

89. *Id.* at 89; see also Michael C. Leitch & Ryan C. Hudson, *The Twombly Trilogy: Exploring the New “Plausibility” Standard for Motions to Dismiss in Kansas Federal Courts*, 79 J. KAN. B. ASS'N, May 2010, at 20, 22 (analyzing *Erickson*'s significance concerning *Twombly*).

sult.”⁹⁰ The Supreme Court presumably concluded the complaint was plausible by citing to *Twombly*,⁹¹ which in turn was cited as reaffirming the notice requirements of *Conley*,⁹² the case *Twombly* expressly overruled.

Even though it was analytically possible to marginalize the import and changes wrought by the plausibility standard in *Twombly*,⁹³ the elaboration of the plausibility standard in *Iqbal* forecloses any such attempt.

2. *The Swierkiewicz Pleadings*

The *Iqbal* complaint, similar to the *Conley* and *Swierkiewicz* complaints, contained specific dates, described specific events, and made specific allegations.⁹⁴ As previously described, the current plausibility test, as refined by *Iqbal*, requires the Court to ignore non-factual allegations in assessing the legal sufficiency of a complaint.⁹⁵ Assess-

90. Leitch & Hudson, *supra* note 89, at 22 (citing the facts listed in *Erickson*).

91. *Erickson*, 551 U.S. at 93.

92. *Id.* The *Erickson* Court specifically attributed *Twombly* credit for a quoted passage from *Conley*, stating:

Federal Rules of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary, the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rest.”

Id. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

93. *See supra* notes 79–92 and accompanying text.

94. *See Sidhu, supra* note 43, at 428–433 (explaining the painstaking detail of the allegations in the *Iqbal* complaint and clearly demonstrating the specificity of the allegations in terms of dates, parties, and conduct that constituted constitutional violations).

95. According to *Iqbal*, the first step in the plausibility analysis is to identify and reject allegations that are legal conclusions or conclusory. “We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). Allegations not entitled to the presumption of truth are legal conclusions. *See id.* “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,” even when such a conclusion is couched as a factual allegation.” *Id.* at 1949. The next step is to reject these legal conclusions. *See id.* The *Iqbal* court clarifies that rejection is the equivalent of disentitling an allegation to the presumption of truth:

To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs’ express allegation of a “contract, combination or conspiracy to prevent competitive entry,” because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

Id. at 1951 (citation omitted).

ing the sufficiency of the complaint is then based on the remaining factual allegations.⁹⁶

Iqbal treated all allegations in the complaint that contained a legal theory of recovery as nonfactual, and not entitled to the presumption of truth.⁹⁷ For example, allegations of discrimination were treated as legal conclusions.⁹⁸ As a result, under the *Iqbal* version of plausibility, the allegation of discrimination in *Conley* would be ignored and the allegation of discrimination in *Swierkiewicz* would be irrelevant if the justices felt the treatment could be alternatively explained.⁹⁹ Indeed, there is nothing in the language of the *Conley* or *Swierkiewicz* complaints foreclosing the existence of an alternative reason for those defendants' actions.¹⁰⁰

A closer examination of the *Swierkiewicz* pleadings further demonstrates the disingenuous analysis the Court employed in *Iqbal*, where the Court accepted the identical pleading theory it emphatically and gratuitously explained it was without power to adopt in *Swierkiewicz*.¹⁰¹ In *Swierkiewicz*, the plaintiff, a Hungarian national, had worked as a senior vice president and chief underwriting officer for a French company since 1989.¹⁰² In 1995, when the plaintiff was fifty-three years old, the French CEO demoted him and transferred the bulk of his underwriting jobs to a thirty-two year old French national.¹⁰³ A year later, the French national was promoted to chief underwriting officer after only one year of underwriting experience, because the French CEO said he wanted to energize the department.¹⁰⁴ After complaining, the Hungarian national was given a Hobson's choice between resigning and being fired. He was subsequently fired.¹⁰⁵

96. *Id.* (explaining the next step after rejection of legal conclusions is to "consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief").

97. *See, e.g., id.* ("These bare assertions, much like the pleading of conspiracy in *Twombly* amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. As such, the allegations are conclusory and not entitled to be assumed true.").

98. *Id.*

99. *Id.* at 1951–52 (explaining that a pleading, which merely states that discrimination occurred, is insufficient to state a claim unless additional information explains why the alleged discrimination is more probable). "As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.* (citation omitted).

100. *See supra* notes 56–63 and accompanying text.

101. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002).

102. *Id.* at 508.

103. *Id.*

104. *Id.*

105. *Id.* at 509.

The plaintiff brought suit alleging his termination was discriminatory on the basis of age, nationality, and the facts described above.¹⁰⁶ The district court dismissed the complaint because the plaintiff had not “alleged circumstances [facts] that support an inference of discrimination.”¹⁰⁷ The appellate court affirmed the dismissal for the same reasons.¹⁰⁸ The Supreme Court, however, reversed the appellate court.¹⁰⁹

Unrecognized in any scholarship is the fact that the *Swierkiewicz* opinion is not merely an implied rejection but an *unequivocal* rejection of plausibility. The motion to dismiss in the *Swierkiewicz* case specifically asked that the complaint be dismissed because a plausible inference of discrimination did not exist.¹¹⁰ A tabular comparison of the statements in the *Swierkiewicz* memorandum supporting the motion to dismiss—located at Table 1—and a description of *Iqbal*’s plausibility standard reveals the identity of *Iqbal*’s plausibility standard with the standard rejected in *Swierkiewicz*.

TABLE 1
A Comparison of the Pleading Standard Rejected in
***Swierkiewicz* with the Standard Accepted in *Iqbal*.**

The Heightened Pleading Standard proposed in the Memo supporting the Motion to Dismiss in <i>Swierkiewicz</i>, but rejected by the Court.	Statements from <i>Iqbal</i> describing the Plausibility Pleading Standard
“In order to survive a motion to dismiss, a plaintiff ‘must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference’ of discriminatory intent.” ¹¹¹	“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” ¹¹²

106. Complaint at 7, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (No. 99-cv-3917).

107. *Swierkiewicz*, 534 U.S. at 509.

108. *Swierkiewicz v. Sorema N.A.*, 5 Fed. App’x 63, 65 (2d Cir. 2001). The appellate court explained its reasons for affirming the dismissal as follows:

With respect to national origin, the only circumstances *Swierkiewicz* pled are that he is Hungarian, others at *Sorema* are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

Id. at 64.

109. *Swierkiewicz*, 534 U.S. at 510.

110. Memo in Support of Defendant’s Motion to Dismiss at 8–13, *Swierkiewicz v. Sorema N.A.*, 86 Fair Empl. Prac. Cas. (BNA) 1324 (S.D.N.Y. 2000) [hereinafter *Swierkiewicz* Memo].

111. *Id.* at 8.

112. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<p>“Bare assertions of discrimination, without more, are insufficient to state a claim of discrimination.” “[C]onclusory allegation ‘fails to satisfy the minimum pleading requirements applicable to claims arising under Title VII’”¹¹³</p>	<p>“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹¹⁴</p>
<p>“Plaintiff alleging [national origin] discrimination must do more than recite conclusory assertions In this action, [plaintiff] does not allege any facts that would connect her national origin with her termination, such that the Court could plausibly infer discriminatory intent.”¹¹⁵</p>	<p>“First, the tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” “[T]he Rule does call for sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹¹⁶</p>

After balancing the vital yet distinct roles of discovery and pleading in the civil justice system, the Supreme Court in *Swierkiewicz* rejected the very pleading standard it adopted in *Iqbal*:

Under the Second Circuit’s *heightened pleading standard*, a plaintiff without direct evidence of discrimination at the time of his complaint must plead [facts giving an inference] of discrimination even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.¹¹⁷

Noteworthy here is the Supreme Court’s description of the exact standard it rejected in *Swierkiewicz* but adopted in *Iqbal* as a “heightened pleading standard.”¹¹⁸ This is problematic because in *Swierkiewicz* the Supreme Court was asked only to decide whether plaintiff’s complaint survived a motion to dismiss based on the *Conley* standard.¹¹⁹

113. *Swierkiewicz* Memo, *supra* note 110, at 10 (quoting and citing *Andrews v. Citigroup Inc.*, No. 99 Civ. 3221(HB), 1999 WL 1277427, at *3 (S.D.N.Y. Dec. 30, 1999); *Alie v. Nynex Corp.*, 158 F.R.D. 239, 245 (E.D.N.Y. 1994)).

114. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

115. *Swierkiewicz* Memo, *supra* note 110, at 10 (alterations in original) (quoting and citing *Farrell v. Child Welfare Admin.*, 77 F. Supp. 2d 329, 332 (E.D.N.Y. 1999)).

116. *Iqbal*, 129 S. Ct. at 1940 (quoting and citing *Twombly*, 550 U.S. at 555).

117. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511–12 (2002) (emphasis added). The Supreme Court values the dichotomy of discovery and pleading as a means to weed out meritless lawsuits in *Swierkiewicz*. *See id.* at 512–13. It also acknowledges that dispositive facts are unavailable at the pleading stage but the purpose of discovery is to allow for the unearthing of such facts. *See id.* Discovery, in the eyes of the *Swierkiewicz* Court, is essential and functioning machinery of the civil justice system. *See id.* *Twombly* and *Iqbal*, by contrast, require the presentation of dispositive facts at the pleading stage and scoff at the notion that discovery is a functioning apparatus of civil justice. *See Iqbal*, 129 S. Ct. at 1953–54.

118. *See Swierkiewicz*, 534 U.S. at 511–12.

119. *See id.* at 512.

Instead of simply reversing the lower courts, a unanimous Supreme Court went further than required in *Swierkiewicz*, gratuitously and strongly reaffirming the general pleading standard.¹²⁰ The Court emphasized Rule 8(a)'s standard did not require pleading of specific facts.¹²¹ As a result, courts were not permitted, in light of the *Rules Enabling Act*, to interpret the *Federal Rules* as requiring heightened pleading other than where it was expressly required by the *Rules*: "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the *Federal Rules*, and not by judicial interpretation.'"¹²²

In *Twombly*, the Court expended significant effort to explain how the plausibility standard is consistent with *Swierkiewicz* and not a forbidden, heightened pleading standard:

Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N.A.*, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise." As the District Court correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." Even though *Swierkiewicz*'s pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that *Swierkiewicz* would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege "specific

120. *See id.* at 514–15.

121. *Id.*

122. *Id.* at 515 (quoting *Leatherman v. Tarrant Cnty. Narcotic Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). Earlier in the opinion, the Court was even more specific on the concept, stating:

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. . . . Just as Rule 9(b) makes no mention of municipal liability under . . . § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. at 513 (footnotes and citations omitted).

facts" beyond those necessary to state his claim and the grounds showing entitlement to relief.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.¹²³

This judicial effort misstates the essence of the alleged defect in the *Swierkiewicz* complaint. The Supreme Court is correct in that the broadly stated issue in the *Swierkiewicz* motion to dismiss was whether the complaint established a prima facie case.¹²⁴ However, that is not the whole truth. There are four elements related to a prima facie case: "(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support and inference of discrimination."¹²⁵ But the only element actually at issue in *Swierkiewicz* was number four. Or, as stated in the motion to dismiss, whether the plaintiff "specifically allege[d] the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference" of discrimination.¹²⁶ The motion to dismiss clearly indicates that *Swierkiewicz* is not a prima facie case, but more precisely concerns whether there is a lack of facts permitting a plausible inference of discrimination.¹²⁷

The relevance of the motion to dismiss to the Supreme Court's ultimate decision is unique in the *Swierkiewicz* case because the appellate decision simply, in its amazingly brief entirety, mirrors the reasoning of the motion to dismiss.¹²⁸ The court of appeals' opinion in

123. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569–70 (2007) (citations omitted).

124. *See, e.g., Swierkiewicz Memo, supra* note 110, at 8 (arguing *Swierkiewicz* failed to meet the requirements of a prima facie case).

125. *Swierkiewicz*, 534 U.S. at 510.

126. *Swierkiewicz Memo, supra* note 110, at 8 (quoting *Andrews v. Citigroup Inc.*, No. 99 Civ. 3221(HB), 1999 WL 1277427, at *3 (S.D.N.Y. Dec. 30, 1999)).

127. *See id.* (showing an absolute void of any argument suggesting that the larger issue was plaintiff's failure to satisfy a prima facie standard because the only time a prima facie case is mentioned is to illustrate that element four of the prima facie case is not satisfied).

128. *Swierkiewicz v. Sorema N.A.*, 5 Fed. App'x 63, 64–65 (2001). In its entirety, sans the reiterated facts, the appellate court stated:

It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6).

To plead discrimination based on national origin, a plaintiff must allege (1) membership, (2) qualification for the job in question, (3) an adverse employment action and (4) circumstances that give support to an inference of discrimination. With respect to national origin, the only circumstances *Swierkiewicz* pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the dis-

Swierkiewicz is completely devoid of the term “prima facie.”¹²⁹ Rather, the decision emphasizes that the sole issue in *Swierkiewicz* is the lack of facts permitting an inference of discrimination.¹³⁰ As the appellate court opined regarding *Swierkiewicz*’s national origin discrimination claim:

With respect to national origin, the only circumstances *Swierkiewicz* pled are that he is Hungarian, others at Sorema are French, and the *conclusory allegation* that his termination was motivated by national origin discrimination. We agree with the district court that *these allegations are insufficient as a matter of law to raise an inference of discrimination.*¹³¹

Similarly, with respect to the age discrimination claim, the appellate court stated “[t]he only circumstance that *Swierkiewicz* alleges gives rise to an inference of age discrimination is Chavel’s comment in 1995 that Chavel wanted to ‘energize’ the underwriting department. We agree with the district court that this allegation is *insufficient as a matter of law to raise an inference of discrimination.*”¹³²

In rejecting these appellate conclusions concerning the necessity of inferences or plausible inferences, the Supreme Court unambiguously stated that the only thing a complaint must do in order to satisfy Rule 8(a)(2) is include “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹³³ The simple purpose of such a statement, according to the Court, is to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹³⁴

Therefore, contrary to the deceptive and broad-brush analysis the Supreme Court employed in *Twombly*, the plausibility pleading standard is not the same pleading standard reaffirmed in *Swierkiewicz*. Rather, it is clearly a heightened pleading standard at odds with the Court’s gratuitous and emphatic pronouncement in *Swierkiewicz* that a heightened pleading standard is impossible through judicial inter-

tribut court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

To plead discrimination based on age, a plaintiff must allege that (1) he is in the protected age group, (2) he is qualified for the job, (3) he was discharged and (4) the discharge occurred under the circumstances giving rise to an inference of age discrimination. The only circumstance that *Swierkiewicz* alleges gives rise to an inference of age discrimination is Chavel’s comment in 1995 that Chavel wanted to “energize” the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination.

Id. (citations omitted).

129. *Id.*

130. *Id.*

131. *Id.* at 64 (emphasis added).

132. *Id.* at 65 (emphasis added).

133. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 512 (2002) (quoting Fed. R. Civ. P. 8(a)(2)).

134. *Id.* at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

pretation.¹³⁵ Summarily, *Iqbal* therefore is a heightening of the pleading standard of Rule 8(a)(2), achieved via a methodology the Supreme Court concluded is barred by the separation of powers inherent in the *Rules Enabling Act*.

Yet, in the seven years between *Swierkiewicz* and *Iqbal*, and without any modification of the *Rules Enabling Act*, the Supreme Court somehow constitutionally raised the pleading standard. One cannot help but wonder whether the sudden difference of constitutional muscle the Court affords itself is related to the fact that the post-September 11th plaintiff in *Swierkiewicz* was northern European while those in *Iqbal* were Arab-Muslims, whose ethnicity was identical to the group of people identified as posing a national security risk.¹³⁶ Hopefully professor Sidhu, who demonstrates the similarities of *Iqbal* and *Korematsu*, is incorrect.¹³⁷ I doubt he is, but one can only hope.

