

# TWIQBAL In Context

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## Introduction

Muddled cases make muddled classes—or do they? In 2007, the Supreme Court ushered in a new pleading threshold for complaints,<sup>1</sup> changing a fifty-year bedrock of civil procedure doctrine. By retiring notice pleading, *Bell Atlantic Corp. v. Twombly* effectively altered Federal Rules of Civil Procedure 8 and 12(b)(6)—forgoing merit-based determinations that long served as the core of civil procedure gatekeeping.<sup>2</sup>

*Twombly* and the related decision in *Ashcroft v. Iqbal*,<sup>3</sup> collectively referenced as *Twiqbal*,<sup>4</sup> create a plausibility standard. Judges are to evaluate the viability of a plaintiff's pre-discovery factual allegations by using common sense based on judicial experience.<sup>5</sup> While some praise the new standard, others push to legislatively overturn it as lower courts struggle to define what is plausible.<sup>6</sup>

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1. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).
2. *See id.* at 563.
3. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
4. *See, e.g.*, *Weiler v. Draper Chevrolet Co.*, No. 12-12402, 2013 WL 388585, at \*1 (E.D. Mich. 2013); *Dec v. Pa. State Police*, No. 2:12-CV-565, 2012 WL 6099078, at \*6 (W.D. Pa. 2012); *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (“There is a ‘new sheriff in town’ now policing FED.R.CIV.P. 12(c), and his name is ‘*Twiqbal*.”). *See generally* Cristina Calvar, Note, “*Twiqbal*: A Political Tool”, 37 J. LEGIS. 200, 202 n.21 (2012) (observing that “[t]he nickname ‘*Twiqbal*’ has gained increasing popularity when collectively referring to the heightened pleading requirements set forth by *Twombly* and *Iqbal*”); David Mills, *Twombly*, Courttoons (Oct. 23, 2009), <http://www.courttoons.net/2009/10/23/twombly/> (providing illustration of *Twiqbal*'s effect on some plaintiffs).
5. *Iqbal*, 556 U.S. at 663-64 (“[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.”).
6. *See* S. 1504, 111th Cong. (2009) (“Notice Pleading Restoration Act of 2009”); H.R. 4115, 111th Cong. (2009) (“Open Access to Courts Act of 2009”).

As someone who worked on *Twombly* before entering academia, I am well-versed in the debates over the new standard.<sup>7</sup> Rather than echoing them, this Article has a different focus, namely the obstacles *Twiqbal* poses for law students and their professors preparing them for practice in a post-*Twiqbal* world. *Twiqbal* comes up in multiple law school classes, starting in first-year civil procedure, and revisited in upper-division courses such as Complex Civil Litigation, Employment, Antitrust, and litigation drafting classes. In each iteration, the plausibility standard generates pedagogical challenges. This Article explores these challenges, focusing particularly on those that arise in introductory civil procedure courses.

Teaching *Twiqbal* is imperative. Not only do the cases offer an opening to explore pleading standards, they are a springboard for discussions of gatekeeping, the differences between rules and standards, and foundational questions about the function of civil procedure. On the more practice-oriented side, *Twiqbal* introduces pre-filing investigation and drafting—skills essential for practice readiness.<sup>8</sup>

However, pleading after *Twiqbal* is somewhat of an enigma. Scholars hotly debate the foundational question of whether “plausibility” is a new pleading standard, let alone what the standard is.<sup>9</sup> Teaching *Twiqbal* is further complicated because the impact of the revised pleading standard heavily depends on the substantive law at issue—leaving civil procedure professors to explain this nebulous intersection to students just learning what a legal claim is. This challenge is compounded by the realities of class size and limited time to devote to any one topic.

Even in my informal discussions with other civil procedure scholars, passing references to *Twiqbal* generate empathetic head-shaking and knowing sighs of frustration. However, given pleading is the first step of any litigation,<sup>10</sup>

7. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535 (2009); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Edward H. Cooper, *King Arthur Confronts Twiqly Pleading*, 90 OR. L. REV. 955 (2012); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1 (2014).
8. See, e.g., Raleigh Hannah Levine, *Of Learning Civil Procedure, Practicing Civil Practice, and Studying a Civil Action: A Low-Cost Proposal to Introduce First-Year Law Students to the Neglected MacCrate Skills*, 31 SETON HALL L. REV. 479, 482-83 (2000) (discussing factual investigation as part of practice-readiness).
9. See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) (“[T]he Supreme Court’s decision in *Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) (“[P]roperly understood, the post-*Iqbal* pleading framework is not fundamentally in conflict with notice pleading, because the most significant pre-*Twombly* authorities on federal pleading remain good law and because the troublesome plausibility standard is rendered irrelevant when a plaintiff provides nonconclusory allegations for each element of a claim.”).
10. Understanding the new federal pleading standard is particularly important, since the

just decrying the opinions' problematic aspects and hoping for the best does little good to prepare students. Yet I worry that traditional Socratic lecture fails to help students explore the contours of the decisions.<sup>11</sup> Instead, teaching *Twigbal* requires attention to context: the context necessary to understand both why *Twigbal* is challenging to teach and the consequences of the plausibility standard.

This Article discusses these dual levels of context. It begins by providing a brief overview of *Twigbal*, one that recognizes that the facts of both cases are well-known and does not belabor them more than necessary to present the remainder of the Article. Second, I theorize why students struggle so mightily to process the nuanced difference between plausibility and notice pleading—let alone the larger implications of the distinction. Third, I set forth one solution for increasing student understanding of this complex aspect of civil procedure jurisprudence. Though this solution is tailored to teaching pleading, the decision process behind this solution should resonate with other professors seeking alternative teaching methods to troublesome doctrines.

### I. Evolving Pleading Standards

This Part details how *Twigbal* fits into the evolving history of pleading requirements. This quick primer foreshadows the teaching challenges *Twigbal* poses. For close to fifty years, Rule 8 of the Federal Rules of Civil Procedure simply required “notice pleading.”<sup>12</sup> A complaint needed only to provide “a short and plain statement of the claim showing that the pleader is entitled to relief” to survive a motion to dismiss.<sup>13</sup> Rule 8 was part of a significant reform effort to ensure “the due subordination of civil procedure to the ends of substantive justice.”<sup>14</sup> The drafters sought to liberalize pleading standards, making it easier to bring suit than under the prior code pleading requirements.<sup>15</sup>

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majority of state courts have modeled their pleading requirements after the federal standard. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J. dissenting) (“Taking their cues from the federal courts, twenty six States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears “beyond doubt” that “no set of facts” in support of the claim would entitle the plaintiff to relief.”).

11. See, e.g., Suzanne Dallimore, *The Socratic Method—More Harm than Good*, 3 J. CONTEMP. L. 177, 177 (1977); Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate over Teaching Method Continues*, 1998 B.Y.U. EDUC. & L.J. 1, 6 (1998); Laura Kalman, *To Hell with Langdell!*, 20 LAW & SOC. INQUIRY 771, 771-72 (1995); Jenny Morgan, *The Socratic Method: Silencing Cooperation*, 1 LEGAL EDUC. REV. 151, 153 (1989); Bernard J. Ward, *The Problem Method at Notre Dame*, 11 J. LEGAL EDUC. 100, 100-01 (1958).
12. FED. R. CIV. P. 8(a)(2) (stating a complaint need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.”).
13. *Id.*
14. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).
15. Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 877 (2008) (“The drafters rejected . . . pleading rules . . . which generally required a plaintiff to allege facts sufficient to establish a cause of action.”). The previous standard

With *Conley v. Gibson* in 1957,<sup>16</sup> the Supreme Court further solidified this liberal pleading standard. Under *Conley*, as long as the trial court can construe the facts in a complaint to state a claim, it should deny a motion to dismiss.<sup>17</sup> The decision articulated the seminal test for a complaint: “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.”<sup>18</sup> Rather than an early screening, a court evaluates allegations either on summary judgment or at trial, after a plaintiff has had an opportunity to build a case through discovery.<sup>19</sup> This generous pleading standard was intended to bolster access to justice and private enforcement efforts.<sup>20</sup>

Lower courts did not always welcome this progression toward more liberal pleading.<sup>21</sup> These courts and other critics raised concerns about the high cost of discovery and expanding caseloads in federal courts to continue pushing for more procedural gatekeeping.<sup>22</sup> Nonetheless, for many years appellate

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was the Field Code. Established in 1848, the Field Code moved pleading away from the rigor of the English Common Law system. English Common Law (and in particular the Hilary Rules) established “a period of the strictest pleading ever known.” Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458-59 (1943); CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 14-15 (1928). The Field Code meant to simplify this rigor by requiring only a short statement of the facts “showing that there was a cause of action.” Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-21 (1957). But in application, courts still construed the Field Code to require unrealistic factual specificity. *Id.*