In other words, the *Swierkiewicz* motion to dismiss argued that facts merely consistent with discrimination were not enough to survive a motion to dismiss.¹³⁸ Just as in *Iqbal*, the district and appellate courts accepted that argument in *Swierkiewicz*—the complaint did not survive a motion to dismiss because other nondiscriminatory reasons seemed more likely.¹³⁹

135. See *supra* notes 117–125 and accompanying text. Even more similarities prove the sameness of the pleading standard rejected in *Swierkiewicz* and the standard adopted as plausibility in *Iqbal*. As previously described, much of the motion to dismiss in *Swierkiewicz* sought dismissal because of the lack of facts permitting an inference of discrimination. See *supra* notes 117–125 and accompanying text. However, also contained in the motion to dismiss, and strikingly similar to the comparative probabilities engaged in by the *Iqbal* court, is the argument that the claim should be dismissed in the face of alternative reasons for the harm alleged unless the plaintiff's claim appears more probable. See *infra* section III.B (discussing plausibility as a comparative probability analysis); see also *Swierkiewicz* Memo, *supra* note 110, at 9–13 (arguing for dismissal by referring to various contexts where the necessary inference of discrimination is impossible to achieve because reasons other than discrimination may exist for conduct apparently consistent with discrimination).

136. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (noting that Al Qaeda, the group at fault for September 11th, is a fundamentalist group of Arab-Muslim members).

137. See Sidhu, *supra* note 43, at 505 (explaining *Iqbal* “has perpetuated the notion that it is legally permissible for the government to rely solely on race, religion, or national origin in the wartime context—an aspect of the case that it shares with *Korematsu* and that has been extended by the lower courts to domestic law enforcement policies completely unrelated to wartime exigencies” (footnote omitted)).

138. See *Swierkiewicz* Memo, *supra* note 110, at 9 (setting out many examples of cases where the facts indicate there could possibly be discrimination based on behavior, numerical disparities, etc., but the courts deem them insufficient to survive a motion to dismiss because nothing in the complaint permits an inference of discrimination).

139. See *id.* at 12–13. The defendant gave examples of alternative explanations which were considered in dismissing the complaint, stating:

While the *Swierkiewicz* complaint may have passed the *Twombly*¹⁴⁰ plausibility test, it would have failed under the *Iqbal* standard which the lower courts applied in *Swierkiewicz*. In other words, even if it is possible to argue *Swierkiewicz* would have passed the plausibility test after *Twombly*, the *Swierkiewicz* complaint would be implausible according to *Iqbal*, despite its abundance of specific factual matter. Stripped of what the *Iqbal* Court considers “legal conclusions,” such as allegations of discrimination, the complaints in both *Conley* and *Swierkiewicz* would be implausible because they only allege facts consistent with discrimination.¹⁴¹ This alone, according to *Iqbal*, does not allow a reasonable or *plausible* inference concerning the theory of relief alleged by the plaintiff.¹⁴²

The standard has indeed changed. Commentators and courts alike describe it as a change from the *Conley* conceivability standard to the *Twombly* plausibility standard.¹⁴³ In other words, *Conley* has long been cited for the proposition that “a claim is well-pleaded [as long as] it is logically consistent with a conceivable set of facts that could lead to liability.”¹⁴⁴ *Twombly*, on the other hand, has been interpreted as holding that a complaint must provide “enough facts to state a claim to relief that is plausible on its face.”¹⁴⁵ This is in hopeless conflict with *Swierkiewicz*.¹⁴⁶ Likewise, professor Arthur Miller recently described the plausibility pleading standard of *Iqbal* as a “notice-plus” standard, which he explains is just another name for fact pleading.¹⁴⁷

That *Swierkiewicz* was not discriminated against because of his age is further confirmed by the fact that he was 43 years old when Sorema hired him. It is illogical that an employer who hires an employee when he is a member of the protected age group would suddenly develop an aversion to older people.

Id. Additionally, the defendant provided an example where a “[plaintiff] was hired by the [defendant] at the age of fifty six, a fact which undercuts any inference of age discrimination.” *Id.* at 13 (quoting and citing *Suttell v. Mfrs. Hanover Trust Co.*, 793 F. Supp. 70, 74 (S.D.N.Y. 1992)).

140. See *supra* notes 84–93 and accompanying text.

141. See *supra* notes 84–93 and accompanying text.

142. The lower court opinions in *Swierkiewicz* and the motion to dismiss, which was granted in that case, clearly establish this. See *Swierkiewicz v. Sorema N.A.*, 5 Fed. App’x 63, 64–65 (2001); *Swierkiewicz* Memo, *supra* note 110, at 8–10.

143. See, e.g., Manfred Gabriel, *Twombly: A Journey from the Conceivable to the Plausible*, THE ANTITRUST SOURCE, June 2007, at 4.

144. *Id.*

145. Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1284 (2010) (using professor Campbell’s own language: “a plaintiff must plead ‘factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

146. See *supra* notes 111–116 and accompanying text.

147. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20 (2010).

B. Mathematics

1. *Plausibility as Bayesian Probability Analysis*

If something is repeated enough, it is deemed true. No truer example of this cliché can be found than the following language from *Iqbal*:

The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”¹⁴⁸

If plausibility were akin to a probability requirement, plausibility would be abhorrent to the constitutionally based division of labor in the federal court system¹⁴⁹ because the judge, rather than the jury, would be answering the question of whether or not the allegations in the complaint are more likely accurate than not.¹⁵⁰ In our civil litigation model, this more likely than not analysis is the exclusive province of the jury.¹⁵¹ Judges are forbidden from engaging in this type of analysis even at the summary judgment stage.¹⁵²

The Court’s use of the term “possibility,” however, belies the assertion that plausibility is not a probability analysis because possibility is

148. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citations omitted).

149. See Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1005–06 (“It is unsurprising that *Iqbal* and *Twombly* both strenuously deny that they impose a ‘probability’ requirement at the pleading stage. Probability—at least in the civil context—is typically understood as the province of the jury. Probability pleading would have been a true sea change in the division between judge and jury.”).

150. *Id.* at 1006 (describing the enormous potential for the usurpation of the jury’s function by the judge if plausibility was really equivalent to probability).

151. See Sidhu, *supra* note 43, at 489–90. Professor Sidhu explains:

Assessing which set of facts is more likely to be true is not, however, a proper function of a court at the motion to dismiss stage. Indeed, passing judgment as to which version of facts is “more likely” is not even appropriate at the summary judgment phase, where courts are charged with determining whether “a reasonable jury” could agree with the non-movant’s factual take on the case. In fact, the Supreme Court has held that in reviewing a motion for summary judgment, “[t]his Court’s ‘function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’” The weighing of facts, however, is precisely what the *Iqbal* Court did—at the motion to dismiss stage.

Doing so not only departs from established norms with respect to the Court’s role in entertaining a Rule 12(b)(6) motion, but arguably usurps the duties of the fact-finder, whom the Supreme Court has acknowledged is tasked with the responsibility to “resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” Plainly, the “factfinder’s role” is the “weigher of the evidence.” It may be the case that *Iqbal* does not have the factual support for his claims against *Ashcroft* and *Mueller*. That is, however, a determination that may not be made at the motion to dismiss stage.

Id. (footnotes omitted).

152. *Id.*

an expression of probability. Mathematically, the probability of event A is represented by a real number in the range from zero to one.¹⁵³ An impossible event has a probability of zero and a certain event has a probability of one.¹⁵⁴ Stated another way, an impossible event has a 0% chance of happening and a certain event has a 100% chance of happening.¹⁵⁵ So an event is possible as long as it has a greater than 0% chance of happening, or a greater than zero probability.¹⁵⁶

Therefore, for example, when the *Iqbal* Court concluded the plaintiff's allegations—by being consistent with the theory of recovery alleged in the complaint—rendered the complaint “short of the line between possibility and plausibility,”¹⁵⁷ the Court's necessary mathematical conclusion is that the probability of discrimination is greater than 0% but not probabilistically high enough to be plausible. Plausibility is therefore achieved when the complaint reaches a threshold level of probability, but the Court does not define what this threshold level of probability is. An examination of probability theory is, however, instructive in defining where the *plausibility* threshold lies on the zero to one probability range.¹⁵⁸

The two main philosophies of probability theory are the Frequentist and Bayesian models of probability. Frequentist models are ill-suited for use in the legal system because they involve computing probability in idealized, non-real-world contexts,¹⁵⁹ and they are incapable of incorporating preexisting information into the decision process.¹⁶⁰ Frequentists explore the relative frequency of occurrence, or probability of a random event, in a world of no variables and carefully controlled or presupposed conditions.¹⁶¹ Bayesian probability analy-

153. See THE NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 6, at 2362 (defining “probability” as “a measurable quantity the extent to which a particular event is likely to occur, or a particular situation be the case, expressed by a number between [zero] and [one] and commonly estimated by the ratio of the number of favourable cases to the total number of all possible cases”).

154. See Harold P. Lehmann, *Glossary*, BAYESIAN COMMUNICATION, <http://www.hopkinsmedicine.org/Bayes/PrimaryPages/Glossary.cfm> (last visited July 18, 2011).

155. *Id.*

156. *Id.*

157. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

158. See *infra* subsection III.B.1.

159. E.T. JAYNES, *PROBABILITY THEORY: THE LOGIC OF SCIENCE* xiii (G. Larry Bretthorst ed., 2002); see also JAMES O. BERGER, *STATISTICAL DECISION THEORY AND BAYESIAN ANALYSIS* 74 (2d. ed. 1985) (comparing the shortcomings of the “frequency concept” of probability with the suitability of Bayesian or subjective probability to real-world situations where idealized experimental conditions do not exist).

160. JAYNES, *supra* note 159, at xiii.

161. *Id.* Perhaps professor Rhee was referring only to frequentist probability approaches when he commented on the inapplicability of statistical probability to litigation without acknowledging the existence of Bayesian probability. Robert J.

sis, by contrast, is an approach to statistics which “formally seeks to utilize prior information.”¹⁶² It is a probabilistic model which closely approximates litigation to the extent it seeks to arrive at an inference based on existing information.¹⁶³ Bayesian probability, like legal inference, essentially seeks to process information in a manner that yields the most optimal inferences based on the information.¹⁶⁴

Additionally, the term plausible inference is recognized in the “concepts, methods and solution practices” of Bayesian probability.¹⁶⁵ If something seems logical to a human being it is *plausible* under Bayesian theory.¹⁶⁶ The following illustration of Bayesian plausible reasoning perfectly demonstrates the similarity between Bayesian plausibility and the plausibility referred to in *Iqbal*:

Suppose some dark night a policeman walks down a street, apparently deserted; but suddenly he hears a burglar alarm, looks across the street, and sees a jewelry store with a broken window. Then a gentleman wearing a mask comes crawling out through the broken window, carrying a bag which turns out to be full of expensive jewelry. The policeman doesn't hesitate at all in deciding that this gentleman is dishonest. But by what reasoning process does he arrive at this conclusion?¹⁶⁷

The policeman's conclusion of dishonesty is plausible because there is a certain threshold value of validity, or probability, to it.¹⁶⁸ When Bayesian modelers make an inference about an event's probability or

Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 650 (2006).

162. See BERGER, *supra* note 159, at 3.

163. See JAYNES, *supra* note 159, at xv (indicating the utility of Bayesian probability in legal research since it is “telling us something about the way our own minds operate when we form intuitive judgments”); see also Herman Bruyninckx, *Bayesian Probability 2* (Nov. 2002) (unpublished article) (on file with author and Nebraska Law Review) (explaining the relevance of Bayesian probability to court decisions and using “reasoning in court decisions” as an example of Bayesian probability application).

164. JAYNES, *supra* note 159, at xiv (explaining Bayesian probability is a means of obtaining optimal inferences based on preexisting information). This is analogous to a jury conclusion based on evidence.

165. Bruyninckx, *supra* note 163, at 1.

166. *Id.* at 3.

167. JAYNES, *supra* note 159, at 1.

168. *Id.* Jaynes explains her point, stating:

A moment's thought makes it clear that our policeman's conclusion was not a logical deduction from the evidence; for there may have been a perfectly innocent explanation for everything. It might be, for example, that this gentleman was the owner of the jewelry store and he was coming home from a masquerade party, and didn't have the key with him. But just as he walked by his store a passing truck threw a stone through the window; and he was only protecting his own property. Now while the policeman's reasoning process was not logical deduction, we will grant that it had a certain degree of validity. The evidence did not make the gentleman's dishonesty *certain*, but it did make it extremely *plausible*.

Id.

plausibility, they do so based on prior knowledge about that event.¹⁶⁹ Bayesians assign probabilities to the prior events and use these assigned probabilities to predict the validity or plausibility of a hypothesis to explain previously unobserved events.¹⁷⁰

Mathematically, Baye's rule is expressed as:

$$P(H|D) = \frac{P(D|H)P(H)}{P(D)}^{171}$$

" $P(H)$ is the prior probability of H : the probability that H is correct before the data D are seen."¹⁷²

" $P(D|H)$ is the conditional probability of seeing the data D given that the hypothesis H is true. This conditional probability is called the *likelihood*."¹⁷³

" $P(D)$ is the marginal probability of D ."¹⁷⁴

" $P(H|D)$ is the posterior probability: the probability that the hypothesis is true, given the data and the previous state of belief about the hypothesis."¹⁷⁵

Analogized to *Iqbal*, the Court's probability estimation of discrimination against Muslims by Ashcroft and Mueller before seeing data in the form of allegations in the complaint was the equivalent of $P(H)$.

169. See *Bayesian Statistics*, RELIASOFT CORP., http://www.weibull.com/LifeDataWeb/bayesian_statistics.htm (last visited July 18, 2010) ("The premise of Bayesian statistics (within the context of life data analysis) is to incorporate prior knowledge, along with a given set of current observations, in order to make statistical inferences.").

170. Bruno A. Olshausen, *Bayesian Probability Theory 1–2* (March 1, 2004) (unpublished article) (on file with author and Nebraska Law Review). Olshausen states:

Bayes' rule really involves nothing more than the manipulation of conditional probabilities. Remember that the joint probability of two events, A & B , can be expressed as $P(AB) = P(A|B)P(B) = P(B|A)P(A)$.

In Bayesian probability theory, one of these "events" is the hypothesis, H , and the other is data, D , and we wish to judge the relative truth of the hypothesis given the data. According to Bayes' rule, we do this via the relation $P(H|D) = P(D|H)P(H) / P(D)$.

The term $P(D|H)$ is called the *likelihood* function and it assesses the probability of the observed data arising from the hypothesis. Usually this is known by the experimenter, as it expresses one's knowledge of how one expects the data to look given that the hypothesis is true. The term $P(H)$ is called the prior, as it reflects one's *prior* knowledge before the data are considered.

Id.; see also JAYNES, *supra* note 159, at xiv (explaining Bayesian analysis as "expressing some prior knowledge or some working hypothesis about the phenomenon being observed").

171. See Olshausen, *supra* note 170, at 1.

172. *Bayesian Probability*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bayesian_probability (last modified June 16, 2011, 9:09 AM).

173. *Id.*

174. *Id.*

175. *Id.*

The new data, or (*D*), in support of the hypothesis was the allegations in the complaint. The hypothesis to be tested was whether or not there was discrimination. If we represent the hypothesis of discrimination as (*Discr.*) and the data in support of the hypothesis (allegations in the complaint) as (*Alleg.*), then the proper mathematical rule for the Bayes rule in the *Iqbal* case is:

$$P(\text{Discr.} | \text{Alleg.}) = \frac{P(\text{Alleg.} | \text{Discr.}) P(\text{Discr.})^{176}}{P.(\text{Alleg.})}$$

We may remove *P. (Alleg.)* from the equation since it “usually plays the role of an ignorable normalizing constant.”¹⁷⁷ The equation would now read:

$$P(\text{Discr.} | \text{Alleg.}) = P(\text{Alleg.} | \text{Discr.}) P(\text{Discr.})$$

$P(\text{Alleg.} | \text{Discr.})$ is an expression of what data or allegations the judge would expect to be present if the hypothesis of discrimination was true.¹⁷⁸ This is usually known by the modeler because it expresses how the modeler expects data to look if a hypothesis is true.¹⁷⁹

Bayesian modeling recognizes that this probability function, $P(\text{Alleg.} | \text{Discr.})$, which expresses the likelihood the observed data (allegations) are due to the hypothesis (discrimination), must be qualified or discounted by the subjective state of the modeler’s knowledge. For example, a lay person on a sunny day with no clouds in sight might say that the chance or probability of rain later in the day—given the state of the atmosphere—is low, and he or she might express this belief as a 30% chance of rain or .3 on the probability scale.¹⁸⁰ However, assume the person sees a weather forecast after expressing the probability of rain. The forecast shows a satellite picture of the area indicating rain clouds approaching, and the meteorologist claims there is a very good chance of rain later in the day. After the forecast, the lay person would likely raise the probability of rain later in the day to 80% or .8, for example.¹⁸¹ The weather forecast would be the equivalent of Bayesian data, represented by *Alleg.* in the equation above.¹⁸²

176. See Olshausen, *supra* note 170, at 1–2.

177. *Id.* at 2.

178. See *id.* at 1. Not surprisingly, this expected data would include disparate treatment and detention of individuals based on race and ethnicity, which was present in the allegations of the *Iqbal* complaint.

179. See *id.*

180. DENNIS V. LINDLEY, UNDERSTANDING UNCERTAINTY 43 (2006).

181. *Id.*

182. *Id.*; see also Olshausen, *supra* note 170, at 1–2 (explaining the Bayesian probability theory).

In other words, the Court's estimate of the probability that any allegations consistent with discrimination are actually caused by discrimination,¹⁸³ or $P(\text{Alleg.} | \text{Discr.})$, must be qualified by an expression of the Court's state of knowledge before the allegations in the complaint were added to the Court's knowledge base. That prior probability of discrimination, given the Court's state of knowledge before the allegations in the *Iqbal* complaint, is represented by $P(\text{Discr.})$ in the equation above.¹⁸⁴ In terms of *Iqbal*, $P(\text{Discr.})$ represents what the Court thinks the probability of Ashcroft and Mueller discriminating against Muslims was before the Court considered the new data in the form of post-September 11th allegations made by Muslim detainees in the complaint.

$P(\text{Discr.} | \text{Alleg.})$ represents the new probability of discrimination in light of the new data in the complaint, (*Alleg.*), and processed in light of the knowledge of the Court before the new data was introduced. The probability of discrimination, $P(\text{Discr.})$, therefore represents the old or prior probability of discrimination based on the Court's state of knowledge if the new data in the complaint was not considered.¹⁸⁵ Bayes rule therefore represents "learning" in that the change in probabilities before and after data, or from $P(\text{Discr.})$ to $P(\text{Discr.} | \text{Alleg.})$, represents a transformation from the prior state of knowledge to the posterior state of knowledge when considering the new data discovered.¹⁸⁶ Bayesian mathematicians thus refer to $P(\text{Discr.})$ as the prior distribution and to $P(\text{Discr.} | \text{Alleg.})$ as the posterior distribution.¹⁸⁷

This is the exactly what judges, and for that matter juries, do—even if it is done unconsciously.¹⁸⁸ Much like the layperson in the rain example, they apply their common sense to the evidence, reevaluating the probability of certain events as more and more data in the form of evidence is presented.¹⁸⁹ This process is called plausible rea-

183. Remember discrimination is not the only thing that can result in what could be considered allegations indicative of discrimination. For example, in medical science it is possible that a symptom of a disease is not caused by the disease. See LINDLEY, *supra* note 180, at 84. Chest pain, for example, could be caused by sore muscles as well as cardiac problems. See *id.* In *Iqbal* for example, the judge was deciding whether or not the data (disparate treatment based on race) was due to discrimination or to another legal cause. See *infra* notes 199–200 and accompanying text.

184. See Olshausen, *supra* note 170, at 1–2.

185. See *id.* at 2.

186. See *id.*

187. See BERGER, *supra* note 159, at 75, 126 (explaining the meaning of prior and posterior distributions).

188. JAYNES, *supra* note 159, at 3.

189. *Id.*

soning, and it is precisely a Bayesian comparative probability analysis.¹⁹⁰

Yet, despite its insistence to the contrary, the Supreme Court engages in this comparative Bayesian probability analysis when assessing a complaint's plausibility. For example, the *Twombly* Court first explains that parallel conduct may be consistent with conspiracy.¹⁹¹ It then concludes: "but here we have an obvious alternative explanation. . . . Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."¹⁹²

It is the presence of these "obvious" and "natural" explanations which render conspiracy, the other possible explanation adduced by the plaintiff in his complaint,¹⁹³ implausible. Despite the existence of two possible theories, the Court purportedly has the ability to discern at the pleading stage that one theory is so much more "natural and obvious" that the Court feels justified in foreclosing the development of evidence concerning the other possible conspiracy theory. The Court is clearly employing a Bayesian model to determine which of the possible reasons for the behavior of the telecommunications companies is the more logical explanation.¹⁹⁴

Likewise, in *Iqbal*, the Court did not reject the allegation of discrimination as impossible or having a probability of zero.¹⁹⁵ Instead, like in *Twombly*, the Court felt the existence of another possible cause, which it describes as an "obvious alternative explanation," rendered the plaintiff's theory of recovery *implausible*.¹⁹⁶

190. *Id.* Jaynes described probability reasoning as follows:

[T]he brain, in doing plausible reasoning, not only decides whether something becomes more plausible or less plausible, but it evaluates the *degree* of plausibility in some way. The plausibility for rain by 10 AM depends very much on the darkness of those clouds at 9:45. And the brain makes use of old information as well as the specific new data of the problem; in deciding what to do we try to recall our past experience with clouds and rain, and what the weatherman predicted last night.

Id.

191. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 554 (2007) (explaining that parallel conduct may be consistent with conspiracy and stating "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: *consistent with conspiracy*, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" (emphasis added)).

192. *Id.* at 567–68.

193. *See id.*

194. *See Bruyninckx, supra* note 163, at 3 (explaining plausibility in Bayesian statistics is a measure of the extent to which a conclusion appears logical to a human).

195. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009). "To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical." *Id.* at 1951.

196. *Id.* at 1951–52 ("On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens

In *Twombly*, the Court carefully and deliberately fails to conclude “natural” reasons are more likely to explain the defendants’ behavior than conspiracy.¹⁹⁷ In *Iqbal* the Court felt that both discrimination and nondiscrimination were possible explanations for the harm suffered by the plaintiff, but the Court made a decision at the pleading stage to deny the plaintiff access to discovery because it was able to determine the harm was “likely” caused by nondiscriminatory motivations.¹⁹⁸

Iqbal concludes nondiscriminatory reasons were likely enough a cause of the disparate treatment of Arab men to deny discovery on another admittedly possible cause: discrimination.¹⁹⁹ This illustrates that the plausibility analysis involves comparing the likelihoods or probabilities of discriminatory and the nondiscriminatory explanations. The relevant language in *Iqbal* explains, where complaints such as the *Iqbal* and *Twombly* complaints “plead[] facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.””²⁰⁰

Mathematically then, if we represent the probability of a nondiscriminatory reason being the source of the data or allegations in the complaint as $P(\text{NonDiscr.})$, the Court performed at least the following two Bayesian analyses:

$$P(\text{Discr.} | \text{Alleg.}) = P(\text{Alleg.} | \text{Discr.})P(\text{Discr.})$$

and

$$P(\text{NonDiscr.} | \text{Alleg.}) = P(\text{NonDiscr.})P(\text{Alleg.})$$

After performing both of these, the Court ultimately concluded $P(\text{NonDiscr.} | \text{Alleg.})$ was greater than $P(\text{Discr.} | \text{Alleg.})$, or the observed data was less likely to be caused by nondiscriminatory reasons than by discriminatory reasons.²⁰¹

The Supreme Court’s encouraged use of “judicial experience and common sense”²⁰² to determine plausibility also convincingly demonstrates it engaged in Bayesian probability analysis even if it did not consciously utilize the above mathematical formulae. According to

who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” (quoting *Twombly*, 550 U.S. at 567)).

197. If the court had openly stated this, the aforementioned problems of judicial encroachment on the constitutional landscape reserved for the jury would render plausibility instantly invalid. See *supra* notes 149–52 and accompanying text.

198. See *Iqbal*, 129 S. Ct. at 1951–52 (concluding the arrests were “likely lawful”).

199. See *id.*

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

201. See *supra* notes 199–200 and accompanying text (explaining the comparative likelihoods involved in the *Iqbal* case).

202. *Iqbal*, 129 S. Ct. at 1950 (emphasis added).

professor Jaynes, when describing Bayesian plausibility, “in our reasoning we depend very much on prior information to help us in evaluating the degree of plausibility in a new problem. This reasoning process goes on unconsciously, almost instantaneously, and we conceal how complicated it really is by calling it *common sense*.”²⁰³

In the context of litigation, professor Jaynes demonstrates: “Even in situations where we would be quite unable to say that numerical values should be used, Bayes’ theorem still reproduces qualitatively just what your common sense (after perhaps some meditation) tells you.”²⁰⁴ Professor Arthur Miller, in his recent piece, agrees that plausibility analysis involves comparative probability considerations, explaining “plausibility . . . depend[s] on the relative likelihood that legally actionable conduct occurred versus a hypothesized innocent explanation.”²⁰⁵ Professor Malveaux likewise concludes that establishing plausibility necessarily entails a probability analysis.²⁰⁶

The Third Circuit also does an excellent job of demonstrating that comparative probability analysis is a necessary component of establishing plausibility, or the reasonableness of an inference:

The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts.²⁰⁷

Whether a judge thinks an event or explanation is more plausible or probable than another in light of the allegations is not usually problematic. The judge is human and will naturally and involuntarily so conclude in any situation where competing inferences can be drawn. A problem develops, however, when a judge or court forecloses consideration of one inference based on its belief regarding the greater

203. JAYNES, *supra* note 159, at 3.

204. *Id.* at 146.

205. *See* Miller, *supra* note 147, at 26.

206. *See* Suzette Malveaux, *Front Loading And Heavy Lifting: How Pre-Dismissal Discovery can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 83–84, 85 (2010). In this piece, professor Malveaux further states that instead of clarifying the meaning of plausibility in relation to possibility post-*Twombly*, *Iqbal*’s analysis suggests the applicability of probability is the following:

In comparing the plaintiff’s intentional discrimination thesis to the more innocent one, the Court finds plaintiff’s explanation wanting and therefore not plausible. Although the Court denies that the plausibility standard is a probability one, the Court openly compares plaintiff’s theory of the case to other theories, judges them relative to one another, and rejects plaintiff’s as implausible because of the unlikelihood of its occurrence. Justice Souter—the author of *Twombly*—identifies the Court’s conflation of plausibility and probability in *Iqbal* as a “fundamental misunderstanding of the enquiry that *Twombly* demands.”

Id. at 83–84 (emphasis added).

207. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987).

probability of one inference over another. This is exactly what the Supreme Court did in making its plausibility determination.²⁰⁸

A finding of implausibility in *Iqbal* and *Twombly* means the Court concluded—based on its own common sense, judgment, and experience,²⁰⁹—that it is impossible for a reasonable person to conclude discrimination and conspiracy were more likely than not the cause of the harm to the plaintiffs.²¹⁰ In essence, because possibility is a measure of probability, plausibility analysis requires that two events occur simultaneously, even though their concurrence is mathematically impossible when comparing relative possibilities and avoiding probability determinations.

2. *Locating Plausibility on the Zero-to-One Probability Scale*

i. *Plausibility is no Higher than .51 on the Zero-to-One Probability Scale*

Having established the plausibility calculus is a probability determination, plausibility must then represent a point somewhere on the zero-to-one probability scale. Moreover, because allegations “merely consistent with” a defendant’s liability indicate possibility, but “[stop] short of the line between possibility and plausibility of ‘entitlement to relief,’” plausibility then represents a finding that the probability of an event is higher on the zero-to-one probability scale than mere possibility.²¹¹ Further, since an event is possible if the probability of it occurring is greater than zero,²¹² the exact value represented by plausibility potentially falls anywhere from greater than zero to less than one, and it may seem impossible to quantify.²¹³ However, a combination of the accepted parameters of the civil justice system’s burden of

208. See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010). There, Judge Posner opines that:

The Court said in *Iqbal* that the “plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring.

Id. at 629 (emphasis added) (citation omitted).

209. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

210. See *infra* subsection III.B.2.b (explaining the plausibility consideration in terms of the more likely than not standard of proof).

211. See *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

212. See *supra* note 156 and accompanying text.

213. Perhaps this is what the Supreme Court intended.

proof, the jurisprudence of judgment as a matter of law, and the language of the *Iqbal* decision permits a precise determination of where plausibility lies within the 0%–100% range of potential probabilities.

The ultimate burden of proof in the civil justice system, with few exceptions not relevant here, is the preponderance of the evidence standard. It requires nothing more than having a plaintiff prove the events described in the complaint are more likely than not, or “that the existence of the contested fact is more probable than its nonexistence.”²¹⁴ All this standard requires is that plaintiffs prove the events alleged in support of recovery have a greater probability that they occurred than the probability that they did not.²¹⁵ In the civil system, full recovery is allowed as long as the jury concludes the probability or likelihood of the events alleged is greater than .5.²¹⁶ On a percentage scale, therefore, the ultimate burden in the civil trial is met by the plaintiff proving there is a greater than 50% chance the events described in the complaint occurred.²¹⁷ For the mathematical convenience of working with integers, this threshold may be represented by a probability of 51%.

Requiring a probability greater than 51% to satisfy the plausibility standard would establish a *reductio ad absurdum* because it would mean plaintiffs must satisfy a higher standard of probability at the pleading stage than what is required in order to ultimately prevail in a civil trial—after they have been given the opportunity to develop evidence and testimony in support of their allegations.²¹⁸ So, in terms of locating plausibility on the probability scale, one necessary conclusion is that plausibility can be no higher than 51% probability.

ii. Plausibility is a More Likely than not Analysis

Iqbal requires a *reasonable* inference for plausibility.²¹⁹ The meaning of reasonable inference is well developed in the jurispru-

214. Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance of the Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

215. *See id.* at 1162 (explaining the standard in light of an industrial accident).

216. *See id.* at 1159 (discussing the criticism of full recovery being allowed as long as the likelihood of plaintiff's case is only slightly greater than 50% whereas no recovery is allowed when it is slightly less).

217. This of course assumes the complaints are elementally complete, recite every element of the cause of action, and proof was developed on every issue. The *Iqbal* and *Twombly* complaints were elementally complete in that the Court noted the complaints all contained the necessary elements for discrimination and conspiracy claims respectively. *See, e.g.,* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009).

218. *See* Orloff & Stedinger, *supra* note 214 (describing the ultimate burden of proof in the civil justice system).

219. *Iqbal*, 129 S. Ct. at 1949 (clarifying the meaning of plausibility as “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged” (emphasis added)).

dence of “judgment as a matter of law.” Combining *Iqbal’s* language with the meaning of reasonable inference reveals plausibility is virtually indistinguishable from a more likely than not analysis. This is because plausibility is located at .51 on the zero-to-one probability scale, or very close to it.

Initially, Rule 50’s title was changed from “Directed Verdict” to “Judgment as a Matter of Law” to reflect the identity of the Rule 50 standard with the second prong of the summary judgment standard within Rule 56.²²⁰ Rule 56 requires, initially, that there be no genuine issue of material fact, and further that the moving party is entitled to judgment as a matter of law.²²¹ However, judgment as a matter of law is, according to Rule 50, appropriate when a judge determines a reasonable jury would not have a legally sufficient evidentiary basis to find for the nonmoving party after the party is fully heard on an issue.²²²

Professor Suja Thomas describes the clichéd role of the judge in determining whether or not to grant judgment as a matter of law:

[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The Court also stated that the facts of the [nonmoving party] were to be taken as true, and “justifiable inferences” were to be drawn for the [nonmoving party].²²³

Recent scholarship has challenged the possibility concerning the purported dichotomy²²⁴ of the judge’s role at summary judgment. Professor Gordillo, for example, argues that it is impossible for a judge to determine whether a party could satisfy the ultimate burden of production without weighing the evidence.²²⁵ He explains that the judge

220. See FED. R. CIV. P. 50 advisory committee’s notes on 1991 amendments (“The revision abandons the familiar terminology of *direction of verdict* . . . [and judgment as a matter of law] call[ing] attention to the relationship between [Rule 50 and Rule 56, and] serves to link the two provisions.”); see also Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 39 (2010) (reiterating the Supreme Court has adopted the same standard for summary judgment and for judgment as a matter of law).