16. *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
17. *Id.* at 47-48 & n.8; cf. Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2000 (2010) (“For nearly fifty years, courts and commentators viewed the pleading stage as a relatively weak point for the exercise of gatekeeping.”).
18. *Conley*, 355 U.S. at 45-46.
19. *See, e.g.*, *Celotex v. Catrett*, 477 U.S. 317, 327 (1986) (discussing how after the advent of notice pleading the primary screening of cases shifted from motions to dismiss to summary judgment); *see also* Effron, *supra* note 17, at 2005 & n.11 (“The Rule was not meant to serve a gatekeeping function for meritorious lawsuits.”); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 994 (2003).
20. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008) [hereinafter Spencer, *Plausibility Pleading*] (explaining Rule 8 had been written so that “pleadings were no longer to be a substantial hurdle to be overcome before plaintiffs could gain access to the courts”).
21. *See* Jason G. Gottesman, *Speculating as to the Plausible: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 17 WIDENER L.J. 973, 983 (2008) (detailing lower courts pushing back against liberal pleading standards).
22. *See, e.g.*, AM. COLL. OF TRIAL LAWYERS, FINAL REPORT OF THE JOINT PROJECT OF THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM 2-3 (2009), <http://iaals.du.edu/sites/default/files/documents/>

courts and the Supreme Court reinforced notice pleadings with citations back to *Conley*.<sup>23</sup>

In 2007, the Supreme Court reversed course in *Bell Atlantic v. Twombly*.<sup>24</sup> *Twombly* involved allegations of market allocation in the cable industry. Brought as a putative class action, the plaintiffs alleged four cable carriers engaged in parallel conduct in violation of the Sherman Act to keep potential competitors out of the market. This horizontal agreement unlawfully inflated the price of local telephone use and high-speed Internet access.<sup>25</sup>

The Southern District of New York dismissed the complaint for failure to state a claim. Under the Sherman Act, mere “conscious parallelism” (meaning competitors acting in the same fashion) is insufficient.<sup>26</sup> Instead, the plaintiffs must allege “plus factors” indicative of an anticompetitive agreement. The district court held the complaint did not include sufficient facts to cross from conscious parallelism to a horizontal agreement.<sup>27</sup> The Second Circuit reversed, noting the plaintiffs need not plead specific facts of an actual agreement. Rather, paraphrasing the *Conley* standard, the Second Circuit held a motion should be dismissed only if it provides “no set of facts that would

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23. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (emphasizing that discovery and summary judgment are the way to screen out unmeritorious cases—not heightened pleading requirements); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard for section 1983 claims as “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules.”); see also A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1721 (2013) [hereinafter Spencer, *Pleading and Access*] (detailing the lower court and appellate court tug of war over pleading standards).
24. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). While *Twiqbal* was the Supreme Court’s first retreat from liberal pleading standards, the Court’s 1986 summary judgment trilogy, including *Matsushita v. Zenith*, arguably foreshadowed this move toward heightened procedural gatekeeping. Rather than continuing to embrace a pro-access policy, the Court strengthened summary judgment mechanisms as a way to screen out cases a trial court concludes the claims asserted are not sufficiently “probable” to be tried by a jury. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 601 (1986). For a thorough discussion of the trilogy, see, e.g., Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 215 (1988); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).
25. See *Bell Atl. Corp.*, 550 U.S. at 550-52.
26. See, e.g., *Theatre Enters. Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (discussing conscious parallelism); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 672 (1962) (“[M]ere interdependence of basic price decisions is not conspiracy.”).
27. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179, 189 (S.D.N.Y. 2003), *vacated and remanded*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”<sup>28</sup>

On appeal, the Supreme Court retired the “plain and simple” interpretation of Rule 8. Citing concerns about litigation expense,<sup>29</sup> the Court instead required plaintiffs plead “enough facts to state a claim to relief that is plausible on its face.”<sup>30</sup> Circumstantial evidence of an agreement alone would not suffice.<sup>31</sup> In rejecting the long-established “no set of facts” standard, the Court in *Twombly* departed from generous pleading standards. Despite this marked change, the majority stated it was not setting forth a new standard nor imposing heightened pleading but rather clarifying the existing requirement.<sup>32</sup> The Court provided lower courts little further guidance except to tell judges to rely on “common economic experience.”<sup>33</sup>

This decision generated significant confusion, particularly given the *Twombly* complaint had alleged facts for several plus factors.<sup>34</sup> After the decision, some commentators and practitioners held on to the affirmation that *Twombly* had not changed the long-standing notice pleading standard. Others assumed the new pleading standard was limited to antitrust or, if more broadly defined, limited to similar allegations of conspiracy. But the following year, the Supreme Court clarified the plausibility standard was transsubstantive in *Ashcroft v. Iqbal*.<sup>35</sup>

*Iqbal* involved allegations of wrongdoing related to the post-9/11 detainment of Javaid Iqbal.<sup>36</sup> Mr. Iqbal was detained and held in the most restrictive confinement conditions known in the federal detainment system for allegedly

28. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

29. *Bell Atl. Corp.*, 550 U.S. at 546.

30. *See id.* at 547.

31. *Id.* at 545-56 (“A parallel conduct allegation gets the § 1 complaint close to stating a claim, but without . . . factual enhancement it stops short of the line between possibility and plausibility.”).

32. *Id.* at 570. This language is particularly interesting given that in neither opinion does the Court use the term “notice” pleading. *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, 19 (2010).

33. *Bell Atl. Corp.*, 550 U.S. at 564.

34. For example, the complaint alleged: (1) ILECs “provid[ed] inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLEC’s relationships with their own customers”; (2) ILECs refused to seek out “‘attractive business opportunities’ in contiguous markets where they possessed ‘substantial competitive advantages’”; as well as allegations that an ILEC executive’s own statement that “competing in the territory of another ILEC . . . [is not] right.” Amended Complaint at ¶¶ 40-42, 50, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *vacated and remanded*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

35. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions . . .’”).

36. *See id.* at 667-68.

using an improperly obtained Social Security number.<sup>37</sup> He alleged that he and other Arab detainees were treated as terrorist suspects despite the lack of evidence of terrorist involvement. He further alleged this mistreatment was unlawfully based on race, religion, and national origin.<sup>38</sup>

Some of the defendants moved to dismiss the complaint.<sup>39</sup> The trial court denied the motion, and the appellate court affirmed.<sup>40</sup> However, the Supreme Court reversed. The Court held there was a plausible, lawful alternative explanation for Iqbal's allegations of daily strip-searches, solitary confinement, and shackling whenever he left his cell.<sup>41</sup> As the majority viewed the allegations:

It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests and the purposeful, invidious discrimination respondent asks to us to infer, discrimination is not a plausible conclusion.<sup>42</sup>

The decision arguably applied an even higher standard than *Twombly*.<sup>43</sup> Under *Iqbal*, courts are instructed to undertake a two-step process for screening complaints: (1) distinguish facts from legal conclusions; and (2) based on those facts, use "judicial experience and common sense" to evaluate whether there is a plausible claim for relief.<sup>44</sup> This sifting through allegations to sort legal conclusions from facts allows judges to screen out weak, not just implausible, cases.<sup>45</sup>

Referenced jointly as *Twiqbal*, the new pleading standard shepherded in more aggressive screening of complaints. But what that standard actually is and how to apply it is still debated. In the nine years since *Twombly*, courts are no closer to understanding the new standard. As Professors Jill Curry and Matthew Ward noted, "*Twombly* was cited over 13,000 times by its one-

37. *See id.*

38. *See id.* at 669.

39. *See id.*

40. *See id.* at 670.

41. *See id.*

42. *Id.* at 682.

43. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 850 (2010) [hereinafter Bone, *Plausibility Pleading*] (discussing how *Iqbal* "signals an even stricter approach to pleading requirements.").

44. *Iqbal*, 556 U.S. at 679.

45. *See* Bone, *Plausibility Pleading*, *supra* note 43, at 850.

year anniversary, and the lower courts ‘reached every conceivable answer’ in applying the Court’s ‘mixed signals.’”<sup>46</sup>

While legislative attempts to overturn *Twiqbal* have been introduced, they have languished in the current political gridlock.<sup>47</sup> Requests for Supreme Court clarification of the standard have been equally unsuccessful. As one such appeal noted, “Lower courts’ wildly inconsistent application of *Iqbal* and *Twombly* is not a feature unique to [certain] claims; it is symptomatic of a larger problem: courts’ inability to reach any consensus of the state of the court’s pleading jurisprudence.”<sup>48</sup> Thus, at least for the near future, the problems with *Twiqbal* are here to stay.

## II. Problems Teaching the Irresoluble

*Twombly* and *Iqbal* invite critical debates about the role of procedural rules, the need for curbing discovery abuse, and the competing considerations of judicial access. Such debates, however, first require a clear understanding of what remains unclear post-*Twiqbal*. As law professors are well-aware, when rules lack solid contours, law students often get confused or frustrated, assuming the professor is hiding the ball. Students commonly respond to uncertainty by distilling material into oversimplistic, single-rule sentences. This is not unique to pleading standards or even civil procedure. *Twiqbal* is but one example of legal doctrine that conflicts with students’ deep desire to extract black-letter rules—absolutes without consideration of nuance.

This Part highlights some of the key difficulties with teaching *Twiqbal*. Necessarily, this discussion overlaps with the problems I see in the cases themselves. Rather than a theoretical critique of the cases, though, this Part explores teaching plausibility to law students. In particular, this Part explains three facets of the plausibility standard that students struggle with: (1) how different the new plausibility standard is; (2) what exactly the standard requires; and (3) the gatekeeping rationale behind the standard.

### A. *Twiqbal* Versus Conley: Did *Twiqbal* Really Change Much?

*Twiqbal* is hardly a model of clarity in drafting.<sup>49</sup> The decisions are confusing independently, but even more so when read conjunctively. Introducing this confusion into a first-year civil procedure class presents significant pedagogical challenges. My students struggle to see how radical a departure *Twiqbal* is from

46. Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 831 (2013) (citations omitted).

47. In 2009, two Acts were proposed to amend the new pleading standard: the Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) and the Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

48. Petition for Writ of Certiorari, *Landers v. Quality Commc’ns, Inc.*, 135 S. Ct. 1845 (2015) (No. 14-969).

49. Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 606 (2007).



traditional notice pleading and, in particular, the standard in *Conley*.<sup>50</sup> As a student once asked me, “Isn’t a complaint that puts a defendant on notice a plausible claim?”

Even just walking students through *Twombly* illustrates the internal tension in the majority opinion. The majority concedes it lacks the power to heighten pleading standards absent a legislative amendment.<sup>51</sup> It also notes that a complaint “does not need detailed factual allegations.”<sup>52</sup> At the same time, though, the decision rejects Justice Black’s language in *Conley*,<sup>53</sup> going so far as to say the “no sets of facts” language is “best forgotten as an incomplete negative gloss on an accepted pleading standard.”<sup>54</sup> However, the decision reaffirms prior cases applying *Conley*, suggesting that perhaps the two standards are not all that different. Thus, when asked whether *Conley* is still good law, students frequently struggle; they often frame their answers in terms of the Court “not liking” the decision but cannot say for sure whether *Twigbal* overturned *Conley*.<sup>55</sup>

50. In fact, as Professor Benjamin Spencer explains, some defenders of the *Twigbal* standard similarly argue that “nothing has changed beyond the language we use to describe the pleading standard.” Spencer, *Pleading and Access*, *supra* note 23, at 1715 (2013) (footnote omitted); see also Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 484-85 (2010) (“Courts have long held that legal conclusions need not be accepted as true on 12(b)(6) motions, have long insisted that pleaders are not entitled to unreasonable factual inferences, and have long treated ‘legal conclusions,’ ‘unwarranted deductions,’ ‘unwarranted inferences,’ ‘unsupported conclusions,’ and ‘sweeping legal conclusions cast in the form of factual allegations’ as ‘more or less synonymous’ terms. So understood, *Twombly*’s insistence that the inference of conspiracy be ‘plausible’ is equivalent to the traditional insistence that an inference be ‘reasonable.’” (footnote omitted)).
51. *Bell Atl. Corp.*, 550 U.S. at 569 n.14 (2007).
52. *Id.* at 555.
53. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
54. *Bell Atl. Corp.*, 550 U.S. at 563.
55. This confusion over the import of the new plausibility standard is not unique to students. Rather, it continues in legal scholarship. On one hand, *Twombly* and *Iqbal* have been called the most “significant” pleading decisions in the past fifty years. See, e.g., Timothy Beyer, Amy Benson & Mark Mathews, *Pleading Standards After Twombly: Surviving A Motion to Dismiss*, 37 COLO. LAW. 29 (2008) (“*Twombly* marks a clear departure from prior liberal federal pleading standards—and may represent one of the most significant pronouncements on pleading by the Supreme Court in the past fifty years.”). At the same time, others have argued the decisions do not change much—either because the plausibility standard is not actually any alteration of the pleading standard or, even if it is, the alteration doesn’t matter. See, e.g., *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 33 (2009) (statement of Gregory C. Katsas, former Assistant Att’y Gen., Civil Division, U.S. Department of Justice) (claiming that *Twombly* and *Iqbal* “faithfully interpret” the Federal Rules of Civil Procedure and are consistent with precedent); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064 (2009) (arguing that the plausibility standard is both coherent and required by the Federal Rules of Civil Procedure).

Moreover, what the new standard requires is equally obtuse. Though *Iqbal* attempts to define plausibility, it does so by drawing an artificial distinction between plausibility and probability:

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.’”<sup>56</sup>

This language creates a spectrum from possible to probable, with plausibility some place between those two ends.<sup>57</sup> However, it does so without clearly defining either end and without clarifying whether plausible is closer to the possible or probable end.<sup>58</sup>

Post-*Iqbal*, there is arguably a need for allegations closer to the level of “proof” previously reserved for summary judgment. This complicates teaching different procedural stages to 1Ls. With courts beginning to blur motions to dismiss and summary judgment screening,<sup>59</sup> students unsurprisingly struggle to distinguish a sufficiently plausible complaint from a claim that is sufficiently probable to survive summary judgment. Admittedly, it is not clear that all judges would draw the same line, but this lack of context only exacerbates law students’ struggle to understand how different the new plausibility standard is.

### B. Teaching Undefined Plausibility

Once students begin to see that plausibility is something new, they then struggle to figure out what that something actually is.<sup>60</sup> While the *Twigbal*

56. *Iqbal*, 556 U.S. at 678 (citations omitted).

57. Effron, *supra* note 17, at 2016.

58. As Judge Posner explains, “[P]lausibility, 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. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid, but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.” *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (citation omitted).

59. For example, in *Mangum v. Town of Holly Springs*, the Eastern District of North Carolina considered a complaint based on allegations of a hostile work environment. In dismissing the complaint, the court rejected some of the plaintiff’s specific allegations, not based on being legal conclusions, but rather for being inadmissible hearsay. See 551 F. Supp. 2d 439, 443-44 (E.D.N.C. 2008).

60. Cf. Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1431 (2008) (“In place of Conley-style notice pleading, the Court substituted a vague ‘plausibility standard’ that has confounded the legal community since its inception.”).

decisions are fast becoming some of the most cited Supreme Court cases,<sup>61</sup> the actual perimeters of the new standard remain a mystery. This adds to the challenges of teaching pleading.

First, to understand pleading and the concurrent drafting process requires students to develop a series of foundational skills. Pleading a claim starts with the elements and supporting factors of the claim. From there, pleading requires gathering facts to allege each element. Then, these gathered facts need to be transposed into actionable allegations. It is at this stage that the practical implications of *Twigbal* become most apparent.

Under *Iqbal*'s two-step test, a trial court first disregards legal conclusions, then uses "experience and common sense" to decide if the remaining facts present a plausible claim. Novice law students are just learning the distinction between factors and elements, let alone the requisite elements for a given claim. The difference between facts and legal conclusions is often lost on them, as students' primary exposure to facts are pre-packaged, distilled facts presented in case law textbooks.<sup>62</sup> Further, the difference between a legal conclusion and a fact is hardly clear cut.<sup>63</sup> As Professor Hartnett explains, "any allegation can be considered 'conclusory' in the sense that one can always ask for the underlying information that supports an allegation."<sup>64</sup> Given this lack of expertise, when asked in lecture, students are quick to recite *Iqbal*'s two-step heuristic, though they struggle to articulate the limitations of this test.