221. See, e.g., *Mosley v. City of Chicago*, 614 F.3d 391, 396 n.1 (2010).

222. FED. R. CIV. P. 50(a)(1).

223. Thomas, *supra* note 220, at 21 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 272, 252 (1986)).

224. See *id.* (explaining the purported dichotomy).

225. Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Summary Judgment Standard*, 42 CLEV. ST. L. REV. 263, 276–77 (1994). Professor Gordillo explained:

The Anderson Court stated that a “judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” In other words, a judge must evaluate the sufficiency of the evidence without weighing its credibility. Perhaps courts silently decide whether the movant has carried his burden of persuasion because the court must avoid the appearance of

at summary judgment does not merely decide whether a reasonable jury could find the more likely than not standard satisfied, but that the judge actually decides whether the more likely than not standard is met.²²⁶

Even more recently, professor Thomas argues that when deciding judgment as a matter of law and summary judgment motions, judges “do indeed decide whether they could find for the plaintiff or whether they think that the evidence is sufficient, not whether a reasonable jury could find for the plaintiff or whether a reasonable jury could think that the evidence is sufficient.”²²⁷ She bases her findings on three principles. The first is that when judges purport to be applying the reasonable juror standard they often explain why they think the evidence is insufficient but not why it is sufficient.²²⁸ Second, she argues the reasonable juror standard is incapable of definition.²²⁹ Finally, she explains how different judges come to different conclusions regarding the sufficiency of the evidence when applying the indefinable reasonable jury standard.²³⁰ It is beyond the scope of this Article to fully explore whether or not the judge is deliberately weighing the evidence at the summary judgment stage. However, when the judgment as a matter of law process is examined empirically, the distinction between assessing sufficiency and weighing evidence appears illusory.²³¹

It is not necessary to directly accuse the judiciary of usurpation in order to agree with professor Thomas’s ultimate conclusion about illusory dichotomies. A probabilistic perspective reveals the same result. Using the language of the *Rules*, when a judge grants summary judgment or judgment as a matter of law, he or she concludes no reasonable juror could find the nonmoving party can satisfy the burden of

weighing the evidence before it. Anderson requires the judge to determine whether the evidence can persuade a reasonable jury. Celotex requires the judge to determine whether the evidence persuades the judge. Thus, an inherent difficulty in the summary judgment standard is that, in theory, courts must determine whether a party has produced sufficient evidence to satisfy the burden of production without considering the persuasiveness of the evidence produced. This is an impossibility.

Id.

226. *Id.*

227. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009).

228. *Id.* at 760.

229. *Id.*

230. *Id.* at 760–61. Interestingly, this defect in dichotomy between oneself and the reasonable person is not unique to summary judgment jurisprudence; it haunts the jurisprudence of negligence as well. Instructing jurors not to define *reasonable* based on what they would have done, but rather based on the objective standard of “the reasonable person,” is perhaps a fiction with which the law is comfortable living. But indeed it is a fiction.

231. *See generally id.*

proof.²³² This means the judge concludes there is no chance a reasonable juror could find for the non-moving party. If something has no chance of occurring, it is impossible, or it has a probability of zero.²³³

Therefore, judgment as a matter of law must be denied if a reasonable juror could possibly make the inference necessary for the non-moving party to satisfy its burden of proof. Denying judgment as a matter of law is only permissible when there is no chance a reasonable juror could make the required inference.²³⁴ The necessary inference is unreasonable “[whenever] it is apparent that [the nonmoving party] is unable to carry a burden of proof.”²³⁵ So an inference is reasonable if it is possible the nonmoving party will be able to carry the 51% burden of proof.²³⁶ In other words, judgment as a matter of law must be denied if the probability of a reasonable juror finding the nonmoving party’s version of events as more likely than not is greater than zero. Or, in other words, if it is *possible*.

There are only two ways judges can determine whether an inference is reasonable, or if possible, whether a reasonable juror would make the necessary inference. They either substitute their version of reasonableness for the reasonable juror’s, as professor Thomas suggests, or they can actually locate the metaphysical reasonable juror and channel that person through themselves in the same manner a medium might channel the dead. The former is impermissible according to the Seventh Amendment; the latter—and its required level of dissociation—has not been proven possible. How else can a judge decide what “the,” or for that matter, “a” reasonable juror would find impossible to infer based on the evidence?

If a judge, in denying judgment as a matter of law, is not substituting his or her own experiences for those of the reasonable juror, the necessary implication is that the judge has examined the fictional reasonable person, or all fictional reasonable people, and concluded that at least one reasonable person would believe the nonmoving party satisfied the burden of proof based on the evidence, even if the judge would not so believe. This must be true; if the chance or probability of

232. Judgment as a matter of law reflects a determination by a court that the nonmoving party is unable to carry its burden of proof. See FED. R. CIV. P. 50 advisory committee’s notes on 1991 amendments. Judgment as a matter of law should be denied if, based on the evidence, a reasonable jury could make the inference sought by the nonmoving party. See *id.* (instructing courts to disregard legally insufficient, evidentiary bases in determining the propriety of granting judgment as a matter of law).

233. See *supra* notes 153–56 and accompanying text (explaining the meaning of possibility and probability).

234. See FED. R. CIV. P. 50 advisory committee’s notes on 1991 amendments.

235. *Id.*

236. See Orloff & Stedinger, *supra* note 214 (explaining the burden of proof in civil trials).

a reasonable person believing is zero, no reasonable person would so believe and summary judgment must be granted.²³⁷

Therefore, the statement that a reasonable person could believe the nonmoving party—or draw the inference required to conclude the burden of proof is satisfied—means it is not impossible for a reasonable person to make the necessary inference or form a probabilistic perspective; the probability of a reasonable person so inferring is greater than zero. The judge therefore is necessarily concluding (whether consciously or not) that given a sufficiently large sample size, a reasonable person somewhere within the confines of the universe could make the necessary inferences based on the evidence such that he or she would conclude the nonmoving party's case is more likely than not. By concluding that a reasonable juror would so infer, the judge has in fact concluded the inference the nonmoving party seeks is more likely than not, at least for that reasonable juror.

Because, in order to find an inference reasonable, a judge must conclude that at least one reasonable juror could find it more likely than not, a reasonable inference is the same as the more likely than not standard for that reasonable person. According to *Iqbal*, plausibility is the equivalent of a reasonable inference.²³⁸ At least for one reasonable jury, plausibility is the equivalent of more likely than not, or its minimal location is .51 on the probability scale.

The more similar the actual jurors are to the hypothetical reasonable person, the more closely plausibility approaches a finding of more likely than not. In any event, the extreme similarity of plausibility to a conclusion of more likely than not should be sufficient to give one a pause in examining whether a judge should really do this type of analysis at the pleading stage.

Since reasonableness of an allegation, a fact, a legal theory, etc.,—wherever else reasonableness is used in the context of the *Federal Rules*—means the possibility of concluding its existence is more likely than not, it is “implausible” to assume reasonableness means something else in the context of a Rule 12(b)(6) motion when the *Iqbal* Court clearly states that plausibility exists only when a reasonable inference is possible.²³⁹

Plausibility therefore means the Court concludes after examining the pleadings that it is possible a juror could conclude the alleged theory is possibly more likely than not the cause of the harm suffered. Even if determining the reasonableness of an inference does not in-

237. Summary judgment is appropriate when the evidence is such that no reasonable juror could find for the nonmoving party. FED. R. CIV. P. 56.

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

239. *Id.* at 1949 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

volve a complete usurpation of the jury's function by the judge, it is indeed enough usurpation that it should cause concern. The identity, or at least extreme proximity of plausibility to .51 on the probability scale, means that plausibility is exactly, or very similar to, a more likely than not analysis.

3. *Plausibility's Impropriety at Pleading and Propriety at Summary Judgment*

The Court's plausibility calculus resulting in dismissal without discovery illustrates a preexisting concern about Bayesian probability theory. Recall the Bayesian equation representing the plausibility analysis in *Iqbal*:

$$P(Discr. | Alleg.) = P(Alleg. | Discr.)P(Discr.)^{240}$$

Also recall that $P(Discr.)$ is referred to as the prior distribution or prior probability, and $P(Discr. | Alleg.)$ is referred to as the posterior distribution or probability.²⁴¹ Clearly the more knowledge the judge has about discrimination before the data in the complaint ($P(Alleg.)$) are introduced equates to more confidence we should place upon the judge's estimation of the probability of discrimination ($P(Discr. | Alleg.)$) in light of the new data introduced. Again recall the example of the lay person predicting rainfall.²⁴² The person has more knowledge on which to calculate the probability of rain, and we are more confident their prediction is correct, when the person has more information after the weather forecast.²⁴³

Therefore in the equation above, the more knowledge we impute to the judge before the data in the complaint are introduced, the smaller the difference between $P(Discr.)$, or the probability of discrimination before the data are introduced, and $P(Discr. | Alleg.)$, or the probability of discrimination after the evidence is considered.

One of the criticisms of Bayesian probability is the subjectivity of assigning the prior state of knowledge used to calculate $P(Discr.)$.²⁴⁴ In reality, without absolute knowledge, the modeler cannot determine if he or she is overlooking knowledge which would affect plausibility if known,²⁴⁵ in much the same way a judge—or jury for that matter—is

240. See *supra* note 176 and accompanying text.

241. See *supra* note 187 and accompanying text.

242. See *supra* note 181 and accompanying text.

243. See *supra* note 181 and accompanying text.

244. See BERGER, *supra* note 159, at 125 (“The most frequent criticism of Bayesian analysis is that different reasonable priors will often yield different answers [resulting in] a supposedly unappealing lack of objectivity.”).

245. See Bruyninckx, *supra* note 163, at 21 (“Assigning equivalent probabilities for equivalent states seems to assume that the modeller has ‘absolute knowledge’”).

incapable of concluding for or against a party without evidence unless the sought-after conclusion is obviously one with zero probability.²⁴⁶

By stressing the use of *common sense* and experience as the plausibility decision does, the Court appears to assign a higher knowledge state to the posterior distribution $P(Discr.)$ such that the difference between $P(Discr.)$ and $P(Discr. | Alleg.)$ becomes smaller. In this way, the conclusion of implausibility becomes a foregone conclusion because the more knowledge we assign to the prior distribution then the more similar to the posterior distribution it will be. For example, if a judge is omniscient, then $P(Discr.)$ equates to $P(Discr. | Alleg.)$ because the data introduced in the complaint would not change the state of the judge's knowledge such that there is no Bayesian learning or difference between prior and posterior probabilities.²⁴⁷ Neither judges nor juries are omniscient, but one thing is certain: whether we are predicting rainfall or making a legal inference, the more information a judge or jury possesses, the more confidence we can have in their ultimate inference, which is an estimation of probability, as previously demonstrated.

This correlation between knowledge and correctness is presumably the reason discovery exists. Discovery facilitates the litigation equivalent of the modeler—the judge and, if necessary, the jury—in obtaining the information necessary to actually determine the plausibility of an event. This is especially troubling in light of the fact discrimination and conspiracy were definitely not zero-probability events in *Iqbal* and *Twombly*.²⁴⁸

This significant difference between determining reasonable inferences without evidence at the pleading stage via plausibility, on the one hand, and reasonable inferences after evidence (knowledge) is presented and developed by adversarial parties, on the other, is overlooked by scholars such as professor Hartnett who claim plausibility is not a radical departure from previous litigation norms.²⁴⁹ According to professor Hartnett, “[t]he need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication.”²⁵⁰ Although professor Hartnett is correct, he fails to distinguish

246. See *supra* subsection III.A.1 (describing inferences which may be judicially noticed as impossible).

247. See BERGER, *supra* note 159, at 75, 126 (explaining the meaning of prior and posterior distributions).

248. See *supra* notes 191–94 (discussing the fact that discrimination and conspiracy in *Iqbal* and *Twombly* were not zero probability or impossible events).

249. Edward A. Hartnett, *Taming Twombly even after Iqbal*, 158 U. PA. L. REV. 473 (2010).

250. *Id.* at 498 (emphasis added) (quoting *Bell Atl. Corp. v. Twombly* 550 U.S. 554, 567–68 (2007)). Professor Hartnett also quotes professor Twinings, who has sum-

between the propriety of common sense or inductive reasoning at the motion to dismiss stage and at the summary judgment stage.

The two motions occur in very different contexts, and the applicability of common sense and experience at the pleading stage is much more offensive to adversarial justice than at summary judgment.²⁵¹ In summary judgment, for example, the parties have typically generated evidence in support of their claims.²⁵² When a judge applies common sense and judicial experience in the summary judgment context, it is analogous to applying icing to a cake. But judicial common sense and experience in the motion to dismiss context is akin to baking the entire cake in that it occupies an exponentially larger proportion of the decision-making consideration because no evidence is developed at the pleading stage.

marized some of the common assumptions underlying our rationalist model of adjudication as follows:

The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty. . . . Judgments about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision maker The characteristic mode of reasoning appropriate to reason about probabilities is induction. . . . Judgments about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialized scientific or expert knowledge when it is available.

Id.

251. Thomas, *supra* note 220, at 39–41. Professor Thomas states that:

Discovery has occurred under summary judgment and judgment as a matter of law, as opposed to under the motion to dismiss. As a result, the same evidence is presented under summary judgment and judgment as a matter of law, though sometimes in different forms, for example, live witnesses under judgment as a matter of law versus documentary evidence under summary judgment. In contrast, none of this same evidence is available for the motion to dismiss. It seems likely then that under the plausibility standard, motions to dismiss may be granted inappropriately in at least some cases where facts may be discovered that would make the claim plausible under a summary judgment motion

In addition to differences in rule construction and cost justification, summary judgment and the motion to dismiss are dissimilar based on the role of the courts, though both motions, as stated previously, increase the role of courts in litigation. At the summary judgment stage, courts examine the evidence developed by the parties to determine whether the claim is plausible. On the other hand, at the motion to dismiss stage, courts have only the facts set forth in the complaint to determine whether the claim is plausible. This type of inquiry at the pleading stage gives the courts themselves more power over the parties than at the summary judgment stage where the parties themselves have developed the evidence in the cases, which the courts use to decide the motions.

Id. (footnote omitted).

252. *Id.* at 41.

In the summary judgment scenario, there is an evidentiary base to which the judge can apply common sense and experience to assess the possible conclusions of a reasonable juror based on that evidence. When a judge determines plausibility at the motion to dismiss stage, common sense replaces evidence and the decision is based solely on existing judicial knowledge rather than the permissible extrapolation of what a reasonable juror could infer in light of the developed evidence.

Before plausibility, there simply was no permissible sans-evidence basis for a jury, or a judge for that matter, to determine the likelihood concerning the existence of a plaintiff's alleged theory of recovery, except when judicial notice permitted it or the cause of action involved little green men. Lack of discrimination in *Iqbal*, however, was not judicially noticeable nor was it dependent on the existence of little green men.²⁵³ Essentially, the application of judicial experience and common sense at the pleading stage is, in the words of professor Thomas, a radical "blank check for federal judges to get rid of cases they disfavor."²⁵⁴

Requiring a reasonable inference at the pre-discovery, pre-evidentiary pleading stage is radical. Prior to plausibility pleading, evaluating the reasonableness of an inference or verdict was the exclusive province of a summary judgment motion and completely foreign to the Rule 12(b)(6) context:

The issue in deciding a Rule 12(b)(6) dismissal motion is not whether the plaintiff will ultimately prevail but whether he or she is entitled to offer evidence to support the claims. In contrast, summary judgment litigants do have the opportunity to develop some evidence on the issues. The question at the summary judgment stage of litigation . . . is whether the nonmovant's evidence would support a reasonable verdict in the nonmovant's favor.²⁵⁵

Professor Thomas believes the plausibility pleading standard represents an inappropriate conflation of the motion to dismiss and the

253. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) ("To be clear, we do not reject [allegations of discrimination] on the ground that they are unrealistic or nonsensical.")