For example, take a straightforward right-of-publicity claim. The elements are sufficiently clear, making the cause of action one that lends itself well to use with first-year students. A plaintiff has a right to relief when an aspect of

61. Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After Twombly and Iqbal*, 11 SEDONA CONF. J. 181 (2010) ("*Twombly* is already one of the 20 most cited cases of all time in the federal courts, and *Iqbal* averages over 300 new citations per month. But this abundance of analysis has so far failed to coalesce around a concrete and workable interpretation of the 'plausibility standard' introduced by these two important decisions.") (footnote omitted).
62. See, e.g., Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 731 (2003) (describing law students' course of study as "the steady diet of common-law appellate opinions, particularly in the first year . . ."); Paula Schaefer, *Injecting Law Student Drama into the Classroom: Transforming an E-Discovery Class (or Any Law School Class) with a Complex, Student-Generated Simulation*, 12 NEV. L.J. 130, 137 (2011) (discussing how students need more experience using facts).
63. This lack of a clear distinction between fact and law was the basis for Souter's dissent in *Iqbal*. See *Iqbal*, 556 U.S. at 687; see also Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word, Iqbal, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215, 248 (2011) ("Souter could not see a principled, discernable standard in the majority opinion for conclusory versus nonconclusory allegations. Souter believed that the majority's application of the conclusory standard was inappropriate because a court must look at an allegation's place in the whole complaint before it can decide whether or not it is conclusory.") (footnotes omitted).
64. Edward A. Hartnett, *Taming Twombly: An Update After Matrixx*, 75 LAW & CONTEMP. PROBS. 37, 40 (2012) (citation omitted); see also JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 198 (5th ed., Hein 2007) ("The difference between a decision and findings of fact and conclusions of law is one in form only.") (emphasis added).

his person (usually his image, name, voice, or signature) is commercially used without permission. But what factual statements are necessary under *Twigbal* is more difficult to parse. Consider these three variations of the same allegations: (1) the defendant used the plaintiff's picture on a CD cover without permission; (2) the defendant used the plaintiff's picture on a CD cover without first contacting the plaintiff to ask for permission; and (3) the defendant wrongly used the plaintiff's image without permission. Arguably, (3) is too conclusory: "wrongly" is a legal conclusion that would be disregarded under the first step of the *Iqbal* test. Statement (2) is better than (1) as it provides more concrete fact statements. But whether statement (2) would suffice under *Twigbal* is not clear. Statement (2) includes "used". Is that a legal conclusion? The answer may very well depend, as courts have adopted varying levels of plausibility.<sup>65</sup> For students seeking the "right" answer, this uncertainty can be off-putting but is a key part of learning about the law, not just in civil procedure but throughout legal education.<sup>66</sup>

Second, beyond segregating facts from legal conclusions, *Twigbal* requires further context that students rarely have about judges and the limitations of judicial "common sense and experience."<sup>67</sup> Under *Twigbal*, courts are instructed to use their common sense and experience to delineate a plausible claim from a possible one. Students, notably in their first year, focus more on extracting tests from opinions than on considering the author of those opinions. By teaching law through the case method, law schools make judicial opinions the keys to unlocking the elusive black-letter law students seek. However, learning more about generalist judges and the composition of the federal judiciary is

65. See, e.g., Owen & Mock, *supra* note 61, at 183 (discussing the differing approaches circuits have taken in response to *Twigbal*).

66. As Professor Woodward aptly explains:

I would argue that objectivity, in human affairs, especially, is not so easily achieved. Law students, above all, should understand this. Lawyers do not capture justice, as if they were caging a lion. In a trial, each side makes its argument from its own perspective and for the benefit of a client. And the assumption is that only through this adversarial *procedure* will justice be served—though of course it often isn't. Or, since this is a Catholic university, consider Sacred Scripture. The Bible speaks differently to the poor than to the well off. Indeed, the Bible itself is a tissue of internal rereadings: the later books of the Bible reinterpret the earlier ones and of course the New Testament radically reinterprets the old. And all this developed long before Friedrich Nietzsche ever wrote a word.

Kenneth L. Woodward, *Neither "Objective" Nor "Post-Modern,"* 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 719, 724 (2005).

67. Students often know little about the homogeneity of the judiciary. Students, particularly in the first year, view judges without a critical eye—rarely going past the opinion to consider the author of that opinion. They know little of the homogeneity of the judiciary, making it harder for them to understand the limitations of this "judicial experience." Judges are disproportionately white males, with a shared elite background. They frequently come from families with judges. Their schooling is frequently limited to Ivy League or other private law schools. See ROBERT A. CARP & RONALD STIDHAM, *OUTLINE OF THE U.S. LEGAL SYSTEM* 142, 154 (2001), <http://iipdigital.usembassy.gov/media/pdf/books/legalotn.pdf> (discussing judges' backgrounds).

a prerequisite for law students to understand how “common sense” differs with the ideologies and values brought to the bench. As Professor Malveaux explains, “[b]ased on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her ‘judicial experience and common sense.’”<sup>68</sup>

Third, students often lack sufficient context to understand how plausibility depends on the substantive law involved.<sup>69</sup> As Senator Arlen Specter noted soon after *Twigbal*:

The effect of the Court’s actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries . . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.<sup>70</sup>

Senator Specter’s warning proved accurate. For example, in antitrust, *Twigbal* permits a judge to decide whether she believes a particular restraint is plausible in a given industry. This subjectivity has generated disproportionate antitrust claim dismissals—without evidence that the complaints for such claims are more flawed than other claims. Specifically, two out of every three antitrust cases filed since *Twombly* have been dismissed—a figure nearly twenty-five percent higher than in torts or contract cases.<sup>71</sup>

My law students rarely enter civil procedure class with knowledge about the different elements of a variety of causes of action. Even for those students with some legal experience, it is often limited to a single area of law, meaning they still lack knowledge about common fact patterns in analogous cases. As Professor Kris Franklin notes elsewhere in this symposium, this lack of experience is “one reason why they can have a hard time understanding how procedural rules operate in the real world.”<sup>72</sup> Perhaps it is not surprising, then,

68. Suzette M. Malveaux, *Clearing Civil Procedure Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 624 (2011).
69. See, e.g., Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2326-27 (2012) [hereinafter Gelbach, *Locking the Doors*] (“Among total other cases, the filing rate increased from 3.1% to 5.0%. For employment discrimination and civil rights cases, the 12(b)(6) MTD filing rate increased from 6.9% to 9.0 percent [sic], and from 10.8% to 12.1%, respectively.”).
70. *Specter Proposes Return to Prior Pleading Standard*, BLOG LEGAL TIMES (July 23, 2009, 11:43 AM), <http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html> (internal quotation marks omitted).
71. Christine P. Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2187-88 (2014) (citations omitted).
72. See Kris Franklin, *Do We Need Subject Matter-Specific Pedagogies?*, 65 J. LEGAL EDUC. 839, 851 (2016).

that students frequently assume this disproportionate impact has more to do with the quality of the pleading in such cases than the plausibility standard itself.

Thus, the second tier of challenge with *Twigbal* arises from the lack of clarity regarding what the new plausibility standard actually requires. Helping students work through plausibility, and how its impact depends on the substantive law at issue, requires providing students additional context to evaluate *Twigbal*—context beyond the edited opinions offered in casebooks.

### C. *The Challenges of Exploring Gatekeeping*

Last, professors face a notable challenge in helping law students engage with the rationale for more rigorous screening procedures. Questions of procedural gatekeeping—the point at which alleged wrongdoing should be kept out of the judiciary—are at the heart of civil procedure rules. Certainly not every allegation of wrongdoing deserves a jury trial. But the question of screening is more nuanced than whether screening is good or bad. Rather, at what stage should the allegations be tossed?

*Twigbal* reflects competing views over the judiciary’s ability to manage the discovery process. For the court’s majority, judges are ill-equipped to oversee discovery, inviting rampant discovery abuse.<sup>73</sup> The dissent disagrees, recognizing judges already have extensive case management tools. Thus, discovery abuse concerns must be tempered by competing right to access interests.<sup>74</sup>

As my students first discuss the decisions, they frequently accept the arguments about the need for mitigating litigation costs at face value.<sup>75</sup> The decisions, alone, do not provide students enough context to interrogate the merits of different screening opportunities, ranging from more stringent case management techniques (such as staged discovery) to stronger reliance on summary judgment mechanisms.<sup>76</sup> This limits the depth of discussions

73. *Bell Atl. Corp.*, 550 U.S. at 559.

74. *See id.* at 586-87.

75. Such an assumption is faulty given the lack of supporting evidence. *See* Spencer, *Pleading and Access*, *supra* note 23, at 1732 (“neither the Court nor any commentator has made the case that the costs to defendants, to the litigation system, or to substantive legal concerns of permitting such claims to go forward are so great as to warrant denying a prospective litigant meaningful access to the courts, either in particular substantive contexts or across all cases generally.”); Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1643 (2012) (“This is not to say, however, that the regulatory mechanism the Court selected to tighten the spigot on discovery—pleading standards—is the best one. Pleading standards empower judges who have neither the information nor the incentives to make wise decisions about which cases are worthy of *Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (“[T]he massive discovery reform agenda unleashed simultaneously through the Advisory Committee on Civil Rules, the CJRA, and executive branch orders is based on questionable social science, ‘cosmic anecdote,’ and pervasive, media-perpetuated myths.”) (footnote omitted).

76. *See, e.g.*, Bone, *Plausibility Pleading*, *supra* note 43, at 881 (“[E]ven in *Iqbal*, strict pleading

regarding the function of civil procedure rules, including how to balance right of access with efficiency.

Similarly, students do not know enough about the challenges of pre-discovery factual investigation to anticipate how shifting plausibility from summary judgments to motions to dismiss matters in practice. Since law students are reading appellate decisions, their understanding of trial-level decisions, let alone litigation strategy and pre-filing considerations, is thin, as such topics are rarely more than passing discussions in most law school classes.<sup>77</sup> When *Twigbal* is discussed later in upper-division courses, some students have more context about what discovery entails, either from summer work experience or through other coursework. But in the first year, students do not always intuit the problems with obtaining pre-filing evidence. In reading a decision, the facts are handed to students in paragraphs that unfold to provide a single narrative. Competing facts (and thus competing narratives) are not provided, except perhaps in the notes to the case or through lecture.

In addition to the timing of judicial screening, students frequently need more context to weigh the trade-offs of a rigid pleading standard. For defendants, the ambiguity over the new plausibility standard has converted a motion to dismiss from an occasional motion to a virtually mandatory one.<sup>78</sup> As Professors Clermont and Yeazell explain, “At a minimum, the foggy warns that any defendant’s lawyer, faced with a complaint employing the minimalist pleading urged by Rule 8’s wording and the appended Forms’ content, commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*.”<sup>79</sup> Each of these motions comes with increased costs to the parties and the judiciary.

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might not have been the best way to achieve an optimal policy balance. The lower courts offered a promising alternative: thin screening followed by limited access to discovery before subjecting the case to a more aggressive screening approach.”); Clermont & Yeazell, *supra* note 7, at 849 (“[O]ne could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.”) (footnote omitted).

77. See, e.g., A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 234-35 (1992) (the “MacCrate Report” named for Robert MacCrate, Esq., chairman of the task force) [hereinafter MACCRATE REPORT] (discussing the need for students to develop factual sensitivity).
78. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 49 AMER. U. L. REV. 553, 556 (2010) (concluding through empirical study that there has been a noticeable increase in the number of 12(b)(6) motions granted in district courts since these decisions); see also Hon. Colleen McMahan, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 853 (2008); JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES vii (2011) (“There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim . . .”).
79. Clermont & Yeazell, *supra* note 7, at 840 (footnote omitted).

Another cost indicated by empirical research post-*Twigbal* is the risk of false positives, striking out cases based not on their potential merit but rather on judges' varying definitions of plausibility.<sup>80</sup> For example, if *Twigbal* was an effective screen, one would have expected a corresponding drop in summary judgment motions after the decisions; if more cases were screened out on motions to dismiss, fewer questionable cases would need to be screened under Rule 56.<sup>81</sup> Instead, at least one study has shown there was no reduction in summary judgments.<sup>82</sup> Thus, the increased dismissals represent only a portion of *Twigbal*'s impact; they do not (and cannot) reflect the cases that go unfiled.

In this way, the heightened pleading standard screens twice: once when plaintiffs are deciding whether to bring suit, then a second time on a motion to dismiss.<sup>83</sup> As Professors Robert Bone and David Evans aptly explain, early screens generate costs of their own:

For example, strict pleading, which requires class plaintiffs to plead claims in detail, creates error costs by making it harder for meritorious plaintiffs to file legitimate class action suits and also increases process costs by inviting more motions to dismiss. Moreover, because penalties must be set quite high to have a substantial impact on filing incentives, the use of a penalty approach can deter risk-averse plaintiffs from filing meritorious suits, and because hearings must precede the imposition of penalties, process costs can rise as well.<sup>84</sup>

But students rarely have this additional context, which provides a critical counterpoint to the narrowly framed efficiency arguments provided in the decisions.

Thus, a final hurdle in teaching *Twigbal* is providing students enough context to question what gatekeeping is appropriate and when. Students will and should reach different conclusions about the complicated needs for gatekeeping and whether *Twigbal* meets those needs. But those conclusions should be rooted in a solid understanding of the trade-offs of increased, early gatekeeping—trade-offs hardly evident from the majority opinions in *Twigbal*.

80. See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 550, 557 (2010) (discussing how *Twigbal* is an example of a transsubstantive procedural rule, working like a substantive one, affecting some causes of action more than others).
81. See Jonah B. Gelbach, *Material Facts in the Dispute over Twombly and Iqbal*, 68 STAN. L. REV. 9 (forthcoming 2016).
82. See *id.* at 9-10.
83. See, e.g., Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. COURTS L. REV. 1, 7 (2011); Gelbach, *Locking the Doors*, *supra* note 69, at 2314 (discussing how the empirical rate of increased motions to dismiss post-*Twigbal* only partially represents the impact of the new standard).
84. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1329 (2002).



### III. Proposed Solutions for Teaching Plausibility

As previously discussed, *Twombly* and *Iqbal* are challenging cases to unpackage. Particularly for 1Ls, the implications of the cases are hardly apparent from reading the decisions. As with challenging topics in other courses, this complexity calls for more creative teaching solutions to help provide students the requisite context to not just memorize but internalize the plausibility standard.<sup>85</sup> A lecture, alone, does not provide this opportunity.

This Part starts by describing the legal education goals and teaching theory considerations I focused on to restructure how I teach plausibility. It then discusses the specifics of the teaching methods I adopted. While the approach I selected may appeal more to civil procedure professors, the design behind those methods hopefully will resonate with legal professors more broadly.

#### *A. Integrating Legal Education Goals & Pedagogy*

Once I decided to move away from a strict lecture format, my goal was to find an alternative approach to do more than just teach pleading. I wanted to see if I could also integrate more practice-readiness skills into my class. Employers and the judiciary have long pushed for increased skills training.<sup>86</sup> As Professor David Oppenheimer also discusses in this symposium,<sup>87</sup> research ranging from the Carnegie studies<sup>88</sup> to the American Bar Association's Task Force reports<sup>89</sup> all emphasize the need for more practice-ready graduates. Students and educators have joined this movement, seeking better preparation for the tasks associated with the practice of law. However, law schools have been slow to adapt. While they have expanded upper-division offerings to include more practical-skills classes and problem-solving courses, the first-year curriculum (and teaching of that curriculum) has generally changed little.<sup>90</sup>

85. *Accord* Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 373 (2012) (proposing law professors “infuse our curriculum with factual, empirical and normative content far beyond that which can be gleaned from appellate cases.”); Michael B. Mushlin & Lisa Margaret Smith, *The Professor and the Judge: Introducing First-Year Students to the Law in Context*, 63 J. LEGAL EDUC. 460, 461 (2014) (discussing the value of beginning law school students receiving a “more contextual introduction to the profession”).
86. Christine P. Bartholomew, *Time: An Empirical Analysis of Law Student Time Management Deficiencies*, 81 U. CIN. L. REV. 897, 898 & n.1 (2013).
87. *See* David Oppenheimer, *Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution*, 65 J. LEGAL EDUC. 817, 819 (2016).
88. *See, e.g.*, ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 281 (1921); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 89-91 (2007) [hereinafter CARNEGIE REPORT].
89. *See, e.g.*, AM. BAR ASS'N TASK FORCE ON PROFESSIONAL COMPETENCE, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 6 (1983); AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-41, 233-36 (1992).
90. *See* Mushlin & Smith, *supra* note 85, at 480; *cf.* GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 84 (2000) (discussing how law schools are inherently slow at implementing

Thus, ideally, any approach I adopted would deepen students' understanding of pleading standards and include practice-ready objectives. But the skills students need for practice are wide-ranging, and no single class can teach all of them. I wanted to find a way to work on two concrete goals proposed by the 2007 report on legal education by the Carnegie Foundation, more commonly referenced as the Carnegie Report.<sup>91</sup> This Report was notably critical of how law schools often segregated analytical and practical training. In particular, the Report focused on perceived issues with the Socratic method and the need for more training on the ethical and political responsibilities of the legal profession.<sup>92</sup>

One proposal for legal change suggested by the Report is to provide "context-based learning."<sup>93</sup> Context-based learning is sometimes too narrowly defined. The quintessential "context-based learning" example is a clinic or externship, where students get hands-on experience with real cases. Such opportunities are unquestionably valuable but often unavailable at the start of law school. Hence, professors must seek out alternative ways to build context in the first year. Providing students with context would not only deepen students' understanding of pleading standards, but also conforms to the Report's suggested changes in legal education. Hence, a "context-based learning" goal for any revised approach to teaching plausibility was both logical and synergistic.

The Report also proposes integrating instruction on professional judgment, meaning "the ability to both act and think well in uncertain situations."<sup>94</sup> Such judgment should be developed through "involvement in situations that are necessarily indeterminate from the point of view of formal knowledge."<sup>95</sup> Pleading standards after *Twiqbal* provide the very opening for developing such thinking. As discussed in Part II.B., what facts are necessary to plead a "plausible" claim are still unclear, with courts taking differing positions both intrasubstantively and transubstantively.

Thus, I locked down my initial framework for tweaking the class: my new goal was to introduce pleading standards through a practice-readiness approach that incorporates professional judgment. Legal education-specific goals are a solid starting place for redesigning a class; however, those goals would be achieved only if the specific methods I adopted were sound. By

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change).

91. See generally CARNEGIE REPORT, *supra* note 88. For a helpful summary of the Carnegie Report and its findings, see Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 720-25 (2009).