254. Thomas, *supra* note 220, at 32. Professor Malveaux also describes the distinction between permissible and impermissible application of judicial experience and common sense as follows:

[I]t is important to recognize that subjective criteria are not per se impermissible or illegitimate. They are often essential tools for evaluating applicants and employees, especially for supervisory and leadership positions. Courts, including the Supreme Court, have recognized that subjectivity can play an important evaluative and screening function, thereby warranting judicial deference to the employer's decision-making. It is when such subjectivity is excessive and uncabined that its utility starts to wane and the risk of bias, *inter alia*, surfaces.

Malveaux, *supra* note 206, at 98-99 (citations omitted).

255. JAMES WM. MOORE ET AL., *MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE* § 17.03 (Release 85-4 2008).

summary judgment motion. She points out the similarities between the motions are that (1) plausibility language was commonly used in summary judgment motions,²⁵⁶ (2) under both motions courts now appear to be comparing the inferences favoring the nonmoving party against those favoring the moving party,²⁵⁷ and (3) courts appear to use their own opinions of what is sufficient to determine plausibility.²⁵⁸

One stark difference between the motions indicates that plausibility pleading ironically might require more on the part of the nonmoving party to survive a motion to dismiss than to survive a summary judgment motion. At least in summary judgments, all inferences are interpreted in the light most favorable to the nonmoving party.²⁵⁹ By contrast, in the plausibility analysis, I believe the inferences do not appear to be interpreted in favor of the non-moving party. For example, in *Iqbal*, the majority identifies the allegations, which include facts the Court claims are entitled to the presumption of truth under the plausibility analysis.²⁶⁰ Yet, despite paying lip service to those facts as presumed true, the mere existence of an alternative explanation rebutted the purported presumption of truth; “Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees of high interest because of their race, religion, or national origin. But given more likely explanations, they do not *plausibly* establish this purpose.”²⁶¹

Clearly, the allegations were not taken as true if the mere existence of possible alternative causalities is enough to preempt discovery related to the cause of the allegations. “As between that ‘obvious alternative explanation’ for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”²⁶²

256. See Thomas, *supra* note 220, at 29–31.

257. *Id.* at 30.

258. *Id.*

259. See, e.g., *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1140 (9th Cir. 2003) (“The dissent’s interpretation of the independent examination rule would require us to abandon a fundamental tenet of summary judgment procedure, namely, viewing the evidence in the light most favorable to the non-moving party.”).

260. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (“The complaint alleges that ‘the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.’ . . . It further claims that ‘[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 Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.’” (emphasis added)).

261. *Id.* (emphasis added).

262. *Id.* at 1951–52 (citations omitted).

No litigant expects a judge to leave common sense and experience at home when the judge enters the courtroom, but that applicable common sense is critical when and where it applies within the litigation stream. Even if part of the reasonableness in summary judgment is that a decision is made in the unclear analytical space between weighing and quantifying,²⁶³ it is not as violative of the Seventh Amendment when compared to plausibility because the judge is using, at least in part, evidence developed by the parties to inductively reason a result. The presence of this evidence tempers the unbridled latitude existing at the pleading stage for the application of judicial experience and common sense when determining whether an inference is reasonable or plausible.

In contrast, in plausibility, which occurs at the pleading stage, there is no evidence to consider, and therefore the entire more likely than not analysis is made without evidence and within the jury's territory of weighing evidence. The judge is a trespasser according to the constitution and the *Rules of Judicial Ethics*.²⁶⁴ Plausibility or relative likelihoods simply should not be determined at the pleading stage given the direct relationship between knowledge base and accuracy of inferences or plausibility.²⁶⁵

C. Neuroscience and the Myth of Empathetic Judging

1. *Human Nature as a Barrier to Empathetic Judging*

Scholars such as professor Darrell Miller approvingly describe the plausibility calculus as an avenue to achieve eventual, empathy-based judicial decision making.²⁶⁶ For example, professor Miller states that “[b]y making conscious effort to imagine themselves in the position of another, judges can arrive at better estimations of whether a set of facts, taken as true, present a plausible claim.”²⁶⁷ Professor Miller is likely overstating the role of the cognitive process in modulating empathic ability. Human nature and judicial nurture are significant barriers to empathetic ability.

263. See *supra* subsection III.B.2.b (explaining the myth of judicial dichotomy in summary judgment).

264. See Sidhu, *supra* note 43, at 426–27; see also Miller, *supra* note 149, at 1005–06 (explaining the “probability” requirement at the pleading stage would be a change in the division of judge and jury).

265. See *supra* note 163 (describing the direct relationship between accurately determining probabilities or plausibility and the quantity of knowledge the modeler possesses in Bayesian probability).

266. See, e.g., Miller, *supra* note 149 (arguing plausibility may be a way to encourage empathy based judicial decision making).

267. *Id.* at 1009.

A recent study in the *Journal of Neuroscience* indicates empathy is evolutionarily and biologically biased, based on race at an affective rather than cognitive level.²⁶⁸ The study found:

Racial group membership defines coalitions and alliances during evolution and thus results in strong modulation of the neural substrates of emotional components of empathy . . . It appears that, relative to cultural influence on empathy, if any, the modulation of empathy by racial group membership is more fundamental and plays a more pivotal role in shaping social behaviors.²⁶⁹

Even studies, which suggest a cognitive rather than affective basis for the direct relationship between our ability to empathize and the phenotypic similarity of the person we are empathizing with, acknowledge:

As a social species, humans have evolved for cooperative living in social groups and possess potent psychological and neural mechanisms that foster adaptive sociality. . . . Effective cooperative living sometimes entails belonging to smaller social groups and limiting resource sharing to members of that group so that individual costs and risks associated with nonreciprocated altruism are reduced.²⁷⁰

Biologically, our ability to empathize differs with the similarity in race and ethnicity of the individual with whom we are empathizing.²⁷¹ This reality reveals “social sensitivity in the human sensorimotor system and”²⁷² the existence of social categorization at “basic sensorimotor levels of brain processing.”²⁷³

Professor Malveaux is in accord in recognizing the dangers of equating plausibility with empathy-based judicial decision making.²⁷⁴

268. Xiaojing Xu et al., *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, *J. NEUROSCIENCE*, July 1, 2009, at 8525.

269. *Id.* at 8528.

270. Vani A. Mathur et al., *Neural Basis of Extraordinary Empathy and Altruistic Motivation*, 51 *NEUROIMAGE* 1468, 1474 (2010).

271. Alessio Avenant et al., *Racial Bias Reduces Empathic Sensorimotor Reasonance with Other-Race Pain*, 20 *CURRENT BIOLOGY* 1020 (2010).

272. *Id.* at 1018, 1020.

273. *Id.*

274. See Malveaux, *supra* note 206, at 96–98. Malveaux explains this danger, stating:

According to legal realists, despite their best efforts, judges’ backgrounds and attitudes already play a significant role in case outcomes. In assessing the sufficiency of the “judicial experience and common sense” standard for determining plausibility, empirical studies on the impact of excessive subjectivity and intuition on decision-making are instructive. Such studies suggest that, where possible, it is important for a standard not to be overly subjective or reliant on intuition.

Sociological and psychological literature explains how excessive subjectivity increases the risk of biased decision-making in the workplace. For example, in the employment context, employers who rely on excessively subjective criteria in hiring, promotions, and other employment actions run the risk of violating the federal civil rights laws because of the propensity of bias to surface. Federal courts have long recognized this risk. The Supreme Court itself, in *Watson v. Fort Worth Bank & Trust*, did the same, noting that “an employer’s undisciplined system of

She cites a study examining judicial reasoning and decision making by 252 trial judges, which concluded:

[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Today, the overwhelming majority of judges in America explicitly reject the idea that these factors should influence litigants' treatment in court, but even the most egalitarian among us may harbor invidious mental associations. . . . [I]ntuitive judgment is more likely to occur than active deliberation where trial judges labor under heavy docket loads and serious time pressures.²⁷⁵

Given these bio-genetic barriers to effective, race-neutral empathy, and the legal scholarship examining them, how could any of the Supreme Court justices ever effectively imagine themselves in the position of an Arab Muslim after September 11th, or a Japanese American during the era of *Korematsu's* legitimacy?²⁷⁶ Even absent the documented involvement of racial bias in empathy, plausibility and the increased emphasis on judicial experience and common sense is an undemocratic derogation of the jury's role in the civil justice system.²⁷⁷

2. *Judicial Nurture as a Barrier to Empathetic Judging*

Any remaining debate that nurture can trump nature, thus removing the bio-genetic and evolutionary barriers to empathetic judging described above, may be dispelled by comparing the majority and dissenting opinions in *Yun v. Ford*.²⁷⁸ This negligence case highlights the significant barrier that *nurture* alone presents to utopian, empathetic judging. In *Yun*, the majority decided proximate cause could not exist as a matter of law, and it removed the issue from the jury's consideration.²⁷⁹ The majority concluded—based on its common-sense knowledge—it was unforeseeable as a matter of law that on a rainy night in New Jersey a passenger in a car would take the risk of exiting a vehicle on a major thoroughfare to recover a spare tire assembly that had fallen off the car.²⁸⁰

subjective decision making" does not guarantee "that the particular supervisors to whom this discretion is delegated always act without discriminatory intent."

Id. (citations omitted).

275. *Id.* at 99–100 (citing Chris Guthrie et al., *Blinking on the Bench: How the Judges Decide Cases*, 93 CORNELL L. REV. 1, 31–35 (2007)).

276. See generally Sidhu, *supra* note 43 (equating *Iqbal* with *Korematsu* in terms of the unique national security climates in both cases).

277. See Miller, *supra* note 147, at 34.

278. 647 A.2d 841 (N.J. 1994).

279. *Id.* at 846.

280. *Id.* ("Logic and fairness dictate that liability should not extend to injuries received as a result of Chang's senseless decision to cross the Parkway under such dangerous conditions. *Common sense* should have persuaded Chang, who was

The dissenting judge perfectly captured the dangers of unbridled application of judicial experience and common sense, stating:

We judges are strange creatures. It is not that we are less brave than others, but rather by reason of our training, if not our nature, we tend to the conservative. For most of us, prudence and caution are the watchwords. We are rarely rewarded for taking risks. But the rest of the population does not always act the way we do. What may appear strange to judges might seem rather ordinary to others. It thus generally makes sense to have lay people, not judges, make decisions on the question of proximate cause, grounded as that concept is in considerations of foreseeability and fairness.²⁸¹

Another excellent example of judicial disconnect as a barrier to empathy is found in *Navajo Nation v. U.S. Forest Service*.²⁸² In *Navajo*, six Indian tribes²⁸³ brought suit against the U.S. Forest Service seeking “to prohibit the federal government from allowing the use of artificial snow [made from] recycled wastewater, which contain[ed] 0.0001% human waste.”²⁸⁴ The artificial snow was to be used on a ski area known as the Snowbowl, comprising one geographic percent of the San Francisco Peaks—which the tribes considered sacred mountain land.²⁸⁵

The tribes sought the injunction under the federal *Religious Freedom Restoration Act*, which required a showing of a “‘substantial burden’ on the exercise of their religion.”²⁸⁶ They argued that even though the Snowbowl area comprised only one percent of the San Francisco Peaks geographically, the use of the recycled wastewater in that area would “spiritually contaminate the entire mountain and devalue their religious exercises.”²⁸⁷ In other words, the use of the artificial snow “desecrate[d] the entire mountain, deprecate[d] their religious ceremonies, and injure[d] their religious sensibilities.”²⁸⁸

The majority denied the injunction, concluding that waste-containing snow in a cosmopolitan nation such as the United States would only have a subjective spiritual effect on the tribes’ religious experience, and therefore it was not a substantial burden.²⁸⁹ Again, however, the dissent perfectly captures the inability of the majority to empathize, stating:

only a passenger, to wait for assistance or abandon the bald tire and damaged assembly. The van could have been driven safely home.” (emphasis added)).

281. *Id.* at 851 (Baime, J., concurring and dissenting).

282. 535 F.3d 1058 (Ariz. 2008).

283. The Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, and the White Mountain Apache Nation. *Id.* at 1063 n.2.

284. *Id.* at 1062.

285. *Id.* at 1063.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 1063–64.

Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's "subjective spiritual experience." Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.²⁹⁰

Maybe in a cosmopolitan society the judicial majority and its views are the equivalent of the majority in the sense that the term is used to describe American society on a broader level. As a result, and as professor Ronner reminds us in *Fleeing While Black: The Fourth Amendment Apartheid*, the need for judicial restraint is highest in cases like *Iqbal*, where there is detention of minority defendants.²⁹¹ Professor Ronner analyzes the decisions in *Terry v. Ohio* and *Illinois v. Wardlow*, and argues convincingly that "[t]he law not only allows police harassment of minorities, but also seems to encourage it."²⁹²

Yet, despite the recognized and necessary limits on trial judges' abilities to democratically resolve cases even with evidence, plausibility analysis has now transformed the pre-evidentiary 12(b)(6) motion into a draconian "Catch-22"²⁹³ for deciding whether or not the plaintiff will ultimately prevail. According to both *Twombly* and *Iqbal*, the facts needed for a plausible complaint are traditionally the type of facts unearthed in discovery.²⁹⁴ If, without these facts, a plaintiff cannot satisfy the plausibility standard and is not allowed to engage in discovery without a plausible complaint, then a finding of implausibility is certain, and leave to amend is an exercise in futility given the foreclosure of discovery.²⁹⁵

290. *Id.* at 1097.

291. See generally Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383 (2001).

292. *Id.* at 393 (examining *Terry v. Ohio*, 392 U.S. 1 (1968) and *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

293. See Ranesh N. Kilaru, *The New Rule 12(b)(6): Twombly, Iqbal and the Paradox of Pleading*, 62 STAN. L. REV. 905, 911 (2009) (explaining that the facts needed to make pleadings plausible are typically facts only obtained in discovery and as such not yet available at pleading stage).

294. *Id.*

295. But see Hartnett, *supra* note 249, at 503–15. Professor Hartnett argues *Iqbal* and *Twombly* do not foreclose cabined discovery in the pursuit of proving plausibility. See *id.* at 503–515. But I can find no support for this assertion in a fair reading of the cases, and his view has also been criticized. Professor Bone, for example, argues that if pleading-stage discovery is allowed, the rules should expressly allow it, and that fitting pleading-stage discovery within the framework of the Rules is at best an awkward fit. See Malveaux, *supra* note 206, at 123 n.342. Examining the normative bases for the courts in *Twombly* and *Iqbal* also demonstrates the unfeasibility of targeted or cabined discovery. The courts currently lament the lack of effective case management during discovery. See Ashcroft v.

So, stripped of the possibility that plausibility is part of the route to eventual, utopian, and empathy-based judicial decision-making, what exactly is different about the plausibility standard from an empirically baseless docket-clearing mechanism?

D. The Impossibility of Plausibility's First Prong

1. *Separating Law from Fact is Impossible*

The first prong of the plausibility analysis requires the federal judge to parse the pleading into facts and law.²⁹⁶ The judge is required to disregard all legal conclusions in the complaint and then consider whether the pleaded facts suggest plausible entitlement to relief.²⁹⁷ The Supreme Court in *Iqbal* did not articulate a mechanism

Iqbal, 129 S. Ct. 1937, 1950 (2009) (foreclosing discovery absent a plausible complaint, and stating “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss”); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007) (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive. . . . [A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”). The *Twombly* Court dedicated a significant portion of its opinion to addressing the argument, stating:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “reasonably founded hope that the [discovery] process will reveal relevant evidence” to support a . . . claim.