92. Thomas Cothran, *The Sophistic Method?: Dialectic and Eristic in Legal Pedagogy*, 100 KY. L.J. 177, 181 (2012).

93. CARNEGIE REPORT, *supra* note 88, at 57, 136 (citing ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 109-22 (2007)).

94. CARNEGIE REPORT, *supra* note 88, at 9.

95. *Id.* at 8.

considering pedagogy research in evaluating a teaching method—in any of my classes, not just civil procedure—I could refine the approach to squeeze every potential benefit from the devoted class time. To this end, I focused on active learning, group work, and chunking, as discussed below.

At this point in legal education, the gains of active learning methods are well-established.<sup>96</sup> Active learning methods, as opposed to passive learning, “require[] students to [engage in] higher-order thinking [such as] analysis, synthesis, and evaluation.”<sup>97</sup> These gains—which are not limited to civil procedure—include greater content retention and higher transfer of knowledge in new situations.<sup>98</sup> Such learning methods help students develop stronger problem-solving skills and generate higher motivation for further learning.<sup>99</sup> Given the problems students had processing the new pleading standards, adopting an active-learning approach made sense. Through engaging in higher-level thinking, students could explore the nuances of the standard while developing professional judgment. Active learning allows me to place greater emphasis on attitudes and values<sup>100</sup> by allowing me to remediate students’ lack of context through the use of real-world materials.<sup>101</sup>

96. See generally Gary F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999) (explaining how active learning in law school is not just a set of techniques but also “an orientation . . . [that] includes a belief that legal education should help students understand legal concepts and theory, improve critical thinking, and develop professional skills and values.”); MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 4-8 (2009) (explaining that cognitivists and constructivists recognize the importance of active learning activities).
97. Elizabeth A. Shaver, *LRW’s The Real World: Using Real Cases to Teach Persuasive Writing*, 38 NOVA L. REV. 277, 281 (2014) (citation omitted).
98. CHARLES C. BONWELL & JAMES E. EISON, *ACTIVE LEARNING: CREATING EXCITEMENT IN THE CLASSROOM* 2 (1991).
99. See, e.g., Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 562 (2004) (“In larger classes, where active learning is often very difficult to implement, its benefits become even more important.”) (citation omitted); Mushlin & Smith, *supra* note 85, at 472 (discussing how students felt that hands-on civil procedure exercises “took the mystery out of the practical application of what [they] read about.”); Gary S. Goldstein, *Using Classroom Assessment Techniques in an Introductory Statistics Class*, 55 C. TEACHING 77, 78 (2007); Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. ENGINEERING EDUC. 223, 225-26 (2004).
100. See Hess, *supra* note 96, at 405 (“assuming that most teachers are adept at transmitting knowledge, they must also teach skills and values, and for those purposes active learning methods are most effective.”); BONWELL & EISON, *supra* note 98, at 2.
101. See SUSAN A. AMBROSE ET AL., *HOW LEARNING WORKS* 83 (2010) (discussing the importance of “assigning problems and tasks that allow students to vividly and concretely see the relevance and value of otherwise abstract concepts and theories”); Linda L. Berger, *Do Best Practices in Legal Education Include Emphasis on Compositional Modes of Studying Law as a Liberal Art? Reporter’s Notes on “A Liberal Education in Law,”* 1 J. ASS’N LEGAL WRITING DIRECTORS 158, 160 (2002) (discussing how “learning theory endorses active learning in the context of real world problems.”). Real-world problems also have the added benefit of generating higher student motivation. See AMBROSE ET AL., *supra*, at 84.

However, I was hesitant to give up the aspects of lecture that did work. Traditional Socratic lecture draws out some of the nuances of pleading standards.<sup>102</sup> For example, through a Socratic lecture, students can learn the limitations of defining plausibility and recognize the competing policy considerations articulated by the majority and dissents in the decisions. Further, given the varying aspects of pleading standards I wanted to explore, no single exercise would suffice; I needed to blend a series of interactive exercises with lecture.

From there, I sought to maximize any interactive exercises by including a group discussion component. Peer discussions increase students' learning and content retention<sup>103</sup> but must be carefully circumscribed to generate these gains. In my first few years of teaching, I noticed a handful of students frequently dominated group discussions. It is easy for some students to disengage or not see the value of the discussion. Group conversations, left undirected, can also quickly fizzle out. Education scholars have written wonderful guides for overcoming these problems,<sup>104</sup> and I have intentionally integrated their research into my own teaching. For example, designating students' roles increases participation in group discussions. Further, expressly identifying the goals of the discussion helps students value the group discussion.<sup>105</sup> Finally, leaving the group discussion ungraded minimizes pressure and stimulates students to collaborate and guide one another through the learning process.

Yet, the specter of problems with group discussions reinforced my decision to interweave lecture with classwide and group discussion components. Rather than initiating open-ended discussion of plausibility, interweaving these components would allow me to "chunk," meaning break the teaching

102. While the Socratic method has its critics, it also has benefits such as "help[ing] students: (1) develop analytical skills; (2) think on their feet; (3) develop intellectual rigor; (4) learn about the legal process; and (5) learn about the lawyer's role or function." Christine P. Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 *DUQUESNE L. REV.* 354 (2010); see also Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Dichotomy: The Debate Over Teaching Method Continues*, 1998 *BYU EDUC. & L.J.* 1, 4-5 (1998) (discussing the Socratic method, including its benefits and deficiencies).
103. HOWARD E. GRUBER & MORRIS WEITMAN, *SELF-DIRECTED STUDY: EXPERIMENTS IN HIGHER EDUCATION* 2-5 (1962) (finding students taught through small, student-led discussions did equal if not better on final examinations than students who heard the teacher lecture). This is particularly true for millennials, meaning those students born between 1980 and the mid-2000s. This generation of students values active learning, in particular group discussions. See Patricia Vincent Roehling et al., *Engaging the Millennial Generation in Class Discussions*, 59 *C. TEACHING* 1, 2 (2010).
104. For a thorough discussion of group discussion research, see MARILLA D. SVINICKI & WILBERT J. MCKEACHIE, *MCKEACHIE'S TEACHING TIPS* 38-57 (14th ed. 2014) (and accompanying citations).
105. Providing goals also helps generate motivation. See, e.g., T.A. RYAN, *INTENTIONAL BEHAVIOR: AN APPROACH TO HUMAN MOTIVATION* 145-47 (1970); T.R. Mitchell, *Motivation: New Directions for Theory, Research, and Practice*, 7 *ACADEMIC OF MANAGEMENT REVIEW* 80, 83 (1982); Andrew J. Elliot & James W. Fryer, *The Goal Construct in Psychology*, in JAMES Y. SHAW & WENDI L. GARDNER (EDS.) *HANDBOOK OF MOTIVATION SCIENCE* 235 (2008).

components into subproblems.<sup>106</sup> Chunking makes an assignment or discussion more manageable, allowing students to track progress by using short-term goals as markers.<sup>107</sup> However, for chunking to work, the professor must do more than merely suggest guideposts; I had to carefully direct the students through the discussion.<sup>108</sup>

Retaining some minimal lecture and group discussion component allowed me to provide this guidance. Lecture would help students stay grounded in the discussion and minimize the potential to rush ahead without fully understanding the material. Guided group discussion would help students see how each step of the exercise fits together. Students needed specific questions to answer, as using questions results in higher quality of discussions.<sup>109</sup> These questions then would structure the student interaction and ensure students are building the necessary learning blocks. After each exercise chunk, I could use lecture to track and connect the exercise to the learning objectives. This tracking creates helpful opportunities for reflection, allowing students more time to absorb what they learned through their group dialogue. Weaving exercises and lecture chunks also has added benefits in terms of increased student attention and retention rates.