Id. (citations omitted). If case management in current discovery is too burdensome, why would courts support adding another layer to the case management; deciding what the applicable limits on discovery are. The discovery rules do not permit definition of the scope of discovery either. They are written to invoke minimal court involvement and severe sanctions are permissible only when a party requests. Discovery was designed to involve minimal court involvement. See Rory Bahadur, *Electronic Discovery, Informational Privacy, Facebook and Utopian Civil Justice*, 79 *Miss. L.J.* 317, 362–63 (2009) (explaining the extrajudicial nature of most discovery proceedings).

296. See *supra* notes 95–96 and accompanying text.

297. See *supra* notes 95–96 and accompanying text.

for distinguishing law from fact²⁹⁸ because this process is impossible.²⁹⁹

Wright and Miller refer to the attempt to distinguish fact from law as creating “‘evanescent judicial distinctions’ and ‘ultimate calcification,’ as well as ‘traps for the unwary’ and ‘tactical advantages’ unrelated to the merits”³⁰⁰ Professor Bone refers to the “hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts,” and professor Marcus, in the context of pleading, mentions the “unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper).”³⁰¹ Professor Arthur Miller describes the factual-legal dichotomy of plausibility as “shadowy at best,” and mentions that, like the Emperor in the Emperor’s New Clothes, the difference between facts and conclusions is likewise without clothes.³⁰²

When the *Federal Rules of Civil Procedure* were adopted, legal scholarship of the era praised the recognition that drawing lines between law and fact was an impossible task.³⁰³ Not only was it impossible but it was a relic of archaic code pleading systems.³⁰⁴ As one commentator put it: “The Court’s dichotomy between factual allegations and ‘legal conclusions’ is the stuff of a bygone era. That distinction was a defining feature of code pleading, but was conspicuously abolished when the *Federal Rules* were enacted in 1938.”³⁰⁵ Further, professor Bone states:

298. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 859 (2010) (“In *Iqbal* . . . the Court deems the key allegations to be legal conclusions not because the plaintiff *intended* them so—he clearly did not—but because they just *were* so. The majority in *Iqbal* is extremely unclear as to why these allegations were legal conclusions.”).

299. Hartnett, *supra* note 249, at 239 n.68 (describing Professor Bone’s conclusion that fact and law are indistinguishable).

300. Bone, *supra* note 298, at 863 n.74.

301. Hartnett, *supra* note 249, at 486–87 n.69.

302. Miller, *supra* note 147, at 24.

303. Bone, *supra* note 298, at 865 n.84 (“The FRCP eliminate any mention of facts because courts have been trying for five hundred years to find ‘facts’ and nobody has ever been able to draw a line between what were and what were not ‘facts.’” (citing Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938))).

304. *Id.* at 859. Bone explained *Iqbal*’s adoption of the antiquated approach, stating: *Iqbal*’s novel doctrinal contribution is to subdivide the pleading analysis formally into two prongs, with the first prong sorting legal conclusions from factual allegations. The distinction between factual allegations and legal conclusions was an important feature of nineteenth century code pleading, but the Federal Rules of Civil Procedure eliminated it and . . . a notice pleading system has little use for it.

Id. (citations omitted).

305. Kilaru, *supra* note 293, at 914 n.71 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 589–90 (2007)).

By omitting any reference to “facts” the Federal Rules have avoided one of the most controversial points in code pleading. As [p]rofessor Moore has so aptly stated, “The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law.”³⁰⁶

Yet despite the reality that “the Court’s dichotomy between factual allegations and ‘legal conclusions’ is the stuff of a bygone era . . . which was conspicuously abolished when the *Federal Rules* were enacted in 1938,”³⁰⁷ the Supreme Court suddenly—and without explanation—claims in *Iqbal* that it can separate law from fact even after the documented impossibility of the task.

In fact, the current Supreme Court is so confident in its ability that it is comfortable mandating district court judges to use this distinction as the basis for determining a plaintiff’s access to federal court.³⁰⁸ The Emperor’s New Clothes indeed. Especially in light of the following, relatively recent statement from the Supreme Court in the case of *Cooter & Gell v. Hartmax Corp.*:³⁰⁹ “The Court has long noted the difficulty of distinguishing between legal and factual issues Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”³¹⁰

Despite the established inability to distinguish law from fact, some scholars have attempted to split hairs in order to make sense of the plausibility standard. The motivation for these attempts seems to be the *Twombly* majority’s forced reaffirmation of Form 11’s validity.³¹¹

Form 11 is the form in the “appendix” referred to in Rule 84, demonstrating what is legally sufficient for a negligence complaint under the “simplicity and brevity” contemplated by the *Federal Rules*. Outside of caption and jurisdictional allegations, Form 11 in its entirety states:

1. On *date at place*, the defendant negligently *drove a motor vehicle* against the plaintiff.
2. As a result, the plaintiff was *physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$ ____*.
3. Therefore, the plaintiff demands judgment against the defendant for \$ *< ____ >*, *plus costs*.³¹²

Simultaneously, Rule 84 establishes that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”³¹³ In accordance with Rule 84 and

306. Bone, *supra* note 298, at 865 n.84.

307. Hartnett, *supra* note 249, at 486 n.68 (citing *Twombly*, 440 U.S. at 589–90 (2007)).

308. See *supra* notes 95–96 and accompanying text (explaining the first prong of the *Iqbal* inquiry requires the judge to separate law from fact).

309. 496 U.S. 384 (1990).

310. *Id.* at 401 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)).

311. See Bone, *supra* note 298, at 860–61.

312. FED. R. CIV. P. Form 11 (emphasis added).

313. FED. R. CIV. P. 84.

the limits on the Supreme Court's ability to alter or amend the *Federal Rules of Civil Procedure* as per the *Rules Enabling Act*,³¹⁴ the majority in *Twombly* was forced to reaffirm the continued validity of Form 11.³¹⁵ According to *Twombly*, Form 11 is plausible and withstands a 12(b)(6) challenge.³¹⁶

The question then becomes why negligence in Form 11 is considered a fact to which the *Twombly* and *Iqbal* Courts afford the presumption of truth in the context of plausibility analysis while conspiracy and discrimination are simultaneously considered legal conclusions not entitled to the presumption of truth.³¹⁷ The aforementioned scholarly, hair-splitting attempts to distinguish Form 11 and negligence, on the one hand, and conspiracy and discrimination on the other, latch on to the language of *Iqbal*, which states that "*Twombly* called for a 'flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.'"³¹⁸

2. *The Fallacy of Context Specific Factual Amplification*

Professor Hartnett offers an explanation for this dichotomous treatment of negligence, on the one hand, and conspiracy and discrimination, on the other. He suggests that Form 11 represents a situation where a "court can easily see' the defendant's duty to the plaintiff,"³¹⁹ while courts need more in the cases of conspiracy and discrimination in order to make the inference *plausible*. He thus distinguishes *Iqbal*, *Twombly*, and their respective allegations of discrimination and conspiracy as allegations which are contrary to judicial baseline assumptions about the way the world works.³²⁰

Implicit in professor Hartnett's argument and in the reasoning of the Second Circuit is that there are certain factual contexts in which a pleading needs factual amplification depending on the substantive theory of law. Professor Malveaux also attempts to illustrate this difference by distinguishing between negligence and civil rights

314. See *supra* notes 123–24 and accompanying text (discussing the Supreme Court's explanation in *Swierkiewicz* of its limited ability to modify the pleading standards outside of the rule amendment procedure within the *Rules Enabling Act*).

315. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (comparing the invalid *Twombly* complaint with the valid complaint under Form [11]).

316. *Id.*

317. See *supra* notes 36–40 and accompanying text (explaining the two steps of plausibility analysis); see also *supra* note 259 and accompanying text (demonstrating factual allegations are "tak[en] as true," in assessing plausibility).

318. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

319. Hartnett, *supra* note 249, at 493, 496 ("Plausibility is easier to find in claims of negligence based on a factual sketch of a car accident on a public street.").

320. *Id.* at 500.

claims.³²¹ Form 11 is plausible because, according to her, the mere fact that defendant hit plaintiff with his car is indicative of illegal behavior.³²² She also states the mere fact that defendant hit plaintiff with his car is indicative of negligence because the contact would not normally occur in the absence of negligence.³²³ No more is required to satisfy the plausibility standard than the mere allegation that negligence occurred and the plaintiff was harmed on a specific date at a specific time.³²⁴ She seems to be advocating that the act of hitting the plaintiff with his car is therefore subject to only one interpretation: negligence on the defendant's part.³²⁵

By contrast, in civil rights claims such as *Iqbal*, professor Malveaux argues the factual allegations—for example dismissal or detention as in *Iqbal*—“are more likely to be subject to multiple interpretations.”³²⁶ More is required to prove plausibility as a result of the multiple interpretations or explanations for the conduct alleged in a discrimination suit.³²⁷

In addition to professor Steven Burbank, who at the 2009 annual meeting of the American Association of Law Schools described this sort of distinction as an attempt to “turn chicken shit into chicken salad,” I argue the distinction is a gross oversimplification of tort law. Professor Malveaux's statement implies that we may invoke some undefined, doctrinal relative of *res ipsa loquitur* every time a plaintiff is hit by a car, which would allow the inference of negligent conduct merely because an accident occurred.³²⁸ *Res ipsa loquitur* simply

321. See Malveaux, *supra* note 206, at 88.

322. *Id.*

323. *Id.*

324. *Id.*

325. See *id.*

326. *Id.* at 87.

327. *Id.* at 87–88. Professor Hartnett explains:

For example, an employer who denies a female worker a promotion might do so because she is a woman (a violation of Title VII of the Civil Rights Act of 1964) or because she is rude (a legitimate employer prerogative). The factual allegation of the denial is consistent with two possibilities, neither of which can be confirmed at the pleading stage. Or the employer may have denied the employee because she was both a woman and rude, in which case the plaintiff can allege a mixed motive. Or the employer may have denied her for a different reason altogether—her older age—which would constitute a separate claim under the Age Discrimination in Employment Act. By discounting as implausible factual allegations because they are equally consistent with legal and illegal behavior, the new pleading standard penalizes plaintiffs who seek relief for invidious discrimination because they do not have “further factual enhancement” to cross the line from possible to plausible based on the judge's “judicial experience and common sense.”

Id. (citations omitted).

328. See *Bolton v. Sea Mar Housing & Logistics Inc.*, 51 So. 2d 836, 840 (La. App. 2010) (“The doctrine of *res ipsa loquitur* means “the thing speaks for itself. *Res*

means “the thing speaks for itself.”³²⁹ It is an extremely rare exception to the general rule that a negligence plaintiff must prove unreasonable conduct on the part of the defendant.³³⁰ When *res ipsa* is applicable, the mere occurrence of an accident permits an inference of negligence even in the absence of direct evidence of negligence, if certain conditions are met.³³¹

These conditions are that (1) the accident is not normally the type of accident that would occur in the absence of unreasonable conduct, and (2) the defendant has exclusive control of the instrumentality which caused the harm.³³² Absent *res ipsa*, the plaintiff in a negligence case must provide evidence of unreasonable conduct.³³³ One practitioner explains why professor Malveaux’s assertion that the mere occurrence of an auto accident permits a baseline assumption of negligence is incorrect:

These accidents occur under a large variety of circumstances under which different drivers and even non-drivers may be potentially at-fault for the accident. It is the rare case when only one inference may be drawn as to the who is at-fault for the accident. Auto accidents and truck accidents are not typical *res ipsa* cases.³³⁴

Res ipsa is clearly inapplicable to Form 11 as it currently reads because many other possibilities apart from negligence exist that may have caused the collision, and none of them receive a reduction in plausibility simply because the plaintiff alleges negligence. For example, the defendant may have skidded into the plaintiff on ice that no reasonable person could have foreseen; the defendant’s tire may have blown out due to an undetectable manufacturing defect; an emergency may have been occurring which relieved the defendant of the duty to act as a reasonable person; or the defendant may have suffered an

ipsa is a rule of circumstantial evidence which allows a court to infer negligence on the part of the defendant if the facts indicate the defendant’s negligence, more probably than not, caused the injury.”)

329. *Id.*

330. *See Day v. Nat’l U.S. Radiator Corp.*, 128 So. 2d 660, 665 (La. 1961) (“This doctrine is a qualification of the general rule that negligence is not to be presumed but must always be affirmatively proved, and therefore should be sparingly applied, and only in exceptional cases where the demands of justice make that application essential.”).

331. *See id.*

332. *See, e.g., Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1362 (La. 992) (stating generally that *res ipsa* “obtains when three requirements are met: 1) the circumstances surrounding the accident are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence on the part of the defendant; 2) the defendant had exclusive control over the thing causing the injury; and 3) the circumstances are such that the only reasonable and fair conclusion is that the accident was due to a breach of duty on defendant’s part”).

333. *See Day*, 128 So. 2d at 665.

334. *Res Ipsa Loquitur in Maryland*, MILLERANDZOIS.COM, <http://www.millerandzois.com/Res-Ipsa-Loquitur-Maryland.html> (last visited July 24, 2010).

unpredictable heart attack or seizure while driving, causing the defendant to lose control of the car. The list is endless.

Contrary to professor Hartnett's and professor Malveaux's assertions, proof of negligence is not easy. In fact, the concept of negligence is difficult and the vast amount of scholarship associated with the recent *Restatement (Third) of Torts* and the formulation of negligence reaffirms this.³³⁵ Scholars are yet to agree on the difference between unreasonable conduct and proximate cause.³³⁶ Moreover, the *Restatement (Third) of Torts* has just altered the elements, pleading, and proving of negligence.³³⁷

Outside of *res ipsa*, proving unreasonable conduct or negligent behavior sometimes involves complex, risk-utility, and cost-benefit analyses as well as complex foreseeability considerations.³³⁸ By no stretch of the imagination is the collision of the defendant's car with the plaintiff indicative of negligence, and the allegations of Form 11 do not permit a reasonable or plausible inference of negligence.³³⁹

335. See, e.g., W. Jonathan Cardi, *Purging Foreseeability, the New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005); W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); David Howarth, *Many Duties of Care—or A Duty of Care? Notes from the Underground*, 26 OXFORD J. LEGAL STUD. 449 (2006); Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L. J. 761 (1951); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990); Patrick J. Kelley, *Proximate Cause in the History of Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991); Patrick J. Kelley, *Restating Duty, Breach, and, Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039 (2001); Jordan K. Kolar, *Is this Really the end of Duty?: The Evolution of the Third Restatement of Torts*, 87 MINN. L. REV. 233 (2002); Paul F. Marci, *How the Law Court uses Duty to Limit the Scope of Negligence Liability*, 53 ME. L. REV. 503 (2001); Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3 (2004); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001); Michael A. Stein, *Priestley v. Fowler (1837) and the Emerging Tort of Negligence*, 44 B.C. L. REV. 689 (2003); Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand That Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77 (1990).

336. See generally Rory Bahadur, *Almost a Century and Three Restatements after Green it is Time to Admit and Remedy the Nonsense of Negligence*, 38 N. KU. L. REV. (forthcoming 2011) (on file with author and the Nebraska Law Review).

337. *Id.*

338. See *supra* note 335 (demonstrating the vast amount of literature debating the proof or negligent conduct).

339. On a humorous note, Professor Malveaux's assertions regarding the simplicity of negligence and its immediate plausibility reminds me of my service on the faculty recruitment committee. Sometimes potential faculty candidates have not listed a first-year course they would be willing to teach. The existing faculty then ask if there are any first-year courses they can teach. Subsequently, they sometimes respond in a flippant manner—representing a mixture of disdain for the subject

Additionally, it is ironic that a negligence complaint survives the scythe of plausibility dismissal while allegations such as conspiracy and discrimination do not. Negligence complaints are subject to dismissal at the pleading stage because the existence of a duty is typically a question for the judge.³⁴⁰ Unlike negligence however, where the question of duty has been typically one for the judge, issues of conspiracy and discrimination are highly fact specific and typically presented to a jury.³⁴¹

If anything, the issue of “negligent driving” is one a judge should feel more comfortable resolving at the pleading stage as a matter of law than allegations involving conspiracy or discrimination. In contrast to negligence, where the judge rightfully determines whether a duty exists as a matter of law, claims involving intent or state of mind such as discrimination and conspiracy should typically be reserved for the jury.³⁴² The irony is that these very claims which should be reserved for the jury are more difficult to plead in a way that will satisfy the plausibility standard.³⁴³

Nothing about Form 11 and negligence serves to justify footnote ten of the *Twombly* opinion,³⁴⁴ or to reconcile Rule 84 and its *Rules Enabling Act* authority with plausibility analysis. Ultimately, because the first step in the plausibility inquiry requires separation of

matter and the obviation of any persons’ ability to teach such—by saying, “I can teach torts!” Enough said.