As for what the group discussions would focus on, I wanted to invite opportunities for disagreement, as this, too, enhances the utility of student discussion groups.<sup>110</sup> “Constructive controversy” requires students to work

106. See Bartholomew, *supra* note 86, at 897, 941. Janeen Kerper, *Let's Space Out: Rethinking the Design of Law School Texts*, 51 J. LEGAL EDUC. 267, 275 (2001) (discussing chunking and how it works); see also Walter H. Gmelch, *Stress for Success*, 22 THEORY INTO PRACTICE 7, 12 (1983) (discussing how breaking larger projects into smaller chunks also minimizes stress and chance of burnout). Chunking is particularly valuable for novice learners. See, e.g., Tracey A. Clarke, Paul L. Ayres & John Sweller, *The Impact of Sequencing and Prior Knowledge on Learning Mathematics through Spreadsheet Application*, 53 EDUC. TECH. RES. & DEV. 15, 15-16 (2005).
107. By focusing on isolated tasks and then building to more complex questions, students often learn more effectively than they do moving directly to the complex issues. See Dennis C. Wightman & Gavin Lintern, *Part-Task Training for Tracking and Manual Control*, 27 HUM. FACTORS 267, 270-71 (1985); Ron J.C.M. Salden, Fred Pass & Jeroen J.G. van Merriënboer, *A Comparison of Approaches to Learning Task Selection in the Training of Complex Cognitive Skills*, 22 COMPUTERS IN HUM. BEHAV. 321, 330 (2006).
108. Cf. NORMAN R.F. MAIER, *PRINCIPLES OF HUMAN RELATIONS* 46 (Wiley ed., 1952); NORMAN R.F. MAIER, *PROBLEM-SOLVING DISCUSSIONS AND CONFERENCES: LEADERSHIP METHODS AND SKILLS* 240 (McGraw-Hill ed., 1963) (discussing how groups are more effective if they deal with one set of problems at a time rather than jumping to the end solution).
109. Norman R.F. Maier & Richard A. Maier, *An Experimental Test of the Effects of "Developmental" vs. "Free" Discussions on the Quality of Group Decisions*, 41 J. APPLIED PSYCH. 320, 322 (1957); Daniel Solomon, Larry Rosenberg & William E. Bezdek, *Teacher Behavior and Student Learning*, 55 J. OF EDUC. PSYCH. 29 (1964) (finding teachers who used interpretive questions produced gains in student comprehension).
110. DAVID W. JOHNSON & ROGER T. JOHNSON, *CREATIVE CONTROVERSY: INTELLECTUAL CHALLENGE IN THE CLASSROOM* (1995) (providing experimental evidence that some disagreement can generate curiosity, which is a basic motivation for learning).

through and identify the source of disagreements.<sup>111</sup> Such controversies create opportunities for richer, more analytical discussions in the student groups. This means the exercise component of the class needed to include problems that were not clear cut.

Thus, in sum, with this research in mind, I solidified the frame for how I would teach pleading standards, starting with legal education goals and pedagogy research as the foundation. I would incorporate active learning, group discussions, and chunking to help students understand pleading standards while developing practice readiness and professional judgment. Admittedly, it was a lofty plan, so I needed some check to see if what I designed would actually work. Given that pleading standards come up early in the semester, I needed a low-stakes formative assessment to evaluate how the learning process unfolded.<sup>112</sup> One option was to review students' answers to guided discussion questions. These answers would provide me with a snapshot of my students' understanding of pleading standards and any potential deficiencies in the class design. As these notes are cursory, their review would not take significant time.<sup>113</sup> By collecting and reviewing the group notes, however, I would gain feedback as to what follow-up to provide, either with particular groups or with the class as whole.<sup>114</sup>

But of course, all this planning and work on generating learning goals was dependent on actually designing the specifics for the class. I still needed to find a way to integrate Socratic lecture with exercises to provide students the much-needed context to process *Twiqbal*. The details of what I adopted are discussed next.

### B. Teaching *Twiqbal* in Context—One Approach

With these practice-readiness goals in mind, I designed a tripartite approach to teaching *Twiqbal* in a single class. The class is intentionally fast-paced and covers significant ground. In advance of class, I assign students the casebook pages that discuss pleading standards (and include excerpts from *Twombly* and

111. *Id.*; David Johnson, Roger T. Johnson & Karl A. Smith, *Constructive Controversy: The Educative Power of Intellectual Conflict*, CHANGE MAGAZINE 28, 30 (Jan./Feb. 2000).

112. See STUCKEY ET AL., *supra* note 93, at 255 (discussing the distinction between formative and summative assessments and their value in education).

113. The value of such feedback is well-established. See, e.g., John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL EDUC. 447 (1992); Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment*, 94 LAW LIBR. J. 59 (2002-4); Carol Springer Sargent & Andrea Anne Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 379 (2012) (citing the extensive literature demonstrating that providing feedback to law students “enhances student learning and performance” and that students “also believe they could learn better if they had more feedback”).

114. Karen Wilson & James H. Korn, *Attention During Lectures: Beyond Ten Minutes*, 34 TEACHING PSYCHOL. 85, 88 (2007) (providing research on the patterns of student attention in class and suggesting this type of professor note-reviewing).

*Iqbal*); a series of complaint excerpts (detailed below); and the relevant Federal Rules of Civil Procedure on pleading standards (Rules 8, 9, and 12(b)(6)). Students often have limited experience reading complaints at this point in the semester, so I instruct them to read the complaints for the general story giving rise to the suit rather than decode all the legal jargon that may slow their reading.

The class starts with the students breaking into groups of roughly four to six. As the groups form, I explain the class that day will take a nontraditional format, whereby lecture and exercises will be fused. I identify three goals for the class: (1) understanding the change in the pleading standards since *Conley*; (2) understanding the consequence of those changes; and (3) understanding the competing reasoning for and against the changed pleading standards.<sup>115</sup>

Once the groups form, the students answer three questions individually, then compare answers within the group: (1) Under *Conley*, what test should courts apply to evaluate the sufficiency of a complaint? (2) Under *Twombly*, what test should courts apply to evaluate the sufficiency of a complaint? and (3) Under *Iqbal*, what test should courts apply to evaluate the sufficiency of a complaint?<sup>116</sup> These questions allow the students to self-assess their critical-reading skills and ability to identify controlling rules from cases—skills that are just developing during the first semester of law school but should be fully formed by the second semester. Comparing notes with their classmates lets them see how they are doing relative to others, a form of feedback students often crave. We then return to a classwide discussion. Groups share their answers, then compare them to answers I post on PowerPoint slides. As the remainder of the class is based on applying these different standards, taking this time ensures students are all on board before going further.

Building on this foundation, students then work on three exercises to explore the new pleading standards. Each student has a handout with the questions for each set of exercises. For each exercise, one student in the group serves as group leader and another is the scrivener (these roles rotate for each exercise to maximize student involvement). The scrivener is asked to keep track of the group's responses to the questions on the handout. Throughout each exercise, I circulate, checking in on the discussions and prompting groups through questions if they are struggling or moving off track. After each exercise, we return to a class discussion before moving on.

The exercises are increasingly challenging and provide openings to remediate the three problems that arise teaching *Twiqbal*, as detailed in Part II. In the first exercise (Exercise Set A), students answer questions based

115. Spelling out these goals upfront helps minimize some of the student frustration that results from a lack of education goals. See Cynthia Ho, Angela Upchurch & Susan Gilles, *An Active-Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example*, 65 J. LEGAL EDUC. 772, 777-78 (2016) (discussing students' struggles to identify learning objectives).

116. To help with clarity, I post all the questions for the class on PowerPoint slides and on the exercise handout I distribute. See Nira Hativa, *Teaching Large Law Classes Well: An Outsider's View*, 50 J. LEGAL EDUC. 95, 105 (2000) (discussing how visual information helps with clarity).

on edited complaints from three different substantive areas: for example, an employment claim, an antitrust claim, and a negligence claim.<sup>117</sup> The class handout includes the elements for each claim and instructs them to evaluate: (1) whether facts for each element have been pled; (2) accepting the facts pled as true, whether it is conceivable that a legal claim has been pled; and then (3) whether the facts pled present a “plausible” claim.

This exercise in application provides the opening for students to see differences between notice pleading and the plausibility standard under *Twigg*. The students all agree the complaints satisfy the low threshold of notice pleading, and they can articulate the general nature of the alleged wrongdoing. Where things get trickier is answering questions (2) and (3). When the inevitable chorus of “I don’t know” begins, students must articulate why they are struggling. In identifying these challenges, the students begin to see how the new plausibility standard differs from notice pleading. Students rapidly recognize the challenges of parsing legal conclusions from facts. They also begin to explore how plausibility may be relative as they debate whether the allegations are plausible or if there is an equally plausible alternative explanation.

For example, the last time I ran this exercise, one of the complaints the students evaluated was from *Khan v. Abercrombie*. The complaint alleged unlawful discrimination based on the plaintiff’s termination. The plaintiff alleges she was terminated for wearing a hijab, though the complaint states *Abercrombie* employees stated her termination was for violating its “Look Policy.”<sup>118</sup> In discussing the specific allegations, students quickly identified the competing, potentially nondiscriminatory alternative explanation for the allegations. Back in the class discussion, when asked to vote on whether they thought the complaint stated a plausible claim, the students divided almost equally. This division allowed me to segue into a discussion of how plausibility differs based on individuals’ “experience and common sense.”<sup>119</sup> By having students first struggle to work through the test themselves, they more fully understand the limitations of “experience and common sense” than they did just reading *Twombly* and *Iqbal*, at least as evidenced by the quality of the class discussion.<sup>120</sup>

With this one exercise, students start exploring bigger questions about the purpose of civil procedure. They begin to understand different pleading

117. There is no particular magic to the complaints I choose. The only selection criterion I would recommend is to pick complaints that neither require specialized knowledge nor are too long. To ensure sufficient time for group discussion, I edited the complaints down to a single cause of action and omitted jurisdiction allegations. I am happy to share the complaints I have edited and any of the other teaching materials referenced in this Article upon request.