340. See, e.g., *Riedel v. Sheraton Bal Harbor Assoc.*, 806 So. 2d 530, 532 (Fla. Dist. Ct. App. 2001).

341. Many courts have held that the determination of discrimination is a question of fact. See, e.g., *People v. Hamilton*, 200 P.3d 898, 900 (Cal. 2009) (racial discrimination); *Dep’t of Bus. & Prof’l Regulation v. Balaguer*, 729 So. 2d 536, 537 (Fla. Dist. Ct. App. 1999) (employment discrimination); *S. Ill. Clinic, Ltd. v. Human Rights Comm’n*, 654 N.E.2d 655, 662 (Ill. App. Ct. 1995) (age discrimination); *Louisiana v. Edwards*, 957 So. 2d 185, 194 (La. Ct. App. 2007) (racial discrimination); *Michigan v. Knight*, 701 N.W.2d 715, 727 (Mich. 2005) (peremptory challenges); *Burks v. Amite Cnty. Sch. Dist.*, 708 So. 2d 1366, 1370 (Miss. 1998) (racial discrimination); *Smith v. Pub. Serv. Comm’n*, 351 S.W.2d 768, 772 (Mo. 1961) (revising rate schedules for users of commercial power was not discriminatory); *Missouri v. White*, 913 S.W.2d 435, 437 (Mo. Ct. App. 1996) (peremptory challenges); *Del., L. & W. R.R. v. Neeld*, 130 A.2d 6, 10 (N.J. 1957) (authority to assess railroad property taxes); *Blaney v. Int’l Ass’n of Machinists & Aerospace Workers*, 55 P.3d 1208, 1212 (Wash. Ct. App. 2002) (age and sex discrimination); *Greyhound Lines-E. v. Geiger*, 366 S.E.2d 135, 138 (W.Va. 1988) (employer racial discrimination).

342. Cf. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 459 (2008).

343. Cf. *id.* (“[A] complaint with an antitrust claim rooted in conspiracies based on indirect inferential evidence will require more facts to traverse the threshold of plausibility than would be needed in a case asserting the conversion of personal property.”).

344. See *infra* note 398 and accompanying text.

law from fact,³⁴⁵ it involves a process which is both empirically necessary to plausibility analysis and simultaneously impossible.

E. The Similarity of Plausibility and Credibility

An established rule of American civil jurisprudence is that the judge is barred from determining credibility because it encroaches on the constitutionally protected territory of the jury.³⁴⁶ If plausibility is akin to a credibility determination, it is constitutionally unacceptable.³⁴⁷ The following illustration suggests that plausibility is the normative equivalent of a credibility analysis.

Consider an eighteen-year old foreign student who is unfamiliar with the structure of a U.S. law school. The student has heard from other people that she should speak with the dean of the law school she wishes to attend. The student arrives at a coffee shop in the city where the law school is located and calls the law school, asking to meet the dean in the coffee shop. Twenty minutes later, two individuals walk into the coffee shop and approach the student. Both are well dressed and both state to the student: "I am the dean." The student asks them both: "How do I know you are the dean?" They both respond: "I have a desk at the law school in an office labeled 'Dean's Office,' and I park in a spot in the parking lot of the law school with a sign stating 'Parking for Dean Only.'"

One of the persons speaking with the student really believes he is the dean; the other is lying to the student. The student, faced with identifying the real dean, uses her limited knowledge of what honest people look like and tells the person she thinks is lying to leave the coffee shop on the basis of this credibility determination. Analogized to civil litigation, the student's decision is the equivalent of a credibility determination. Yet, the Supreme Court assures plausibility is not credibility when it claims it does not engage in probability determinations.³⁴⁸

However, now consider if the student simply eliminates one of the alleged deans using a different calculus. She tells one of them: "It is possible you are the dean and I do not know nor care whether or not you believe you are lying. In fact, I think you honestly believe you are

345. See *supra* note 95.

346. Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV 261, 281 n.127 (2009) (explaining that even the majority of the Supreme Court acknowledges credibility, or weighing the credibility of a witness, is impermissible).

347. See *id.*

348. See Miller, *supra* note 149 (explaining that if plausibility were probability it would involve impermissible determinations of credibility and violate the Seventh Amendment); see also Sidhu, *supra* note 43, at 489–90 (warning of the impermissibility of judges, rather than juries, determining what is more likely than not).

the dean but I do not think you are the dean based on my limited experience and common sense regarding what deans look and sound like, and so it is more likely someone else is the dean.” In other words, she believes it is possible the person is the dean, but she does not think it is *plausible*. This is exactly what *Iqbal* mandates a judge to do when deciding if a claim is plausible. “Determining whether a complaint states a plausible claim for relief will, as the court of appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³⁴⁹

The result is the same in both scenarios: the end of the conversation. Or by analogy, the end of the civil action. In one case it is based on credibility, but in the other it is based on the judge’s belief that something other than the alleged theory of liability was more likely responsible for the alleged harm.³⁵⁰ The result of applying both methods of dismissing the self-proclaimed deans is identical; dismissal without discovery. There may be moral ramifications for the attorney and client concerning credibility-based dismissal not present in a plausibility-based dismissal. Apart from this, there appears to be no tangible difference between the two. It is an inadequate consolation prize for the plaintiffs and their attorneys in *Twombly* and *Iqbal* that the Court does not say it does not believe them. The actions were dismissed without discovery exactly as if it was patently clear they were lying or their complaints had zero probability.

In addition to the negligible difference between plausibility and credibility, the use of common sense and experience rejects well-established 12(b)(6) jurisprudence which, much like the parol evidence rule in contracts, permits a court to concentrate only on the contents of the complaint if the Rule 12(d) shunt to summary judgment is inapplicable.³⁵¹ Whereas the foreign law student is allowed to use common sense and experience in an unbridled fashion to end her conversations with the dean, neither federal litigation norms³⁵² nor the role of discovery in the broad structure of adversarial justice³⁵³ permit a judge

349. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); see also *supra* notes 250–53 and accompanying text (discussing the use of “common sense” at different stages of pleading and procedure).

350. *Id.* at 1951–52 (“As between that ‘obvious alternative explanation’ for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”).

351. See *Miller*, *supra* note 147, at 28 n.103.

352. See *supra* subsection III.B.3 (explaining the difference in applying judicial common sense at the pleading stage and at summary judgment).

353. See *Bahadur*, *supra* note 295, at 318–19 (describing the adversarial system as “[a] system for the consideration and resolution of legal disputes under which each side is entitled to have its nonfrivolous contentions considered by interests opposing them and presented in relationship to the opposing contentions, with the assistance of competent counsel, after reasonable notice and opportunity to be heard, to an impartial judge or jury for fair consideration and final decision all in

the same freedom at the pleading stage when deciding to dismiss a plaintiff's lawsuit.

As professor Miller points out, judicial discretion, if unconstrained at the motion to dismiss stage, would allow a judge to dismiss a complaint preventing adjudication on the merits "whenever an equivocal set of facts can be interpreted as 'more likely' to reflect lawful conduct."³⁵⁴ Professor Miller doesn't merely believe that the normative bases of credibility and plausibility are the same. He believes that plausibility analysis results in something so similar to credibility or judicial weighing of evidence that it represents a significant shift in the functional division of the judge and jury in civil trials.³⁵⁵ I agree.

F. Unacceptable Procedural Rule Conflation

1. Conflation of Rules 11 and 12

Rule 11 requires that every pleading submitted to a court be signed.³⁵⁶ The signature on a complaint represents a certification that the advocate has done an investigation reasonable under the circumstances,³⁵⁷ and that after such an investigation it appears the "factual allegations of the complaint have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . ."³⁵⁸ Rule 11 sanctions are no longer dependent on a litigant's culpable conduct.³⁵⁹

The test for the imposition of Rule 11 sanctions [is] "whether the individual's conduct was reasonable under the circumstances." The standard of "reasonable under the circumstances" is "objective," and thus, a demonstration of "good faith" does not defeat a motion for sanctions. Allegations of sanctionable conduct should not be viewed with "the wisdom of hindsight," but "by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."³⁶⁰

a manner provided by law commit[ted] to the immutable American expectation that liberty will be ordered under law only after impartial judgment upon fair consideration of conflicting ideas"); *id.* at 319 (explaining the role of discovery in the adversarial system as "the principal fact-gathering mechanism in the formal civil litigation process" is an integral part of the adversarial system of civil justice and is "one of the most significant innovations of the Federal Rules of Civil Procedure"). The process is fundamental in federal notice pleading as the basis for development of a party's factual contentions. *See id.*

354. *See* Miller, *supra* note 147, at 29.

355. *Id.* at 30.

356. FED. R. CIV. P. 11(a).

357. *Id.* 11(b).

358. *Id.* 11(b)(3).

359. *See id.* 11(c).

360. Heike v. Guevera, No. 09-10427-BC, 2010 WL 3905088, at *3 (E.D. Mich. Sept. 30, 2010) (citations omitted).

In the American adversarial system, it is the parties and not the passive judge who are tasked with developing evidence in the case.³⁶¹ The requirement of a passive judge in the American system reflects American values such as “human individuality” and the prevention of “state overreaching and tyranny.”³⁶² It is these values which provide the impetus for our concept of discovery.³⁶³

When one party alleges a complaint violates Rule 11(b) and seeks post-safe harbor sanctions pursuant to Rule 11(c), the judge must determine whether the submitting party performed a reasonable investigation at the time of the complaint’s submission and whether the results of that investigation objectively demonstrated the existence of evidentiary support for the factual contentions in the pleading.³⁶⁴ In many instances, before the judge can rule on the propriety of sanctions, discovery is necessary to determine whether, after reasonable investigation, there was the likelihood of evidentiary support for an allegation.³⁶⁵ The advisory committee notes go on to explain: “[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient “evidentiary support” for the purposes of Rule 11.”³⁶⁶

If implausibility equates to a finding by a judge that no evidence developed in favor of the plaintiff’s theory of liability can emerge, then clearly an advocate charged with developing the case must have breached his or her duty to conduct an investigation reasonable under the circumstances. An adversarial advocate charged with zealous and

361. See Bahadur, *supra* note 295, at 353–54. There, I describe the difference in the American and Continental justice systems:

The major differences between the inquisitorial continental legal system, typified for example by Germany and France, and the American adversarial legal system may be summarized as follows. The American system is “characterized by a high degree of partisan behavior, party autonomy, judicial passivity and reliance on lawyers’ integrity.” In stark contrast to the American adversarial system where truth is often subordinate to privacy, is the Continental or inquisitorial system, where resolution of disputes is not party driven before a neutral and passive judge but involves an inquiry conducted by the court which is not confined to submissions of the opponents.

Id.

362. See *id.* at 355.

363. See *id.* (illustrating a foreign view of the perceived importance of discovery to the American civil system and as reflecting “American distrust in concentrated power and the belief that a neutral judge would not apply the same zeal to discovery in “ferreting” out the positives of their cases and the negatives of their opponent’s”).

364. See *Heike*, 2010 WL 3905088, at *2–3.

365. FED. R. CIV. P. 11 advisory committee’s notes on 1993 amendments (“The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation.”).

366. *Id.*

reasonable investigation should reach the same conclusion that is obvious to the impartial, neutral, non-investigatory referee who is concluding based only on the statements in the pleadings.³⁶⁷ In other words, if the detached, passive judge in the adversarial system concluded implausibility from mere pleading review, then in the course of the mandatory reasonable investigation a reasonable attorney would have also concluded that a cause other than the one alleged in the complaint was responsible for the plaintiff's harm.³⁶⁸

However, as previously suggested, implausibility does not equate to a finding by the judge that no evidence in support of the plaintiff's allegations exists. It means only that the judge as a superficial, non-investigatory, participant in a trial is able to conclude at the pleading stage that there is a more likely reason for the alleged harm than the theory of alleged recovery in the complaint.³⁶⁹ In fact, the Chief Judge of the Fourth Circuit Court of Appeals also understands *Iqbal* as requiring the more likely than not calculus in the plausibility decision. "Indeed, as *Iqbal* teaches, it is only where there are "more likely explanations" for the result that the plausibility of the claim is justifiably suspect."³⁷⁰

A finding of no plausibility therefore means, even when prohibited from investigating a case, a judge at the pre-evidentiary pleading stage is certain enough there is a more likely explanation for the harm caused than the theory alleged by the plaintiff, warranting termination of the plaintiff's cause of action. Therefore, it appears possible a judge would dismiss a complaint as implausible even if the judge thought evidence in support of plaintiff's theory of liability existed, thereby making the pleading nonviolative of Rule 11.³⁷¹

Professor Hartnett also suggests that the plausibility standard is different from the Rule 11 standard.³⁷² Professor Hartnett attempts to describe the difference as follows: Rule 11 deals with the "plausibility of finding evidence to support x given a , b , c and d ," while the motion to dismiss standard deals with the plausibility of "inferring x

367. See *supra* notes 361–63 and accompanying text (comparing the passive role of the judge from the aggressive investigatory and advocacy role of the lawyer in the American adversarial system).

368. See *supra* notes 361–63 and accompanying text.

369. See *supra* subsection III.B.1 (explaining the plausibility analysis as a comparative probability test).

370. *Nemet Chevrolet, Ltd. v. Consumer Affairs.com*, 591 F.3d 250, 262 (4th Cir. 2009) (Jones, J., dissenting).

371. See FED. R. CIV. P. 11 advisory committee's notes on 1993 amendments (indicating less evidence is required to avoid sanctions than is required to prevail in summary judgment motion); see also *supra* subsection III.B.3 (indicating the similarity of plausibility to the second prong of summary judgment—judgment as a matter of law).

372. See Hartnett, *supra* note 249, at 506–07.

given *a*, *b*, *c*, and *d*.”³⁷³ He is wrong for one obvious reason and another not so obvious reason.

The obvious reason is that the language of *Twombly* itself forecloses the distinction attempted by professor Hartnett. *Twombly* explains: “Asking for plausible grounds . . . simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”³⁷⁴ The *Twombly* opinion explains plausibility in the context of the motion to dismiss as exactly what professor Hartnett describes plausibility should mean in Rule 11.³⁷⁵ Both concern the plausibility of developing evidence to support the allegations of the complaint.

The less obvious reason requires a parsing of professor Hartnett’s illustrative differences. Professor Hartnett fails to identify what exactly *a*, *b*, *c*, and *d* represent in his illustration. If *a*, *b*, *c*, and *d* are merely statements in a complaint and not evidence, then it is only in those situations where plaintiffs plead themselves out of court that plausibility can be applied as described by professor Hartnett. But in these situations implausibility would be identical to the Rule 11 standard. If *a*, *b*, *c*, and *d* are not evidence, plausibility analysis, which professor Hartnett describes as the plausibility of “inferring *x* given *a*, *b*, *c*, and *d*,”³⁷⁶ can be illustrated by an almost satirical modification of Form 11. To reiterate: “On *date* at *place* the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$ <____.”³⁷⁷

According to the *Twombly* opinion, and in accord with the continued viability of Rule 84, this complaint survives the plausibility inquiry.³⁷⁸ However, consider a modified version of Form 11 in which the plaintiff repeats the allegations above but additionally states that the reason plaintiff alleges defendant was driving negligently was because “Defendant was driving with due care, paying attention and looking straight ahead at the time of the collision.” At some point, the plaintiff deposits enough facts that a judge can conclude the probability of negligence approaches zero—or impossibility—in light of the additional but unnecessary facts pled in the complaint. Thus, it can be stated that the plaintiff pled himself or herself out of court.

In such a case, if driving with due care, paying attention, and looking straight ahead were considered the equivalent of *a*, *b*, *c*, and *d*, then not only is it implausible that the plaintiff was negligent but it is

373. *Id.*

374. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2009).

375. *Compare id.* at 556–57, with Hartnett, *supra* note 249, at 556–67.

376. Hartnett, *supra* note 249, at 506.

377. *See* FED. R. CIV. P. Form 11.

378. *See Twombly*, 550 U.S. at 565 n.10

likely impossible. In fact, it is fair to say it is very likely some other cause was the cause of the accident and a plausibility dismissal would be almost unassailable.³⁷⁹ Likewise, given such allegations, a reasonable investigation should also have revealed the legal theory of negligence was not “warranted by existing law,” and therefore violative of Rule 11.³⁸⁰

It is remotely possible to confine *Twombly* to a situation in which a plaintiff pled himself out of court. By alleging there was parallel conduct, the Supreme Court’s rationale can plausibly be understood as a decision that applies when a plaintiff bases recovery on a legal theory which the allegations of the complaint themselves refute and the case is implausible because the allegations themselves are inconsistent with the theory of recovery asserted.³⁸¹ However, this interpretation of *Twombly* as a plaintiff pleading himself or herself out of court is troubling because, unlike the modified Form 11 example in which driving with due care and paying attention are inconsistent with negligence, parallel conduct is not inconsistent with conspiracy. In fact it may be indicative of conspiracy.

Conversely, if professor Hartnett’s *a*, *b*, *c*, and *d* are meant to be the equivalent of evidence, then professor Thomas is correct when she argues the motions for summary judgment and 12(b)(6) are now trending towards being the same thing.³⁸² If *a*, *b*, *c*, and *d* are evidence, and if a court will actually consider this evidence when deciding a motion to dismiss, the court would be making an unprecedented decision in federal procedure—unless, of course, the motion was converted to a summary judgment motion under Rule 12(d).³⁸³ If *a*, *b*, *c*, and *d* are evidence, the line between motions to dismiss and summary judgment is severely blurred.

The key distinction between implausibility and a Rule 11 violation appears to be, as the advisory committee notes to Rule 11 explain: a Rule 11 certification does not mean that the party will prevail with respect to the contention regarding the fact. “That summary judgment is rendered against a party does not necessarily mean, for the purposes of this certification, that it had no evidentiary support for its proposition.”³⁸⁴ In other words, a judge can conclude another theory of liability is more likely without believing that the plaintiff has no evidence in support of the alternative theory of recovery it advanced in

379. Professor Hartnett uses a similar illustration involving an Apple iPod in his article. See Hartnett, *supra* note 249, at 495.

380. See FED. R. CIV. P. 11(b)(2).

381. See *supra* subsection III.A.1 (explaining the possibility of marginalizing the import of the changes wrought by *Twombly*).

382. See Thomas, *supra* note 220 (explaining that plausibility analysis is indistinguishable from analysis typical of the summary judgment motion).

383. See Miller, *supra* note 147, at 28 n.103.

384. FED. R. CIV. P. Rule 11 advisory committee’s notes on 1993 amendments.

the pleadings. The judge can then conclude on the comparative likelihood that no reasonable juror would rule for the plaintiff. However, as mentioned, prior to plausibility analysis, outside of Rule 12(d)'s applicability, this calculus is not the province of the Rule 12(b)(6) motion, but is typical of post-discovery summary judgment and judgment as a matter of law decisions, where evidence has already been presented.³⁸⁵

If *a*, *b*, *c*, and *d* are evidence in professor Hartnett's analogy, then Rule 12(b)(6) and Rule 56 motions are indeed indistinguishable, and plausibility represents the equivalent of a more likely than not standard.³⁸⁶ If this is the case, then the following would be true assuming an honest advocate:

1. If something is plausible it definitely does not violate Rule 11.
2. A pleading could be implausible and also violate Rule 11.
3. A pleading could be implausible but still satisfy Rule 11.

The first statement is correct because if a judge reading the pleadings as a disinterested observer is able to conclude that the plaintiff's theory of recovery is more likely than not, then clearly the judge is concluding the reasonable likelihood of evidence exists. The second statement is also true because a judge could agree a plaintiff's theory of recovery is so remote that he or she could dismiss the complaint and meet out Rule 11 sanctions after dismissal, when it is revealed the plaintiff had no reasonable likelihood of producing evidence supporting the theory. The third statement represents situations like *Iqbal* and *Twombly*, where a judge disagrees that the plaintiff's theory is plausible or more likely than not, but thinks it is possible that a reasonable plaintiff's advocate might believe—after a pre-filing investigation—that evidence of the alleged theory existed. But this leads us back to the essential dilemma of plausibility. Is it appropriate for a judge to so conclude at the pleading stage without violating the Constitution?³⁸⁷ If no, then Rule 11 and plausibility can only be distinguished in the constitutionally barred reality of judges doing more likely than not analyses at the pleading stage.

2. Conflation of Rules 8 and 9(b)

In deciding whether the employment discrimination complaint at issue in *Swierkiewicz* satisfied the specificity required by Rule 8(a)(2), the Court contrasted the heightened pleading standards of Rule

385. See *supra* subsection III.B.3 (describing the difference in weighing evidence post-discovery with attempting the same pre-discovery at the pleading stage).

386. See *supra* subsection III.B.2 (explaining that at least for one hypothetical reasonable juror, plausibility is the same as more likely than not).

387. See *supra* subsection III.B.3 (discussing the impropriety of making more likely than not decisions at the pleading stage).

9(b).³⁸⁸ Overwhelming cognitive dissonance is the result of comparing the language of the unanimous Supreme Court in *Swierkiewicz* with the language of *Twombly* and *Iqbal*. This is because the plausibility standard obliterates any distinction between the general pleading standard of Rule 8(a) and the heightened pleading standard of Rule 9(b), despite the Supreme Court's assertion it is incapable of achieving this conflation by judicial interpretation.³⁸⁹

For example, functionally Rule 8(a) and 9(b) are the same post-plausibility. Federal Rule 9(b) has two main functions. First, it plays a "screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later."³⁹⁰ Second, it prevents defendants from the *in terrorem* aspects and consequential, inequitable settlement pressure of fraud allegations.³⁹¹ The stated functions of plausibility are remarkably similar.

In *Twombly*, the Court announced that the normative efficacy of discovery as a screening tool was much less than widely acknowledged.³⁹² The *Twombly* court also proves the plausibility standard performs a "gatekeeper to discovery" role as well.³⁹³ "[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust

388. See *supra* notes 122–23 and accompanying text.

389. See *supra* notes 122–23 and accompanying text.

390. *Aubrey v. Barlin*, No. A-10-CA-076-22, 2010 WL 3909332, at *5 (W.D. Tex. Sept. 29, 2010).

391. See *Denny v. Barber*, 576 F.2d 465, 470 (2nd Cir. 1978). Commenting on Rule 9(b)'s purpose, the appellate court stated:

The Supreme Court has admonished that to the extent that such discovery "permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit."

Id. (emphasis added) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

392. *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2009). The *Twombly* court stated:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a [section] 1 claim.

Id. (citations omitted).

393. See *id.* at 558–59.

discovery can be expensive.”³⁹⁴ In fact, the screening requirements for claims of fraud long recognized as a function of Rule 9(b) are now performed in non-fraud causes of action by the plausibility analysis of Rule 8(a).³⁹⁵

The discovery gatekeeper role of the plausibility analysis is not confined to antitrust lawsuits but to law suits in general, as *Iqbal* emphasized: “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”³⁹⁶

Second, like Rule 9, the role of the plausibility standard is to prevent defendants from succumbing to the settlement pressure, the genesis of which is the lawsuit itself, or to serve the practical purpose of preventing a plaintiff with “a largely groundless claim” from “tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”³⁹⁷

The similarity of the Rule 9(b) standard and the plausibility standard is also evidenced by comparing footnote ten in the *Twombly* opinion with the well-established, classic case law on the standard required by Rule 9(b). In footnote ten, the majority makes clear that the *Twombly* complaint was deficient under a plausibility analysis not only because it appeared to allege parallel conduct as the only basis of conspiracy or agreement, but also because it failed to provide important information such as “specific time, place, or person involved in the alleged conspiracies.”³⁹⁸

The contents required of a pleading to satisfy Rule 9(b) are remarkably similar. As in plausibility, a pleading is deficient under Rule 9(b) when it fails to provide sufficient allegations regarding, “who, what, when, where and how.”³⁹⁹ In fact, so similar are the standards for

394. *Id.* at 558.

395. *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009) (“The new [plausibility standard] raises a hurdle in front of what courts had previously seen as a plaintiff’s high immediate access to discovery—modest in its demands but wide in its scope. . . . In cases of fraud, Rule 9(b) long played that screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later.”).

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

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

398. *Id.* at 556 n.10.

399. *See, e.g., Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.* 614 F.3d 1163, 1171 (10th Cir. 2010); *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010); *United States ex rel. Lacy v. New Horizons, Inc.*, 348 Fed. Appx. 421, 424 (10th Cir. 2009); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009); *United States ex rel. Elms v. Accenture LLP*, 341 Fed. Appx. 869, 873 (4th Cir. 2009); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *Investors Group v. Avaya, Inc.*, 564 F.3d

satisfying the specificity requirements of Rule 9(b) and the plausibility analysis, federal courts are concluding that complaints satisfy Rule 9(b) when they satisfy the plausibility standard of *Twombly*.⁴⁰⁰

One aspect of Rule 9(b) jurisprudence might initially appear to distinguish its standard from the plausibility standard. The language of the plausibility requirement is that the pleading must permit a “reasonable inference” of the theory alleged in the complaint while a Rule 9(b) compliant pleading must permit a “strong inference of fraudulent conduct.”⁴⁰¹ However, the distinction is a linguistic illusion. The reasonable inference language of the plausibility standard is the equivalent of a more likely than not standard.⁴⁰² Nothing in the Rule 9(b) jurisprudence indicates that “strong” is necessarily stronger than reasonable or “more likely than not.” It is implausible to conclude the “strong inference” required by Rule 9(b) is any stronger than the ultimate burden of proof standard in civil trials, because again this would mean plaintiffs need to satisfy a stronger burden at the pleading stage than their ultimate burden at the trial stage. This, according to *Swierkiewicz*, is incongruous.⁴⁰³ Quite likely, something less than more likely than not satisfies the heightened pleading requirements of Rule 9(b).

Since plausibility might in fact be the equivalent of more likely than not and Rule 9(b) logically requires less than a more likely than not showing at the pleading stage, ironically there is room to argue that the reasonable inference standard of plausibility is stronger than the strong inference of Rule 9(b) and therefore more is now required to satisfy Rule 8(a)(2) than Rule 9(b). Federal judges need not contemplate this inversion of Rule 8(a)’s pleading standard with Rule 9(b)’s because enough mess exists when the standards are merely indistin-

242, 253 (3rd Cir. 2009); *United States ex rel. Rafizadeh v. Cont’l Common, Inc.*, 553 F.3d 869, 874 (5th Cir. 2008).

400. *See, e.g., Twombly*, 550 U.S. at 554–56 (stating generally that complaint must provide enough information to describe a fraudulent scheme to support a plausible inference that false claims were submitted because plaintiffs provided sufficient factual detail to demonstrate the viability of their FCA claims and the dismissal under Rule 9(b) was error); *Envirocare of Utah*, 614 F.3d at 1173 (conflating the standards of Rule 9(b) and plausibility and stating “[r]ather, to avoid dismissal under Rules 9(b) and 8(a), plaintiffs need only show that, taken as a whole, a complaint entitles them to relief” (emphasis added)).

401. *Compare Iqbal*, 129 S. Ct. at 1949 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”), *with Exergen Corp.*, 575 F.3d at 1327 (reiterating Rule 9(b) is satisfied only where the factual content of the complaint permits a strong inference of fraud).

402. *See supra* subsection III.B.2.b.

403. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 506 (2002) (explaining brilliantly that it is “incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits . . .”).

guishable. On the one hand, the Supreme Court has unequivocally stated the pleading standards can only be elevated by the rule-making process or by Congressional enactment,⁴⁰⁴ yet the reasonable inference requirement of plausibility is a judicial raising of the pleading standards.

IV. CONCLUSION

The *Iqbal* decision left the Supreme Court with two choices to reach a decision. One was substantive and the other was procedural. The substantive option was politically unpalatable and involved recognition—as in *Korematsu*—that the government is given exponentially more latitude, in the interest of exceptional threats to national security, than is otherwise constitutionally permissible to single out and detain members of the ethnic group representing the threat.

Acknowledging this would mean the *Korematsu* decision, widely reviled as one of the Court's biggest lapses in judgment, would again be adorned with the raiment of legal correctness and validity. Think of the ramifications if the highest court suspended the treasured tenets of American society. The phrase "Liberty and Justice for All"⁴⁰⁵ would be replaced with the phrase Liberty and Justice for All except where Justice (however you define this illusory concept) and Security Trump Liberty. Suffice to say it would wreak havoc with the basic fabric of American society and the assumptions, necessary both domestically and abroad, which justify America's place of reverence in the world.

Instead of answering the substantive question, the Court used a procedural shortcut. If my science background made me uncomfortable with the impossibility of plausibility, then my involuntary education in a nonsecular elementary school provides me with a metaphor for plausibility. Plausibility is a procedural Tower of Babel. The biblical Tower of Babel is arguably now a secular metaphor illustrating the unsustainability of systems comprised of incompatible components. The wailing cacophony of ignored empirical realities' renders the plausibility standard unsustainable.

Rule 84's continued viability, as exemplified by Form 11, conflicts with the requirements of plausibility pleading. The constitutional safeguards preventing the Supreme Court from changing pleading standards by interpretation scream in frustrated agony when the pleadings of *Swierkiewicz* are compared to the rationale of the *Iqbal* decision, and when the two are asked to coexist. The promise of em-

404. See *id.* at 514–15 (2002).

405. See Ward Connerly, *With Liberty and Justice for All*, HERITAGE FOUNDATION (April 30, 1996), <http://www.heritage.org/research/lecture/with-liberty-and-justice-for-all>.

pathic judging is too risky in light of the research showing deep racially based, biogenetic bases for bias and the recognized judicial disconnect from the populace.

Comparing possibilities without engaging in probability analysis is impossible, as is the first prong of the *Iqbal* test: separating law from fact. Rule 9(b) loudly reminds us in vain, in light of the plausibility requirement of *Iqbal*, about the tenet of statutory interpretation which requires us to interpret statutes such that no language is redundant. Rule 11 argues it is distinct from Rule 12 but recognizes after the plausibility standard that it can only be different in a constitutionally prohibited existence, one in which a judge is allowed to weigh evidence and engage in dispositive, more likely than not analysis at the pleading stage.

Perhaps the apparent doctrinal dissonance of the *Iqbal* and *Korematsu* decisions should not be surprising. It may be a frightening reality that the founding fathers envisioned the federal courts as incompetent institutions regarding national security matters, particularly those related to war. As one conservative viewpoint states:

The courts are institutionally incompetent when it comes to matters of national security, particularly the prosecution of war. The Framers intended it that way. National-security decisions are the most important ones a political community makes, so our system of government was designed to have them made by the political branches—by those who answer to the voters, to the people whose lives are at stake. When the political branches abdicate this first responsibility of government, sitting by as it is usurped by politically insulated judges, they deny us the freedom to decide for ourselves what our security requires. We are then the subjects of judges rather than masters of our own destiny.⁴⁰⁶

That debate, however, is the province of an expert in a different area.

406. Conn Carrol, *Founding Father Never Intended Courts to Make National Security Decisions*, THE FOUNDRY (March 26, 2010, 10:14 AM), http://blog.heritage.org/2010/03/26/founding-fathers-never-intended-courts-to-make-national-security-decisions/?utm_source=twitter&utm_medium=micro-blog&utm_campaign=twitter.