118. U.S. Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 955-56 (N.D. Cal. 2013).

119. Cf. *Iqbal*, 556 U.S. at 664.

120. Notably, I have not attempted any empirical assessment to compare the prior teaching method to the current one. Rather, my conclusions are anecdotal, based both on feedback from students and my personal assessment of the discussion quality.



standards and the challenges of defining plausibility. Further, this exercise introduces a discussion of why certain causes of action fare better under the *Twigbal* standard than others do. As one student said, “How is the plaintiff supposed to allege facts about what was going on in someone else’s head?”

Building on this discussion of judicial subjectivity, students move to Exercise Set B, which consists of three antitrust complaints.<sup>121</sup> At first blush, the complaints seem similar: they involve the same legal theory (horizontal restraint) and are roughly the same length. Just as in *Twombly*, the key issue is whether each complaint pleads sufficient, plausible “plus factors” to satisfy the “agreement/combination” element of a Sherman Act claim. However, only two of the three survived motions to dismiss. Working in the same groups, students again undertake the two-step process for evaluating a complaint identified in *Iqbal*. From there, each group is divided into plaintiffs, defendants, and the judiciary. Based on their role, the students argue for or against a motion to dismiss. The student assigned as judge guides the discussion and eventually “rules” on the motion, explaining the ruling to the parties.

After the groups work through the problems, we return to a class discussion. Students again vote to identify the insufficient complaint. Students once again disagree on the problematic complaint. This disagreement allows the class to discuss the challenges of delineating a possible claim from a probable one.<sup>122</sup> Further, the class discussion at this stage can also integrate a comparison of the pleading standard for mistake and fraud under Federal Rule 9. This allows students to explore the indistinct line between heightened pleading and the *Twigbal* standard, thus squarely addressing an issue students struggle to grasp through lecture alone.

Finally, we look at *Twigbal*’s practical implications in Exercise Set C. This time, the focus is on allegations from the complaint in *Iqbal*.<sup>123</sup> To foster fact investigation skills, students brainstorm potential, additional allegations and where to find evidence pre-discovery—both of which are practice-readiness skills.<sup>124</sup> The students draft two to three sentences of factual allegations based

121. If class time is an issue, one time-saving measure is to edit the complaints and focus solely on one issue, such as horizontal agreement. The primary tip is to pick complaints that do not require a highly technical understanding of a particular area of law. One sample triad is: Second Consol. Am. Compl., *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314 (2d Cir. 2010); First Am. Compl. for Violations of Section 1 of the Sherman Antitrust Act, *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009); Consol. Compl., *Haley Paint Co. v. E.I. Dupont De Nemours & Co.*, 804 F. Supp. 2d 419 (D. Md. 2011).

122. *Cf. Iqbal*, 556 U.S. at 678 (“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.”) (citation omitted). To ensure this divide is not based on confusion about the complaints or challenges reading the Supreme Court jurisprudence, I sample the groups by asking them to identify the specific allegations in the complaint that support their conclusions.

123. This could just as easily be done using the complaint from *Twombly*, as the students now have sufficient background on plus factors.

124. *See* Mushlin & Smith, *supra* note 85, at 471 (discussing how such pleading exercises take “on a heightened importance” post-*Twigbal*); *see also* Stephen Gerst & Gerald Hess, *Professional Skills*

on these details. These allegations are then shared in their groups to evaluate which allegations survive the two-step process from *Iqbal*. This brainstorming ties directly into the problems distinguishing facts from conclusions.

In this round of the exercise, I check in with each group early on and frequently. Sometimes students struggle at first on Exercise Set C, finding themselves trying to work within the allegations of the complaint rather than stepping back to consider hypothetical additional facts. Sometimes offering examples clears this mental logjam and frees students to develop strategies for planning pre-filing investigation. Once they complete this task, each group discusses rationales for and against the new standard. This requires students to identify and apply the theoretical and practical challenges created by *Twiqbal*, ranging from pro-efficiency to right-to-access concerns.

Once again, the groups share their results with the class as a whole. Through this exercise, students uncover the falsity of any clear-cut distinctions between facts and legal conclusions—reinforcing an issue with the plausibility test they initially recognized in the earlier exercises. They also begin to discuss pre-filing strategies, including how to gather additional factual allegations. This discussion then transitions into the challenges of gathering facts outside discovery. It is during this phase of the group discussions that I disclose that I worked on *Twombly* while in practice.<sup>125</sup> With this experience, I discuss why the amended complaint lacked more fleshed-out conspiracy allegations.

Exercise Set C also provides an opening to discuss, classwide, the potential chilling effects of the plausibility standard and the competing efficiency arguments. We can explore the impact of the new pleading standard, including the empirical data highlighting how procedural alterations impact substantive claims. This naturally segues into discussions of whether *Twiqbal* runs contrary to the transsubstantive goals of civil procedure rules.

By reserving these issues until the last set of exercises, the policy discussion goes beyond just recitation of the stated considerations in *Twombly* and *Iqbal*. Instead, the students connect the two competing issues to the other cases they examined in Exercise Sets A and B and to their own struggles in articulating arguments for and against a motion to dismiss. We also talk about what advice they would have given the respective parties in *Iqbal*: would they have recommended filing the motion to dismiss if they represented the defendants? What would they have advised Mr. Iqbal upon receipt of the motion? From there, we debate some of the proposed legislative reforms and consider why they have not gained traction. Thus, this last exercise set provides an opening for students to develop professional judgment. Not only do they have to consider challenges advising clients about an uncertain area of procedure,

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*and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 521 (2009) (listing pleading drafting as important for a high level of competency in practice).

125. This disclosure helps overcome the skepticism students sometimes have about law professors' assessments of real world implications. See Rand, *supra* note 62, at 749 (observing that "students will resist the material, and be skeptical of its efficacy, unless the lessons are explicated through an accessible set of specific, real-life examples.").

they also begin to contemplate larger implications of this uncertainty to justice and judicial access.

At the end of the exercise, I collect each group's notes for review and feedback. My review focuses on the students' written explanations for the foundational questions and each exercise set. The written responses for the foundational questions particularly help me assess the development of critical-reading skills, which guides show much time to spend working on how to read cases in future lectures. I can also gauge students' understanding of key legal terms (such as pleading, complaint, and cause of action) and legal analysis concepts (such as the distinction between elements and factors). On occasion, a group's answers may be too cursory. For example, one group's responses to the questions in Exercise Set B simply said "yes" without any further consideration of alternative arguments. When I identify such groups, I can write a note on the handout suggesting the group come in during office hours to talk through the exercises further. Thus, not only do students gain from the exercise, the exercise helps identify and remedy potential confusion before moving onto other topics.

The student response to these exercises has been positive. Students have commented how the exercises highlight the difference between notice pleading and plausibility pleading. One student said the class "clarified the difference between *Conley*, *Twombly*, and *Iqbal* better than the reading."<sup>126</sup> They noted the exercises help them understand the limitations of the plausibility standard. Students have also said this approach solidified that civil procedure rules are not absolute, confirming this approach helps develop professional judgment. As one student said, "These exercises helped me see that there is a lot of grey area in pleading requirements." As with any teaching method, though, there are limitations. Some students suggest the exercises would be improved if they had more time for group discussion or if I picked the groups for the students. Another student requested I distribute hard copies of the complaints rather than electronic copies the students then needed to print themselves.

Overall, these critiques, though, are overshadowed by the positive feedback. As this particular class often takes place during the first few weeks of the semester, students have said the exercises provide them their first real understanding of the importance of civil procedure. One student said, "I learned that all these rules actually impact the definition of justice." While initially civil procedure cases seem less sexy than students' reading for criminal law or torts, students start seeing that procedure matters. And getting a 1L to buy into that precept is no small victory.

### **Conclusion**

While civil procedure professors may be loath to concede it, pleading standards rarely move students to great excitement. Despite many students'

126. To assist in drafting this Article, I added a final part of the Exercise, which was to solicit student feedback on the restructured class.

lack of innate passion, procedure defines the pragmatic contours of substantive law. As civil procedure professors well know, before exploring the intersection of procedure and substantive law, we must first remedy law students' lack of context. Adding context benefits students' conceptual understanding of the plausibility standard and allows them to more fully engage with the critical questions it raises.

Providing context is hardly a problem unique to pleading standards or civil procedure, though. I hope this Article stimulates thought about the process that leads to alternative teaching methods beyond the civil procedure classroom. Many a law professor has that one topic that just does not seem to work as currently taught. Sometimes those subjects create the ideal environment for creative teaching methods to overcome those obstacles. I make no claims that my proposed teaching methods are either optimal or novel. The only claim I can make is that teaching pleading through these exercises helps develop practice-readiness skills while building the critical reading and analytical skills essential to success in both law school and practice. And by taking a chance to walk away from the podium for a while—giving over precious lecture time—I found one way to make a clear class out of muddled law.